



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1909/2009

#### Views adopted by the Committee at its 114th session (29 June-24 July 2015)

<i>Submitted by:</i>	Taito Fa'afete (represented by counsel, Tony Ellis)
<i>Alleged victim:</i>	The author
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	12 May 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 92 and rule 97 decision, transmitted to the State party on 6 February 2014 (not issued in a document form)
<i>Date of adoption of views:</i>	13 July 2015
<i>Subject matter:</i>	Miscarriage of justice and unfair trial
<i>Substantive issues:</i>	Miscarriage of justice; discrimination; due process
<i>Procedural issue:</i>	Admissibility — victim status; admissibility — manifestly ill-founded, competency <i>ratione materiae</i>
<i>Articles of the Covenant:</i>	2, para. (3) (a); 9, paras. 1 and 3; 14, paras. 1, 2, 3 (b), (c), (d), (e) and (g); 14, paras. 5 and 6; 17; and 26
<i>Articles of the Optional Protocol:</i>	1; 2; and 3

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## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (114th session)**

concerning

#### **Communication No. 1909/2009\***

<i>Submitted by:</i>	Taito Fa'afete (Represented by counsel, Tony Ellis)
<i>Alleged victim:</i>	The author
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	12 May 2009 (initial submission), completed by submission dated 19 July 2010

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

*Meeting* on 13 July 2015,

*Having concluded* its consideration of communication No. 1909/2009, submitted to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

*Adopts* the following:

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

1. The author of the communication is Taito Fa'afete, a New Zealander national of Samoan origin, born on 22 October 1962. He claims that his rights under articles 2 (3); 9 (1) and (3); 14 (1), (2), (3) (b)-(e) and (g), (5) and (6); 17 and 26 have been violated by New Zealand in the context of criminal proceedings initiated against him for a robbery in which he claims he did not take part. The author is represented by counsel, Tony Ellis. The Optional Protocol entered into force for New Zealand on 28 March 1979.

#### **The facts as presented by the author**

2.1 On 29 July 1994, the author was arrested by the police while he was driving a getaway car for the two principal offenders of a robbery of two security guards at the Saint

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\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelic, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabian Omar Salvioli, Dheerujall B. Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

Luke's shopping centre in Auckland. Two cars were involved. The offenders drove to the back of the shopping mall in one car, which they then abandoned. They then climbed into another car, driven by the author, and drove off. The author was stopped while driving the car some thirty minutes after the robbery took place. The cash that had been robbed was no longer in the car.

2.2 The author was provided with legal aid. Nonetheless, he argues that his trial counsel acted incompetently as she only met with him for 40 minutes the day prior to his criminal trial and disregarded his instructions to call two witnesses. At the start of the trial, the two main offenders of the robbery pleaded guilty, whereas the author denied his implication, stating that he had not taken part in the robbery.

2.3 On 9 December 1995, a jury in the High Court found the author guilty and he was sentenced to seven years' imprisonment, to be served concurrently with an existing sentence for an unrelated offence. The author considers that the jury was influenced by the guilty plea of his co-accused and that the whole situation resulted in a miscarriage of justice. He further argues that his right to presumption of innocence was violated as the prosecutor suggested that the author's sister, who intervened as a main witness in the proceeding, had "concocted her story", with the author's lawyer being a "party to that lie".

2.4 In June 1996, the author requested disclosure, from the High Court, of the trial judge's summing-up.<sup>1</sup> The author argues that, as the High Court was unable to provide a copy of the summing-up, he had no access to the relevant information and had to rely on his memory and recall the grounds and arguments used by the jury at trial in order to prepare his appeal.

2.5 The author could not afford to pay for legal representation and therefore applied for legal aid. His application was dismissed *ex parte*, on paper, by three judges of the Court of Appeal, who conducted no hearings and did not meet to discuss the merits of the case. The author did not appeal this decision, but three persons whose application for legal aid had also been dismissed did. The author argues that their applications for review were dismissed without hearing and without reasons and that his appeal would therefore not have been effective. Having been denied legal aid, the author personally filed written submissions before the Court of Appeal against his criminal conviction. He considers that the denial of legal aid, together with the impossibility to access the summing-up of the High Court, thoroughly complicated the preparation of his appeal, and that he therefore had to request various extensions to be able to submit his grounds for appeal in writing.

