



## International Covenant on Civil and Political Rights

Distr.: General  
17 November 2014

Original: English

### Human Rights Committee

#### Communication No. 1998/2010

#### Views adopted by the Committee at its 112th session (7–31 October 2014)

<i>Submitted by:</i>	A.W.K. (represented by counsel, Frank Deliu)
<i>Alleged victim:</i>	A.W.K.
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	2 August 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 May 2011 (not issued in document form)
<i>Date of decision:</i>	28 October 2014
<i>Subject matter:</i>	Fairness of criminal proceedings
<i>Substantive issues:</i>	Right to fair hearing; right to effective remedy; right to interpreter; right to know the nature and cause of charges; opportunity to present a defence; right to counsel; right to face accusers; right to appeal conviction
<i>Procedural issues:</i>	Substantiation of claims
<i>Articles of the Covenant:</i>	2 (para. 3); 14 (para. 1); 3 (a), (b), (d), (e) and (f); 5
<i>Articles of the Optional Protocol:</i>	2



## Annex

### **Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (112th session)**

concerning

#### **Communication No. 1998/2010\***

*Submitted by:* A.W.K. (represented by counsel, Frank Deliu)  
*Alleged victim:* A.W.K.  
*State party:* New Zealand  
*Date of communication:* 2 August 2010 (initial submission)

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

*Meeting on 28 October 2014,*

*Adopts the following:*

#### **Decision on admissibility**

1.1 The author of the complaint, dated 2 August 2010, is A.W.K., a national of New Zealand. He claims to be a victim of violations by New Zealand of his rights under article 2, paragraph 3, read alone; and article 14, paragraphs 1, 3 and 5, of the International Covenant on Civil and Political Rights, with regard to procedural aspects of his trial and the appeals he filed against his criminal conviction for importing methamphetamine drugs and possessing them for supply purposes.<sup>1</sup> The author is represented by counsel, Frank Deliu.

1.2 On 26 April 2012, the Committee, acting through the Special Rapporteur on new communications and interim measures, granted the request of the State party to separate the consideration of the admissibility of the communication from the consideration of its merits. On 8 June 2012, pursuant to rule 92 of its rules of procedure, the Committee, acting through the same special rapporteur, denied the author's request for interim measures, namely, for the State party to release him on bail from prison. The author remains incarcerated in New Zealand.

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

<sup>1</sup> The Optional Protocol to the International Covenant on Civil and Political Rights entered into force for New Zealand on 26 August 1989.

## Factual background

2.1 On 16 June 2006, the author was convicted of having imported and possessed methamphetamine drugs in July 2004.<sup>2</sup> On 8 September 2006, he was sentenced to 17 years of imprisonment for those offences.<sup>3</sup> On 14 April 2008, the Supreme Court granted his appeal and ordered a retrial.<sup>4</sup> The drugs in question were destroyed at the request of the New Zealand police after the conclusion of the first trial in 2006. Thus, when the author attempted to have the drugs independently retested before his second trial, he was unable to do so.<sup>5</sup> The author was incarcerated between June 2006 and April 2008, when he was granted bail pending the second trial.

2.2 The author chose to represent himself during the second jury trial, which took place before the Auckland High Court. The author submits that during the retrial, the judge committed a number of errors, resulting in violations of his rights under article 14 of the Covenant. In that regard, the author alleges that after several hours of jury deliberations, the foreperson of the jury sent a note to the judge stating that the jury had “finished deliberating” and had “reached a decision”. The judge then requested clarification. She received a second note stating that the jury was unable to “reach a unanimous verdict” and that “any further effort would result in bullying”. The judge then consulted with the parties and gave the jury what is known as a “*Papadopoulos* direction”, instructing them to retire again and to see if they could reach a unanimous verdict.<sup>6</sup> The instruction was given at

<sup>2</sup> The author provides a copy of the judgement rendered on his pretrial applications before the second trial at the High Court of New Zealand. (*The Queen v. [A.K.W.]*, CRI 2005-004-15296 (16 January 2009)). The judgement states that the author was convicted in 2004 of five counts: two counts of importing methamphetamine into New Zealand, one count of supplying methamphetamine to a person or persons unknown, one count of possessing methamphetamine for the purposes of supply, and engaging in money laundering in a sum of not less than \$150,000.

<sup>3</sup> The author provides a copy of the sentencing judgement of the High Court of New Zealand, dated 1 May 2009 (*The Queen v. [A.K.W.]*, CRI 2005-004-15296).

<sup>4</sup> The author provides a copy of the judgement of the Supreme Court of New Zealand, *[A.K.W.] v. The Queen*, SC 53/2007 [2008] NZSC 29 (14 April 2008), in which the Supreme Court allowed the author’s appeal and ordered a retrial. The Supreme Court based its decision on the finding that there did not exist “exceptional circumstances” that justified the trial court’s use of a jury with a reduced number of 10 members.

<sup>5</sup> The author cites a pretrial hearing transcript in which the police officer stated that he gave the order to destroy the drugs without informing the author or his lawyer about that decision. The officer stated that the destruction of drugs by law enforcement officials is a common practice and is done on a case-by-case basis. The officer stated that he had made the decision to destroy the drugs for security reasons and in the light of the fact that the drugs had been fully analysed already; that a statement of the analysis had been disclosed to defence counsel; that there had been no request for further analysis during the trial; and that there had been no dispute as to the analysis. The author also provides a copy of the judgement rendered on his pretrial applications before the second trial at the High Court of New Zealand, *The Queen v. [A.K.W.]*, CRI 2005-004-15296 (16 January 2009); this judgement denied the author’s application for independent analysis of the drugs because the drugs had been destroyed.