2.6 Before the Court of Appeal, the author argued that the jury pool selection before the High Court had not observed the standard procedure and that, as a consequence, the jury was not representative. On 25 July 1996, a Court comprising Judges McKay, Keith and Blanchard heard and dismissed the author's appeal *ex parte*, without examination of the merits, and only provided brief reasons. The author considers that this decision seriously

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<sup>1</sup> See William C. Burton, *Burton's Legal Thesaurus*, fourth edition (2007): "When the judge delivers his charge to the jury, he is said to sum up the evidence in the case. In summing up, the judge should, with much precision and clearness, state the issues joined between the parties, and what the jury are required to find, either in the affirmative or negative. He should then state the substance of the plaintiff's claim and of the defendant's ground of defence, and so much of the evidence as is adduced for each party, pointing out as he proceeds, to which particular question or issue it respectively applies, taking care to abstain as much as possible from giving an opinion as to the facts. It is his duty clearly to state the law arising in the case in such terms as to leave no doubt as to his meaning, both for the purpose of directing the jury, and with a view of correcting, on a review of the case on a motion for a new trial, or on a writ of error, any error he may, in the hurry of the trial, have committed".

violated his right to challenge his conviction and sentence. He argues that the decision reflects a “longstanding unlawful practice of the Court of Appeal, according to which the Court considers that if the three members of the Court of Appeal had already concluded that the case did not merit legal aid, it had no prospect of success, and the appeal was “routinely rejected”, without examination of the merits.

2.7 This led the author to seize the Privy Council,<sup>2</sup> together with 11 other appellants. Over the same period, some of the judges of the Court of Appeal lobbied Parliament on the Crimes (Criminal Appeals) Amendment Bill, which intended to validate the longstanding unlawful practice of the Court of Appeal. According to the author, the judges, including Judge Tipping, then judge of the Court of Appeal, lobbied a political party in secret, as well as the Justice and Electoral Select Committee.

2.8 On 19 March 2002, the Privy Council rendered its decision in favour of the author in *Taito v. The Queen*.<sup>3</sup> It held that the decision not to grant legal aid to the author through *ex parte* appeals had been unlawful, as it was decided by three judges of the Court of Appeal without discussion; the grounds for dismissing the appeal had not been substantiated; the system operated on paper only, with no party appearing before the Court at any stage. The Privy Council further considered that “since the *ex parte* system was applied only to appellants who were refused legal aid and never to those who had either obtained legal aid or were privately funded, it unlawfully discriminated between rich and poor”. The Privy Council remitted the case back to the Court of Appeal. The author was granted legal aid in respect of his subsequent appeal before the Court of Appeal.

2.9 In this new appeal, the author argued that he had suffered a miscarriage of justice in breach of article 14 (1) of the Covenant and section 25 of the New Zealand Bill of Rights Act 1990, and the New Zealand common law, in that: (a) the Court had failed to provide the author with the trial judge’s summing-up, thereby depriving him of the opportunity to perfect his grounds of appeal; (b) the prosecutor had accused the author’s sister of lying when she had intervened as witness during the hearings, which amounted to a “scandalous attack on the author’s witness”; (c) the unlawful longstanding practice of the Court of Appeal had breached the author’s right to have his 1996 appeal heard by the Court of Appeal without undue delay; (d) the author’s trial counsel had acted incompetently as she had only met with him for 40 minutes on the day prior to his criminal trial and had disregarded his instructions to call two witnesses; and (e) the jury pool had been inadequate and the jury selection had failed to follow due process rendering the Court not independent and impartial.

2.10 On 1 March 2005, the Court of Appeal again dismissed the author’s appeal, considering that the judge had properly directed the jury in addressing the identification issues. The author considers that, in the absence of a transcript of the summing-up and of proper evidence, the Court was not in a condition to reach such a conclusion and the Court of Appeal was wrong in applying the test of “real likelihood” that the trial judge would not have properly directed the jury. The author further argues that the failure to preserve the trial judge’s summing-up cannot be hidden behind a miscarriage of justice test, and that the Court should have given the author the benefit of the doubt.

2.11 On 12 April 2005, the author applied for leave to appeal with the Supreme Court. On 17 June 2005, the Supreme Court dismissed the author’s application for leave to appeal as being “not necessary in the interests of justice”.<sup>4</sup> The author argues that two of the judges sitting on the Supreme Court and who had dismissed his application for leave to appeal had

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<sup>2</sup> The Privy Council was replaced by the New Zealand Supreme Court on 1 July 2004.

<sup>3</sup> *R. v Taito*, Privy Council, 19 March 2002, 3 NZLR, pp. 577-604.

<sup>4</sup> *R v Taito* [2005], 2 NZLR 832 (SC), para. 7.

been Judges Tipping and Elias, two of the lobby judges who had, among other judges, provided evidence to a parliamentary law reform Committee in respect of the reform of criminal appellate procedure considered in the *Taito* decision. According to the author, these elements amounted to a further violation of article 14, paragraph 1 and paragraph 5 of the Covenant.

2.12 In its submission dated 19 July 2010, the author informed that he did not pursue these allegations of judicial bias before the New Zealand courts because his counsel had raised the same claims on behalf of another client in 2007, when the Supreme Court had rejected them. The author therefore considered that it would have been futile to advance the same allegations before the Supreme Court and that he has no further remedy available. Furthermore, the author stresses that the proceedings lasted for over ten years, and were unduly prolonged.

### **The complaint**

3.1 The author alleges several breaches of the Covenant by the State party in his regard, vis-à-vis the following events and substantive rights under articles 2 (3) (a); 9; 14 (1), (2), (3) (b)-(e) and (g), (5) and (6); 17 and 26 of the Covenant.

#### *Selection of the jury*

3.2 The author claims that he was not granted a fair hearing because the jury selection was biased. In this connection, he argues that the jury was not preliminarily balloted as requested under the Juries Rules 1990, because approximately 100 jurors did not answer their jury summonses that day. The point of pre-ballot is that counsel can watch the pre-balloting process, know which jurors are in the jury pool and discuss those potential jurors with a client. The author considers that he was denied this opportunity owing to the fact that all other trials had their juries selected first, and his panel consisted of those left over. He argues that the failure to organize a preliminary ballot of his panel prevented him from discussing the potential jurors with his trial lawyer and from preparing and presenting a defence, in violation of article 14 (1) of the Covenant.

3.3 The author further argues that the whole process resulted in the selection of a jury of mostly European origin. He considers that this composition prejudiced him, as one of the main issues at his criminal trial related to his identification and the question of “whether all Samoans look alike”. He therefore argues that not having enough jurors, and those jurors not being properly selected, affected the independence and impartiality of the tribunal; his right to adequate time and facilities to prepare his defence; and his right to be free from discrimination, in violation of articles 14 (1) and 26 of the Covenant.

#### *Right to defence and inability to examine witnesses*

3.4 The author considers that the handling of his case by his first public defence lawyer deprived him of his right to have adequate time and facilities for the preparation of his defence. In this connection, he argues that his trial counsel acted incompetently because: (a) she had only met with him for 40 minutes on the day prior to his criminal trial; (b) she had failed to follow his instruction to call his two co-accused as witnesses in his defence; (c) she had incorrectly told him that, if the trial judge failed to give proper direction to the jury concerning dock identification then this would provide grounds for appeal; and (d) she had failed to object to the size and composition of the jury panel and its method of selection, in that the jury had not been selected in the usual manner (see above). The author argues that such conduct and errors amount to a violation of article 14 (3) (b) and (e) of the Covenant.

3.5 He further considers that the denial of his right to legal aid by the Court of Appeal in an *ex parte* decision amounts to a further violation of his right to defence under article 14 (3) (d) of the Covenant

*Presumption of innocence and judicial bias*

*High Court*

3.6 The author contends that, by associating him with the other two defendants in their guilty plea, the State party violated his right to presumption of innocence under article 14 (2).