<sup>6</sup> The author provides a copy of the text of the judge’s *Papadopoulos* direction, and a partial copy of the judge’s reasons for giving the direction (“Reasons of Potter J Relating to *Papadopoulos* direction”, 12 March 2009). The text of the direction states in part: “Do remember that a view honestly held can equally honestly be changed, so within the oath there is scope for discussion, argument and for give and take. That is often the way in fact in which the end unanimous agreement is reached. But of course no one should be false to his or her oath or affirmation. No one should give in merely for the sake of agreement or to avoid inconvenience. If in the end you honestly cannot agree after trying to look at the case calmly and objectively and weighing carefully the opinions of others, you must say so.” The text of the “Reasons” states that the judge gave the direction in the light of a number of circumstances, including, among others, the following: the jury had been in deliberation

2.25 p.m. and the jury came back with a guilty verdict at 3.20 pm. While the foreperson was delivering the verdict, she appeared distressed and started crying.<sup>7</sup> On 1 May 2009, the author was sentenced to 14 years and six months of imprisonment. When the author applied for permission to interview the jurors in order to obtain evidence of the bullying, he was denied permission by the appellate courts.<sup>8</sup>

2.3 The author appealed his conviction and sentence to the Court of Appeal, raising, inter alia, the fair trial issues summarized above.<sup>9</sup> The sole issue of substance addressed at appeal was whether the judge's conventional *Papadopoulos* direction resulted in an unsafe verdict by the deadlocked jury. The Court found that the judge was clearly correct to clarify the first communication (stating: "We have finished deliberating and reached a decision"), because it had not confirmed that the jury had reached verdicts. The Court noted that the decision to give a *Papadopoulos* direction was within the discretion of the trial judge, and that the Supreme Court had confirmed that a good deal of latitude was given to trial judges in the exercise of that discretion.<sup>10</sup> The Court found that the judge had correctly approached the decision.<sup>11</sup> It also observed that the note provided by the jury did not indicate that there had been bullying, but merely that the members of the jury were unable to agree at that time and that there was a risk of intimidation were they to continue.<sup>12</sup> In analysing the issue of

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for a total of about seven hours, including a lunch break and two cigarette breaks; the jury had not been sequestered overnight; the jury was required to deliver verdicts on five charges covering two alleged importations of methamphetamine and a charge of money laundering; the prosecution's case was circumstantial and extremely detailed, featuring 19 witnesses; the jury was required to consider a source and disposition statement assessing unexplained income and financial data; and there were extensive documentary exhibits.

<sup>7</sup> The author provides an affidavit dated 30 March 2009 from Sai Law, the court interpreter during his retrial, who states that "[a] moment after the guilty verdicts were read, [the author's] mother began to break into a wail which could be heard throughout the courtroom. Right after that, I saw the jury forewoman, a Caucasian woman in her forties, begin to cry and dab at her eyes. She was visibly distressed."

<sup>8</sup> The author cites *[A.K.W.] v. Registrar of the Auckland High Court* [2008] 1 NZLR 849 (HC), para. 72. ("The application for access to the criminal file on the applicant's trial for the purpose of identifying the jurors who sat on his trial so they can be approached to explore the question of bias, due to the circumstances surrounding the discharge of juror X, is denied.")

<sup>9</sup> The author provides a copy of the judgement dismissing his appeal against his conviction and sentence (Court of Appeal of New Zealand, *The Queen v. [A.K.W.]*, CA190/2009 [2009] NZCA 440 (28 September 2009)). The appeal related to one charge of importing methamphetamine and another charge of possessing it for supply.

<sup>10</sup> On this point, the Court cited *Hookway v. The Queen* [2007] NZCA 567 and stated that the judge should have given a *Papadopoulos* direction for the jury to continue deliberating only if she was satisfied that there was no risk of an unsafe verdict in the circumstances.

<sup>11</sup> The Court based this finding on the judge's reasons stated in paragraph 14 of the decision of 12 March. The reasons given by the judge were the following: the jury had been deliberating for seven hours but that was not a long period given the number of charges, the circumstances and extremely detailed nature of the Crown case, which included many documents, and the need to consider a source and dispositions statement which assessed the appellant's unexplained income over a period of six months; the jury had begun its deliberations at 12.45 p.m. on 10 March and had been sent home for the evening at 4.50 p.m. after a lunch break and two cigarette breaks; the first communication from the jury had been conveyed after just three hours of deliberations following their return at about 10 a.m. on 11 March; there had been no previous indication of problems with the jury; and finality was desirable because it was a retrial. (Court of Appeal of New Zealand, *The Queen v. [A.K.W.]*, CA190/2009 [2009] NZCA 440 (28 September 2009)).