*Supreme Court*

3.7 The author challenges the participation of Judges Tipping and Elias in the Supreme Court decision of 1 March 2005, because both had been involved in parliamentary lobbying regarding the question of *ex parte* appeal decisions. As Supreme Court judges did not disclose their involvement in the lobbying, full recusal applications could not be made. The Supreme Court rejected the author's allegations related to bias, on the grounds that there had been no objective and real ground for questioning the ability of the judges to hear the case. The author argues that any judge who had stated that there was no miscarriage of justice in the *Taito* cases, or had associated him or herself with that proposition, should have recused him or herself. He therefore considers that the participation of Judges Tipping and Elias in the decision of the Supreme Court destroyed any appearance of judicial independence and impartiality, in violation of article 14 (1) and (3) (e) of the Covenant.

*Right to review sentence and conviction by a higher tribunal*

3.8 The author argues that, despite his counsel's repeated requests, the Court was unable to provide him with the trial judge's summing-up. He assumes that the trial judge's summing-up was never transcribed and was therefore lost. He considers that the failure of the High Court to transcribe the summing-up denied him his right to a fair hearing in respect of his 1996 appeal and caused further unfairness in violation of his rights under article 14 (1) and (5) of the Covenant. In this connection, the author argues that the lack of summing-up made it impossible to verify the assumption of the Court of Appeal that the judge had properly directed the jury by giving a special direction in respect of the dock identification. He considers that, before such a level of uncertainty, he should have been given the benefit of the doubt. The author further refers to the judgement of the Court of Appeal in which the Court recognized that "it is not satisfactory that we should have to determine the appeal in the absence of a transcript of the summing-up. ... It is also unfortunate that [the trial counsel's] file is no longer available.<sup>5</sup> She and the appellant would each appear to blame the other for its loss. ... The party most likely to have been prejudiced by the unavailability of material, which would normally be available on appeal, is the appellant; this is because his appeal must be dismissed unless he can persuade us that there was a miscarriage of justice".<sup>6</sup> The Court of Appeal concluded that there was "no real likelihood" of a procedural error of significance or miscarriage of justice. The author considers that, instead of having applied a miscarriage of justice test, the Court should instead have assessed the prejudice he had suffered.

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<sup>5</sup> This point is not further referred to in the author's complaint.

<sup>6</sup> See *R. v. Taito* [2005], 2 NZLR 815 (CA), paras. 84-86.

3.9 He further argues that he was denied his right to review of his conviction by a higher tribunal according to the law, in breach of articles 14 (3) (d) and (e); 14 (5); and 26 of the Covenant, when his appeal was declined *ex parte*, without hearing, by the Court of Appeal.

3.10 The author further contends that the decision of the Court of Appeal of 1 March 2005 was unsubstantiated, and that the Court of Appeal failed to carry a proper review of his case, in violation of article 14 (1) and (5) of the Covenant. The author refers to general comment 32/48 of the Committee, according to which “the right to have one’s conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant”.<sup>7</sup>

#### *Delays in proceedings*

3.11 The author further considers that his trial has suffered undue delay from 22 December 1995, the date of the High Court judgement, until 1 March 2005, the date of the Supreme Court final judgement. In this connection, the author describes the different stages of the procedures. On 22 December 1995, the author appealed the High Court judgement and applied for legal aid, without submitting his grounds for appeal. On 11 March 1996, the author’s trial counsel submitted the tentative appeal points. The author then requested two extensions to submit his grounds for appeal, which were granted by the Registry until 19 April 1996. The author was then advised that no further extensions would be granted and that the Deputy Registrar would refer the file back “to the Court” for determination of the legal aid application on that date. On 10 May 1996, the author was denied legal aid. He was informed of that decision on 13 May 1996. On 30 May, the author requested an extension of four to six weeks to prepare his appeal, which was granted until 15 July 1996. On 25 July 1996, the author’s appeal was heard and dismissed. The duration of the appeal proceedings was therefore slightly more than seven months. Upon rejection of his appeal *ex parte* in July 1996 by the Court of Appeal, the author, along with 11 others, filed an application for judicial review on 21 August 1999. These applications were considered by the Privy Council in February 2001, and judgement was eventually rendered in March 2002.

3.12 The author argues that the delay in the proceedings partly resulted from the failure of the Court to preserve the trial judge’s summing-up, following which he had strong difficulties in presenting his appeal and had to request various extensions to submit his grounds for appeal. The author further considers that the main delays occurred between 1995 and 2002, when the Privy Council remitted the appeal back to the Court of Appeal for hearing. In this connection, the author refers to the jurisprudence of the Committee, according to which a delay of over four years and seven months between conviction and the judgement on appeal was in violation of article 14 (3) (c) and (5) of the Covenant.

#### *Right to an effective remedy*

3.13 The author argues that, by rejecting his appeal, the Court of Appeal failed to provide him with an appropriate remedy, which would then have been a reduction of sentence, in violation of article 14 (6), read together with article 2 (3), of the Covenant. However, he

<sup>7</sup> See the Committee’s general comment No. 32 (2007) on the right to equality before the courts and to a fair trial (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 40, A/62/40 (Vol. I), Annex VI*), para. 48.

argues that, as he has now fully served his sentence, the appropriate remedy now available to him for such a gross miscarriage of justice would be an acquittal.

#### *Miscellaneous*

3.14 The author has served his sentence while not being given full judicial guarantees. He therefore considers that the State party has violated his right not to be arbitrarily deprived of his liberty, under article 9 of the Covenant. He also considers that this situation, which lasted for over 10 years, violates article 17 of the Covenant. The article 17 violation is not further substantiated.

3.15 No specific allegations are made in respect of articles 9 (1) and (3); and 14 (3) (g) and (6) of the Covenant.

#### **State party's observations on admissibility and merits**

4.1 In its observations dated 19 April 2010, the State party adds to the factual background of the communication, observing that, in 1994, the author was arrested and charged with an aggravated robbery. Following a first trial, which was discontinued when the jury was unable to agree on a verdict, the author was tried and convicted in a second jury trial in December 1995. The author was then sentenced to seven years imprisonment. He was represented at trial and sentencing by an independent criminal law barrister, who was publicly funded under the New Zealand legal aid regime.

4.2 On 22 December 1995, the author filed a notice of appeal against both his conviction and his sentence to the Court of Appeal and sought a grant of legal aid for the appeal. The notice did not identify any grounds of appeal.<sup>8</sup> In January and February 1996, the author wrote to his trial counsel about his appeal. On 1 March 1996, the author wrote to the registrar of the Court of Appeal requesting that the Registrar delay the date of the author's appeal hearing, as he wanted to instruct his trial counsel. On 7 March, the Registrar replied and advised the author that his trial counsel had told the Court that she would provide grounds of appeal shortly. On 11 March 1996, his counsel provided the suggested grounds of appeal by letter to the Court. Between 14 March and 14 May 1996, the author corresponded with the Court of Appeal Registrar seeking extensions of time for filing additional grounds of appeal and submissions. The author was granted two successive time extensions, but did not file anything further. In the light of the information provided by the author's trial counsel, the Court of Appeal Registrar, who was at that time responsible for the administration of legal aid for criminal appeals, considered the author's request for legal aid in consultation with three judges of the Court. On 13 May 1996, the author's application for legal aid for his appeal was declined.

4.3 Following that decision, the author's appeal was set to be determined on 27 June 1996. On 13 May 1996, the Registrar wrote to the author to request him to file submissions for the appeal within 28 days. On 30 May, the author wrote to the Registrar requesting extra time for filing further submissions as he was representing himself. On 4 June, the Registrar wrote to the author advising that his appeal had been adjourned until 25 July 1996. The author's submissions were received by the Court around 23 July 1996 and were considered by the Court of Appeal without an oral hearing. The Court issued a short judgement declining the author's appeal on 25 July 1996.

4.4 In August 1999, the author applied for special leave to appeal to the Judicial Committee of the Privy Council, at the time New Zealand's highest court, challenging the way in which the Court of Appeal had decided his appeal. Over the following two years,

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<sup>8</sup> See Court of Appeal (2005), tab. 7, para. 17.



the author's case was joined with that of 11 others, whose appeals had also been dismissed by the Court of Appeal without an oral hearing between 1997 and 2000. Leave was granted by the Privy Council in February 2001, and the case was heard in February 2002. As heard, the appeal canvassed both the legal aid procedure followed by the Registrar of the Court of Appeal and the determination of appeals without an oral hearing. The Privy Council upheld the appeal on both points, holding that while "undoubtedly well intentioned", both procedures were unlawful and that the conduct of appeals without an oral hearing was contrary to the right of appeal protected in New Zealand law and, more broadly, to the right to natural justice. The Privy Council directed that all of the appellants' appeals be reheard in oral hearings. It specifically considered, and rejected, an application by the author and several others that their convictions should be quashed altogether.