<sup>12</sup> The Court analogized these circumstances to those in the *Hookway* case, in which the members of the jury were given a *Papadopoulos* direction after advising that they were split 50/50 on the charges and positions were "rock solid". In that case, the Court had accepted that the trial judge did not err by

whether the judge erred by failing to add to the conventional *Papadopoulos* direction by warning the jurors not to engage in bullying or intimidation of other jurors, the Court concluded that the judge had not erred in that respect, because she had made it clear that the direction was given in response to the jury communications, and she had cautioned that no juror should give in for the sake of agreement. The jury's communications did not indicate that problems had arisen within the jury, they had not been deliberating for long in the circumstances, they had not been sequestered overnight and jurors often become distressed when a verdict is delivered.<sup>13</sup> In this case, there was no evidence of dissent, and the only evidence of distress was that the wailing of the author's mother triggered the foreperson's tears after the verdicts were delivered; nothing that happened after the jury's two communications suggested that the jury's deliberations had gone awry.<sup>14</sup> The appeal was dismissed on 28 September 2009. The author further appealed the second instance decision to the Supreme Court of New Zealand, which dismissed his application for leave to appeal on 2 March 2010.<sup>15</sup>

### The complaint

3.1 The author asserts that his right to a fair hearing, as set forth in article 14, paragraph 1, of the Covenant, was violated because of procedural errors committed by the judge presiding over his second trial.<sup>16</sup> The author submits that after receiving the first note, in which the jury stated that it had finished deliberating and had reached a decision, the judge should not have made further inquiries of the jury and should have instead brought the jury into open court to ask for its verdict, which would have resulted in a mistrial; that once the judge learned of the jury's "bullying" concerns, she should have immediately discharged the jury; that the judge failed to ask the jury for clarification as to what was

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asking the jury to continue. (Court of Appeal of New Zealand, *The Queen v. [A.K.W.]*, CA190/2009 [2009] NZCA 440 (28 September 2009)).

<sup>13</sup> The Court cited *The Queen v. Accused* (1996) 14 CRNZ 516, para. 522.

<sup>14</sup> The Court further rejected the author's argument that the verdicts were inconsistent and may have reflected a compromise, and that the judge should have informed the members of the jury that the Court could accept verdicts on those counts upon which they could agree if they were having difficulty reaching unanimous verdicts. It stated that mere inconsistency is not sufficient to justify quashing a conviction and that the author did not meet his burden of explaining why no reasonable jury could arrive at the different verdicts, reasoning that the July counts were supported by direct evidence and the May counts depended on an inference. The Court also rejected the author's argument that the money laundering charge should not have been brought before the jury; it reasoned that the charge was properly joined in the indictment, since all of the counts were linked in time and circumstance, and that there was ample circumstantial evidence to support the charge. The Court further rejected the author's argument that the verdicts were unreasonable due to insufficient evidence; the court analysed the importation case against the author and found it circumstantial but cogent. The court also analysed and rejected the author's various other arguments relating to admissibility of evidence, the author's right to conduct his own defence and make a proper opening statement, and the sentence imposed by the judge. (Court of Appeal of New Zealand, *The Queen v. [A.K.W.]*, CA190/2009 [2009] NZCA 440 (28 September 2009)).

<sup>15</sup> The author provides a copy of his Notice of Application for Leave to Appeal, dated 16 October 2009, and a partial copy of the judgement of the Supreme Court of New Zealand denying the application for leave to appeal. (*[A.K.W.] v. The Queen*, SC 96/2009 [2010] NZSC 14 (2 March 2010)). The author does not provide the full version of the judgement, which considered the issue of whether, in circumstances where a jury note referred to the possibility of bullying if there were further deliberations, it was open to the judge to have given a *Papadopoulos* direction and whether the direction actually given was adequate to deal with that possibility.

<sup>16</sup> The author cites communications No. 1098/2002, *Guardiola Martínez v. Spain*, decision of inadmissibility adopted on 31 October 2006, para. 6.4, and No. 1376/2005, *Bandaranayake v. Sri Lanka*, Views adopted on 24 July 2008, para. 6.5.

meant by “bullying” and to ask whether it had already occurred; that the judge did not give the jury a direction that they could hold their vote; that she failed to ask the foreperson why she was distressed; and that she failed to poll the jury to ensure that the verdict was indeed unanimous and not coerced.<sup>17</sup> The author argues that the judge’s oversight of procedural standards compromised his fundamental right to substantive justice.<sup>18</sup>

3.2 The author further asserts that his rights under article 14, paragraph 3 (b), of the Covenant were violated because he was denied adequate facilities for the preparation of his defence. Specifically, the author maintains that the methamphetamine drugs that he was convicted of possessing and importing were destroyed without a court order after the conclusion of his first trial in 2006, and that he was therefore unable to have the drug evidence independently retested before his second trial.<sup>19</sup> He submits that he was unable to mount a defence without access to the drug evidence, and suggests that the police could have kept a small sample of the drugs but failed to do so. The author further states that he provided evidence to the High Court of New Zealand that the shipment which he was convicted of importing and possessing was not a toxic substance.<sup>20</sup>

3.3 The author also submits that, in violation of article 2, paragraph 3, of the Covenant, the State party denied him a realistic prospect of obtaining an effective remedy, because the appellate courts denied him permission to interview the jurors in order to obtain evidence of the bullying, as jury members are protected by the secrecy of the legal system. The author’s submission includes an audio recording of part of the author’s 2009 hearing before the Court of Appeal, and a video recording of a focus group discussion conducted on behalf of the author, in which members of the public were asked to comment on the issues raised by the author in respect of the jury.

#### **The State party’s observations on admissibility and the merits of the communication**

4.1 In its observations dated 14 April 2011, the State party adds to the factual background of the communication, observing that the author’s offending was serious, as he was convicted of importing approximately 8.9 kilograms of methamphetamine that was dissolved in liquid contained in lava lamps. The methamphetamine, a Class A illegal drug, had a total value, depending on the intended manner of sale, of between 2.5 million and 8.9 million New Zealand dollars.<sup>21</sup> The author received a sentence of 14 and a half years of imprisonment, with a parole ineligibility period of seven and a half years. The State party also notes that the author’s conviction was confirmed by the Court of Appeal in September 2009, that an application for leave to pursue a further appeal was denied by the Supreme Court in March 2010, that a second application for leave made on other grounds after the filing of the present communication was denied in March 2011, and that the first trial in 2006 was set aside and a retrial was ordered because the first trial was wrongly allowed to continue after the withdrawal of two jurors. The domestic courts found that the trial judge,

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<sup>17</sup> These arguments are featured in the “Memorandum of Counsel’s synopsis of submissions”, dated 18 November 2009 and filed before the Supreme Court of New Zealand in support of the author’s application for leave to appeal; the author provides a copy of that memorandum.

<sup>18</sup> The author cites communications No. 1514/2006, *Casanovas v. France*, Views adopted on 28 October 2008, para. 11.3, and No. 912/2000, *Deolall v. Guyana*, Views adopted on 1 November 2004, para. 5.2.

<sup>19</sup> See para. 2.1 and footnote 5.

<sup>20</sup> The author cites a report dated 7 June 2004, obtained from Guangzhou City Chemical Industry Research Institute.

<sup>21</sup> At current exchange rates, 2.5 million–8.9 million New Zealand dollars is equivalent to about 2.2 million–7.8 million United States dollars.

consistent with New Zealand criminal procedure law and practice, considered a number of factors when deciding to give a *Papadopoulos* direction.<sup>22</sup> Concerning the crying by the jury foreperson, the Court of Appeal noted that jurors commonly become distressed when a verdict is delivered, and described the incident as follows: “The only evidence of distress is that the wailing of the appellant’s mother triggered the foreperson’s tears after the verdicts were delivered.” The Supreme Court similarly commented that the tears were apparently induced by the author’s mother’s cries, and added that the foreperson’s willingness to deliver the verdicts very much suggests that she was not a victim of bullying.<sup>23</sup>

4.2 The State party considers that the communication contains a number of factual errors. Concerning the author’s assertion that the trial judge failed to make a contemporaneous record of what occurred, such a record was in fact reflected in the report issued in a timely manner by the trial judge on 14 September 2009 in response to an inquiry by the Court of Appeal.<sup>24</sup> Additionally, although the author asserts that the trial proceeded “without any drugs evidence” and that the seized methamphetamine was “the main” or “the only real piece of hard evidence”, the charges against the author were pursued at both trials on the basis of expert analytical evidence as to the seized substance, while the methamphetamine itself was never introduced as evidence.<sup>25</sup> Although the author asserts that he provided proof that the shipment of drugs showed no toxicity, the certificate he provided at trial was not accepted by the jury. Although he asserts that the seized methamphetamine was destroyed without a lawful order, because the seized drugs were never used as evidence, they remained in the custody of the Customs Service and/or the Police and, for that reason, no court order was required to authorize its destruction following the trial. In spite of the author’s assertion that the destruction was “flagrant”, the drugs were destroyed for security reasons, as outlined in the trial judge’s two rulings.<sup>26</sup>

4.3 The State party also considers that the author’s claim under article 14, paragraph 1 of the Covenant, relating to the adequacy of the judge’s *Papadopoulos* direction in response to the difficulties expressed by the jury, is inadmissible because it is insufficiently substantiated. The Committee does not revisit jury instructions or national court determinations absent arbitrariness or manifest injustice, neither of which is present in this

<sup>22</sup> The State party cites *[A.K.W.] v. The Queen*, [2010] NZSC 14 (2 March 2010), paras. 2–3; *[A.K.W.] v. The Queen*, [2009] NZCA 440 (28 September 2009), paras. 23–24.

<sup>23</sup> The Supreme Court also found that there was no error with respect to the jury direction, because the jury note did not indicate that there had actually been intimidation of any juror; the language used by the judge was sufficient to reference the possibility of bullying; there was no sign of disagreement by any juror when the verdicts were delivered; and the tendered affidavits from the author’s parents did not contradict the judge’s observations of what occurred when the jury verdicts were given. (*[A.K.W.] v. The Queen*, [2010] NZSC 14 (2 March 2010), para. 3.)

<sup>24</sup> The State party notes that the trial judge stated in the report: “The Foreperson confirmed the verdicts were unanimous. She delivered the verdicts without hesitation in a clear, firm voice. There was no indication of dissent from any member of the jury. I closely observed the jury while the Foreperson was delivering the verdicts on the five charges and as she confirmed that the verdicts were unanimous.” (Citing *The Queen v. [A.K.W.]*, CRI 2005-004-15296, Report of Potter J. (14 September 2009), para. 2).