4.5 The State party emphasizes that the Privy Council decision and its wider circumstances were of broad significance. As the Privy Council noted, the procedures for criminal appeals and for legal aid in issue were extensively reconsidered by the New Zealand courts in 1998 and were then addressed by legislation enacted in 2000 and 2001. Additionally, the procedure followed in the author's case potentially affected as many as 1500 other appeals, although only 62 appellants, including the author, have since taken advantage of the order of the Privy Council for rehearing.

4.6 On 3 and 4 February 2005, the Court of Appeal reheard the author's appeal. The author was represented by counsel and he filed an affidavit and written submissions in January 2005 prior to the hearing. The Crown also filed submissions opposing the appeal and an affirmation of the author's trial counsel. The Court reserved its decision and, on 1 March 2005, dismissed the author's appeal in an extensive written judgement.

4.7 On 7 March 2005, the author applied for leave to appeal against the Court of Appeal decision to the Supreme Court. On 17 June 2005, after receipt of written submissions from the author's counsel and from the Crown, the Supreme Court issued a brief written decision in which it declined the author's application on the basis that it did not raise either a miscarriage of justice or any question of general or public importance in terms of the leave criteria provided under the Supreme Court Act 2003.

4.8 The State party considers that the author's allegations of legal error, misconduct and incompetence in respect of his trial have been examined and declined by the competent New Zealand courts. The communication discloses no basis on which to conclude that those determinations are arbitrary or otherwise so manifestly in error as to warrant reconsideration by the Committee. The State party therefore considers that these allegations are both inadmissible and lacking in merit.

4.9 The State party further argues that the author's criticisms of the "on paper" procedure followed in the 1996 appeal were raised, and upheld in the 2002 decision of the Privy Council. The Privy Council determined that the appropriate remedy for these deficiencies was the rehearing of the author's appeal. The State submits that this remedy, as determined by the then-final appellate court for New Zealand after extensive argument from the author's counsel and others, is an effective and sufficient remedy. These allegations are therefore inadmissible under article 1 of the Optional Protocol, as they relate to breaches that were remedied within the New Zealand court system in 2002.

4.10 The State party considers that the delay between the author's appeal to the Court of Appeal and hearing of the author's further appeal to the Privy Council between July 1996 and February 2002 is, although exceptionally long, attributable in this instance to two elements: (a) more than three years' wait on the part of the author and his counsel before applying to appeal to the Privy Council; and (b) the author's subsequent decision to pursue his appeal in conjunction with several other appellants, who did not pursue appeals to the Privy Council until after mid-2000. The State party notes the finding of the Committee in

*Dean v New Zealand*, that the delay entailed in the Privy Council's invalidation of the "on the papers" procedure was, in the circumstances, not undue.<sup>9</sup> In respect of the particular steps taken in the author's case, the State party observes that it is not responsible for the independent actions of the author and his counsel and, furthermore, that the time then taken between the filing of the other appellants' appeals by all 12 appellants in February 2002 is not untoward in respect of a further appeal to a final appellate court. The State party also notes that, in the particular case, the author had received parole from his sentence of imprisonment for the aggravated robbery in March 2000.