<sup>25</sup> The State party cites *The Queen v. [A.K.W.]*, judgement on pretrial applications, CRI 2005-004-15296 (16 February 2009), paras. 25–27; and *The Queen v. [A.K.W.]*, reasons on pretrial applications, CRI 2005-004-15296 (5 March 2009), para. 9, second subparagraph.

<sup>26</sup> The State party cites the author’s submission, in which the author’s counsel states, “It really is in my submission inexcusable that my client can go to prison for almost 15 years with such flagrant destruction of the only real evidence that could have been used both against him, but also possibly by him for exoneration purposes.”

case.<sup>27</sup> Moreover, the claim rests upon the author's factual claim that the jury had been subjected to or was at risk of bullying, and this contention was rejected by domestic courts without manifest injustice. The State party observes that the direction was upheld on appeal in accordance with domestic trial procedure, and that the communication advances no adequate basis on which the Committee ought to revisit questions of the application of domestic law.

4.4 The State party further considers that the author's claim under article 14, paragraph 3 (b), of the Covenant, concerning the alleged prejudice caused by his inability upon retrial to obtain an independent analysis of the seized drugs, is inadmissible for failure to exhaust domestic remedies. The State party argues that the author could have appealed this issue before domestic courts but did not do so. In his complaint, the author states that although he raised this appellate point, he did not "actively pursu[e] it, to preserve it for an eventual complaint to [the Committee]". The State party further considers that the claim is inadmissible for lack of substantiation. The claim rests on the contention that the seized substance was not in fact methamphetamine or that the author could not adequately pursue this point at trial, and this contention was rejected by domestic courts without manifest injustice.

4.5 On the merits, the State party considers that each of the author's three claims under article 14, paragraph 1, of the Covenant has no substance. Firstly, the author's allegation that the jury was subject to or was at risk of bullying was rejected by successive decisions of domestic courts, and the communication contains no sufficient basis on which to question those decisions. Secondly, the author's allegation that the trial judge erred by giving a formal *Papadopoulos* direction is unfounded, because domestic criminal procedure allows such a direction in appropriate circumstances, and the appellate courts determined that the circumstances were appropriately addressed by the formal direction. Finally, the author's allegation that the confidentiality of jury deliberations prevents him from establishing that bullying occurred has no merit, because jury confidentiality is an essential element of the jury trial system and has been repeatedly upheld as consistent with fair trial rights by the European Court of Human Rights;<sup>28</sup> the New Zealand courts can in appropriate but exceptional circumstances inquire into jury deliberations,<sup>29</sup> but such circumstances were not present in this case.

4.6 The State party also considers that the author's claim under article 14, paragraph 3, of the Covenant has no merit because New Zealand criminal procedure law makes robust provision for instances in which evidence sought by the defence is unavailable. Specifically, and consistently with the Committee's approach, New Zealand criminal procedure law provides for the assessment of whether there is unacceptable prejudice to the defence and, if so, provides that prosecutions can be stayed if necessary. In this instance, the trial judge determined, in accordance with the law, that the defence was not prejudiced and could properly advance the contention that the seized substance was not methamphetamine at trial.<sup>30</sup> The author was able to challenge that analytical evidence, and

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<sup>27</sup> The State party cites the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, and communication No. 1758/2008, *Jessop v. New Zealand*, Views adopted on 29 March 2011, para. 7.11.

<sup>28</sup> The State party cites European Court of Human Rights, *Gregory v. United Kingdom*, Application No. 22299/93, judgement of 25 February 1997, para. 44, recently endorsed in *Szypusz v. United Kingdom*, Application No. 8400/07, judgement of 21 September 2010, para. 80.

<sup>29</sup> The State party cites *The Queen v. Papadopoulos* (No. 2) [1979] 1 NZLR 729, n. 9, 627; *The Queen v. Fernando* [2007] NZCA 485, para. 80.

<sup>30</sup> The reasons of the judge on the author's pretrial application describe the evidence presented to the jury and used to convict the author of importation and possession of the drug for supply. The evidence



he did so, but without success.<sup>31</sup> The author was also able to appeal the trial judge's determinations, but he did not do so.

4.7 Concerning the author's claim that an effective remedy is warranted under article 2, paragraph 3, of the Covenant, the State party considers that the author contradicts himself on this issue. Specifically, the author states that he seeks a retrial, and yet simultaneously states he should not be subjected to further retrial.<sup>32</sup> The State party further considers that it would not be appropriate to release the author without the possibility of retrial, because he has been convicted by a trial jury of a grave offence, and the conviction has been upheld twice on appeal. The State party also notes that the communication raises no issue of undue delay, and infers that this is due to what the submission describes as a "myriad of interlocutory and related proceedings", as well as repeated appeals.

4.8 Regarding the audio recording submitted by the author, the State party notes that the appropriate permission was not sought or obtained, and that the recording was therefore not authorized and has no official or authoritative character. Regarding the video recording of the focus group, the State party notes that the author's counsel sought to adduce the recording before the Supreme Court, which commented that it had "no probative value" and that it was "a completely artificial exercise divorced from the evidence and circumstances of the trial".<sup>33</sup>

#### **The author's comments on the State party's submission**

5.1 By submission dated 28 June 2011, the author repeated his assertions that the trial judge's failure to conduct a diligent investigation as to whether the jury was deciding the case according to facts in evidence and nothing else constituted a breach of his rights under article 14, paragraph 1, of the Covenant.<sup>34</sup> The author stresses that the judge gave a template *Papadopoulos* direction that did not properly address the issue of bullying that was made clear by the jury's second note. He maintains that the jury foreperson was "clearly distressed" during the reading of the verdicts.

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includes an analysis of the liquids that were sent to "ESR" (undefined) by New Zealand Customs following interception of the 2004 drug shipment at Auckland International Airport. The analysis stated that all the liquids contained methamphetamine, and that the content was equivalent to 8.9 kilograms of methamphetamine hydrochloride with a purity between 43 and 48 per cent ("Reasons of Potter J on pre-trial applications", *The Queen v. [A.K.W.]*, CRI 2005-004-15296 (17 February 2009)).

<sup>31</sup> The reasons of the judge reject the author's application for exclusion of the drug evidence due to prejudice. The judge reasoned that the drugs were no longer available for testing because the police had destroyed them through a routine decision against the background that at no point had any request been made by the defence for access to the drugs, and that the author had never sought a peer review of the analysis and processes undertaken by ESR, which had supplied the drug analysis used by the prosecution. The judge further considered the evidence provided by the author, namely, the laboratory test report from Guangzhou City Chemical Industry Research Instituted dated 7 June 2004, stating that the "lamp" contained a "general product" that did not belong to category 6 toxic substances. The judge concluded that the report was of little probative worth, because no details of the single lamp were given, and was dated about one month before the date of importation of the cartons into New Zealand. ("Reasons of Potter J for Rulings dated 25 February 2009", *The Queen v. [A.K.W.]*, CRI 2005-004-15296 (5 March 2009)).

<sup>32</sup> The State party cites paras. 31 and 88 of the submission.

<sup>33</sup> The State party cites *[A.K.W.] v. The Queen* [2010] NZSC 14, 2 March 2010, para. 5.

<sup>34</sup> The author cites communications No. 811/1998, *Mulai v. Guyana*, Views adopted on 20 July 2004, para. 6.1 and No. 912/2000, *Deolall v. Guyana*, Views adopted on 1 November 2004; and Committee on the Elimination of Racial Discrimination communication No. 3/1991, *Narrainen v. Norway*, opinion adopted on 15 March 1994, para. 9.3.

5.2 Regarding his claim under article 14, paragraph 3 (b), of the Covenant, the author argues that he was denied equality of arms due to his inability to have the drug evidence tested. He further submits that the State party's courts unfairly placed the burden of proof on him to show evidence that the seized substance was not methamphetamine, and that he was therefore placed in an "extraordinary dilemma" because the drug evidence had been destroyed.<sup>35</sup> The author acknowledges that the toxicity report he presented was not accepted by the trial jury, but asserts that this rejection was due to the fact that he was not permitted to present his own evidence as to the seized substance. The author further submits that the State party does not cite any legal authority in support of its observation that it is entitled to destroy property such as the drug evidence without a legal order. Regarding the State party's observation that the drugs were destroyed for security reasons, the author maintains that he had an appeal pending when the drugs were destroyed, that the drugs were destroyed about two years after they were seized and were therefore "secure enough for a couple of years", and that it would have sufficed to keep only a minute sample for independent testing.

5.3 The author maintains that the communication is admissible because he does not dispute the substantive trial issues but instead seeks redress for procedural defects that amounted to a denial of the fair trial process to which he was entitled. In the alternative, the author submits that the circumstances of the trial judge's direction are exceptional and warrant close scrutiny by the Committee. The author also maintains that he exhausted domestic remedies with regard to the drug destruction issue because he unsuccessfully raised it in the trial court, during the 2009 Supreme Court appeal and again in 2010 before the Supreme Court.

#### **Further comments by the author**

6.1 In a submission dated 22 December 2011, the author introduced additional claims under articles 14, paragraph 3, and 2, paragraph 3. In that regard, the author argues that he is originally from China and his native tongue is the Cantonese dialect. He is not fluent in the English language, has only an intermediate level of education, and is a non-professional individual with no legal training. During his retrial in 2009, he had no counsel to represent him and because of his lack of English abilities, he had an interpreter appointed for him by the Court. However, his interpreter did not interpret the opening statement and closing submissions from the prosecution, the judge's summation to the jury and some of the witness testimony and judicial rulings. The only real interpretation was done when there were direct communications with him, and even when there was interpretation it was often in a whisper and was not "contemporaneous". His attempts to communicate with the amicus curiae appointed by the Court were also not properly interpreted, and he was not provided with "transliterated" copies of the written evidence against him. The author also encountered the following procedural obstacles: the trial judge repeatedly refused to release to him a copy of the audio recording of his trial; his appeal to the Supreme Court was dismissed in 2011 with an intimation that he may have to revert to the Court of Appeal; and the Court of Appeal originally refused to accept his further appeal paperwork for filing, and it was only through the insistence of counsel that he was able to file the new papers. When the Court of Appeal did finally allow access to the audio recording in early 2011, it was only on the basis that counsel and an expert could attend the trial.

6.2 The author further argues that the Court of Appeal initially questioned why the author needed an interpreter at his further appeal hearing, and did not provide him one, requiring him to pay for his own interpreter (and because the Minute was not timely

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<sup>35</sup> The author cites section 31 of the Misuse of Drugs Act 1975 of New Zealand.

provided to the author, he was unable to obtain his own interpreter).<sup>36</sup> The Court of Appeal dismissed his appeal on the merits, even though the only hearing held was a jurisdiction hearing. The author alleges that he was unable to present evidence on the merits, and that the Supreme Court Registry refused to accept his paperwork for filing a final appeal. In the light of the foregoing facts, the author submits that the State party's courts grossly abused his rights, because he was denied the high standard of interpretation to which he was entitled during his retrial;<sup>37</sup> the courts refused to give him a hearing on the merits and instead frustrated his efforts at both the trial and appellate levels; he was not informed of the nature and the cause of the charge against him in a language which he understood; he was unable to present a defence because he was acting *pro se* and did not understand the key issues in the trial due to the poor interpretation; he was in essence denied the right to counsel because he was his own lawyer and was denied suitable interpretation; and he was denied the right to face his accusers because he was unable to understand what they were saying.

6.3 Regarding the exhaustion of domestic remedies, the author states that he did not in his 2009 and 2010 appeals raise any issue related to the quality of interpretation at his retrial because he only became aware of this as a potential appellate issue after those appeals had closed. He then sought leave to further appeal to the Supreme Court, but in early 2011, this was declined with the intimation that the Court of Appeal might be the proper avenue to seek to further appeal. After the Court of Appeal Registry initially refused to accept his paperwork for filing, he was finally given a hearing on an application for a further appeal, but this was declined in November 2011. His appeal of this decision was not accepted by the Supreme Court Registry.

#### **The State party's further observations on admissibility**

7.1 On 13 April 2012, the State party submitted further observations on the admissibility and merits of the communication. With regard to the author's new claims (in the submission dated 22 December 2011) relating to the adequacy of interpretation provided during his retrial, the State party notes that this point was not raised in the initial communication or in the author's earlier appeals in the New Zealand appellate courts prior to mid-2010. The State party considers that the point was raised before the Court of Appeal and was thoroughly considered, and is inadmissible under articles 2 and/or 3 of the Optional Protocol due to the absence of any substantiated suggestion of arbitrariness, manifest error, denial of justice or partiality. Specifically, the State party cites the Court of Appeal decision stating that "Mr. [W.] has not pointed to any aspect of the conduct of the defence that was affected by any of the alleged failings on the part of [the interpreter.] In particular, he does not say that he did not understand what the Crown case against him was."<sup>38</sup> The State party also cites the portion of the decision relating to the assessment made by the amicus curiae barrister appointed to assist A.K.W.: "From his closing address it is clear that Mr. [W.] understood that the case against him was circumstantial and that the Crown had asked the jury to draw certain inferences on the basis of particular facts. Mr. [W.] pointed out the dangers of drawing inferences and challenged the inferences that the Crown had asked the jury to draw. In doing so, he referred to the various counts against

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<sup>36</sup> The author does not further clarify this assertion.

<sup>37</sup> The author cites *Abdula v. The Queen*, SC 80/2010 [2011] NZSC 130, judgement of 25 March 2011, paras. 22–39.

<sup>38</sup> The State party cites *The Queen v. [A.K.W.]* [2009] NZCA 440, para. 26. It appears the State party intended to cite *The Queen v. [A.K.W.]*, CA227/2011, [2011] NZCA 563.

him, to particular submissions made by the Crown, to specific evidence, including exhibits, and asked why the police had not investigated further.”<sup>39</sup>

7.2 The State party also quotes the decision recording the view of the trial judge, who instructed the jury as follows: “In this case Mr. [W.] has been assisted by an interpreter because English is not his first language. It is very important that the accused be able easily to follow the proceedings and the evidence given in court. You must not draw any inference adverse to Mr. [W.] because of the use of the interpreter. However, sometimes something can be lost in translation even when, as here, we have had the benefit of an excellent interpreter in Ms. Law. ... You will need to make allowance for the fact that Mr. [W.] throughout the trial asked questions in cross-examination through the interpreter and that he made his opening statement and closing address to you through the interpreter.”<sup>40</sup> Finally, the State party considers that the decision indicates that the author had no concern about the quality of the interpretation, quoting the following excerpt: “Mr. [W.] has had considerable experience with interpreters in the criminal justice context. In particular, he was assisted by an interpreter in relation to his retrial from at least October 2008 and Ms. Law had been interpreting for him from at least 20 February 2009 (and perhaps earlier, the record is unclear). If he considered that he did not understand what was happening at any particular point, or that significant parts of the trial were not being translated for him so that he could not follow what was happening, we would have expected Mr. [W.] to have raised his concerns with Ms. Law and, if he did not receive a satisfactory response from her, with [the amicus curiae] or the Court. ... He did not raise then any deficiencies in her interpretation at trial. We do not accept Mr. [W.’s] explanation that he did not understand his rights in relation to an interpreter at that stage, given his experience of the criminal justice system and his confidence that he could represent himself both before and during the trial despite his language difficulties.”<sup>41</sup> The State party considers that domestic law robustly provides for the right to an interpreter, and that the Court of Appeal decision fully considered that this right was not denied to the author.<sup>42</sup>

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<sup>39</sup> The State party cites *The Queen v. [A.K.W.]* [2009] NZCA 440, paras. 27-28. It appears the State party intended to cite *The Queen v. [A.K.W.]* CA227/2011 [2011] NZCA 563, para. 27.

<sup>40</sup> The State party cites *The Queen v. [A.K.W.]* [2009] NZCA 440, para. 30. It appears the State party intended to cite *The Queen v. [A.K.W.]* [2011] NZCA 563, para. 30.

<sup>41</sup> The State party cites *The Queen v. [A.K.W.]* [2009] NZCA 440, para. 29. It appears the State party intended to cite *The Queen v. [A.K.W.]* [2011] NZCA 563, para. 29. In the decision, the Court of Appeal further bases its conclusion regarding the author’s argument that he was denied the right to an effective interpreter on the following observations. At his first trial, the author had been provided with the assistance of an interpreter and had been represented by counsel; thus, although he was a layperson, he was not a novice as far as the trial process was concerned. Moreover, the author’s conduct during the retrial indicated that he had a reasonable grasp of the relevant processes and concepts and was able to look after his own interests. For example, when the judge dealt with the question of bail on 6 August 2008, he was not aware of a minute issued by the Court on 16 July 2008, and the author drew the Court’s minute to the judge’s attention by letter dated 7 August 2008. Also, he sought and was granted leave to have a McKenzie friend and made numerous applications as to the admissibility of evidence, and he made a further application to adjourn the trial so that he could appeal adverse pretrial rulings. He requested a copy of the transcript of the evidence in his first trial, and according to his affidavit, this was used to assist him in his cross-examination of the prosecution’s witnesses. Further, the court transcripts indicate that the author was well aware of what was happening: for example, when the prosecution attempted to produce a hearsay statement from an unavailable witness, the author asked why the prosecution was permitted to use a hearsay statement while he had not been allowed to use his father’s evidence during his first trial (the judge explained the position to him). The Court concluded that the author had not demonstrated the “exceptional circumstances” required to reopen the trial court decision.

<sup>42</sup> The State party cites sections 24 (g) and 25 (a) of the New Zealand Bill of Rights Act 1990.

7.3 The State party considers that the author's new claims raised in his submission dated 22 December 2011 are inadmissible as manifestly ill-founded and/or incompatible with the Covenant, because they seek to reopen specific factual findings of the New Zealand Court of Appeal.<sup>43</sup> The State party further considers that these claims are an abuse of the right of submission, as they were not raised in the communication only because the author had not thought to do so.<sup>44</sup>

#### **Further comments by the author**

8. By submissions dated 27 December 2012 and 22 March 2013, the author submitted new information concerning his application for a prerogative of mercy, which was denied by the Ministry of Justice on 20 December 2012.<sup>45</sup> The author asserts that no reasons were provided for the decision, and that he is unable to obtain justice in New Zealand.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

9.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

9.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

9.3 The Committee notes the author's arguments that the State party violated his rights under article 14, paragraphs 1, 3 and 5, of the Covenant (a) because the judge presiding over his retrial committed a number of procedural errors relating to the *Papadopoulos* direction she gave to the jury; (b) because the State party, by destroying the drug evidence that was the basis for his conviction while he had a pending appeal of his conviction and sentence, denied him the possibility to have the evidence independently tested; (c) because the State party provided ineffective interpretation services to him during criminal proceedings; and (d) because he was denied the right to appeal his conviction. The Committee takes the view that these allegations relate essentially to the evaluation of the facts and the evidence carried out by the New Zealand courts, and to the application of domestic legislation. The Committee recalls that it has repeatedly held that it is not a final instance competent to re-evaluate findings of fact or the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice.<sup>46</sup> In the present case, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the conduct of the

<sup>43</sup> The State party cites general comment No. 32 and *Jessop v. New Zealand*, para. 7.11.

<sup>44</sup> The State party cites communication No. 958/2000, *Jazairi v. Canada*, decision of inadmissibility adopted on 26 October 2004, para. 7.2.

<sup>45</sup> The copy of the decision on the application for the royal prerogative of mercy states that the recourse is an exceptional power typically exercised in cases where fresh and significant evidence becomes available, and does not operate as a further right of appeal or an opportunity to repeat arguments or re-examine evidence already considered by the courts.

<sup>46</sup> See communications No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2; No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6; No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 29 March 2004, para. 5.7; and No. 1528/2006, *Fernández Murcia v. Spain*, decision of inadmissibility adopted on 1 April 2008, para. 4.3.

domestic courts amounted to arbitrariness or a denial of justice. Accordingly, these claims are inadmissible under article 2 of the Optional Protocol.

9.4 The Committee further notes that according to the author, the State party violated his right to an effective remedy under article 2, paragraph 3, of the Covenant because the appellate courts denied him permission to interview the jurors in order to obtain evidence of the alleged bullying, and because he was denied the right to file an appeal before the Supreme Court. The Committee recalls that article 2, paragraph 3, of the Covenant can be invoked by individuals only in conjunction with other articles of the Covenant, and cannot, in and of itself, give rise to a claim under the Optional Protocol. The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.<sup>47</sup>

9.5 In the light of the foregoing, the Committee considers that the communication is inadmissible under article 2 of the Optional Protocol.

10. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the author of the communication.

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<sup>47</sup> See, *inter alia*, communication No. 1834/2008, *A.P. v. Ukraine*, decision of inadmissibility adopted on 23 July 2012, para. 8.5.