4.11 As regards the author's complaint over the adequacy of the 2005 appeals, the State party considers that they are unfounded. In this connection, the State party argues that the appeal before the Court of Appeal was conducted over two days of oral argument, with the author represented by highly experienced counsel and at public expense, and was decided by a reasoned judgement of the Court, of 7500 words in length, that fully canvassed each of the claimed errors. In particular, and contrary to the author's assertions in respect of the unavailability of part of the 1995 trial transcript and criticisms of what is said to be an untenably high threshold, the State party argues that the Court gave the author the benefit of the doubt when addressing the issue. In this connection, the Court stated: "If we thought that there was a real likelihood of a procedural error of significance or anything else which could fairly be seen as giving rise to a miscarriage of justice, we would have no hesitation in allowing the appeal. But, giving the matter the best consideration we can, we are not persuaded that there is such a real likelihood".<sup>10</sup> The State party considers that the author does not give any basis on which to consider those findings, which relate to matters of fact and of national law, as arbitrary or otherwise manifestly in error. The State party therefore considers that these allegations are inadmissible and lacking in merit.

4.12 The State party further argues that the author's application for leave to appeal to the Supreme Court was declined on the basis that the right for further appeal is limited to cases of sufficient importance to warrant further reconsideration. The State party considers that the author's complaints in this respect fail at two levels. First, as a general proposition, such restriction of further rights of appeal raises no inconsistency with article 14 (5). There is, as is widely recognized, a distinction between first appellate courts and further tiers of appeal, for which such leave criteria are apposite and common among States parties. There is also no obligation, in respect of such provision for further appeal, to undertake a full rehearing of an intending appellant's case. Second, so far as the author's own case is concerned, a panel of three judges of the Supreme Court has considered and declined the author's application for a further appeal against the criteria applicable under the New Zealand legislation. That determination, given in a reasoned judgement, was again neither arbitrary nor otherwise so manifestly in error as to justify reassessment by the Committee.

4.13 In respect of the claims of error on the part of the appellate courts on matters of fact and of national law, the State party again observes that there is no basis on which to suggest that those determinations are arbitrary or otherwise so manifestly in error as to warrant reconsideration.

4.14 As regards the author's claim of bias on the part of one or more members of the Supreme Court, the State party initially raised that it had not been pursued in the New Zealand courts and should be held inadmissible for failure to exhaust domestic remedies. Nonetheless, in the view of the later author's submission that his counsel had raised the same allegations on behalf of another client in 2007 (see para. 2.13), and that the Supreme Court had declined to uphold those allegations, the State party considers that domestic

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<sup>9</sup> See communication No. 1512/2006, *Dean v New Zealand*, Views adopted on 17 March 2009.

<sup>10</sup> See Court of Appeal (2005), tab. 7, para. 86.

remedies had indeed been exhausted to that regard. Nonetheless, it argues that the author's claim of bias on the part of one or more members of the Supreme Court is without any sufficient foundation on which to advance such a grave allegation. It further considers that, as these factual allegations have been considered and rejected by national jurisdictions in consistency with general comment 32 and constant jurisprudence, there is no basis on which the Committee should seek to revisit that factual determination. The State party therefore considers that this point of the communication remains inadmissible under article 1 of the Optional Protocol, and that these allegations are without merit for the same reason.

#### **Author's comments on the State party's observations**

5.1 On 7 February 2011, the author submitted his comments on the State party's observations. He argues that he is fully aware of the no fourth instance principle and that his communication is not an attempt to treat the Human Rights Committee as a further Court of Appeal. He argues that his complaint is made on the basis of breaches of the Covenant that have never been determined by the Court of Appeal, the Privy Council or the Supreme Court. In this connection, the author considers that he has been a victim of discriminatory treatment when, as an indigent defendant, he was denied the summing-up transcript, while defendants with a privately paid lawyer were provided with the crucial document. The author reiterates that this discriminatory treatment amounts to a violation of his right to adequate facilities for his defence.

5.2 The author reiterates that his legal aid trial lawyer failed to follow his instructions to call his two co-accused as witnesses, gave improper directions and failed to challenge the size and composition of the jury post. He further argues that the decision of the Court of Appeal to decline his application for legal aid for his appeal reflects a practice that was affecting most indigent appellants at the time.

5.3 Referring to general comment 32/28, the author further argues that the Supreme Court failed in its responsibility as third appellate Court by not giving proper attention to his appeal.

5.4 In addition, the author considers that, contrary to State party's argument, a rehearing by the Court of Appeal is not an effective remedy when trial transcripts are not available, and the Court does not properly address Covenant breaches. The Supreme Court ignored the Privy Council change of position on undue delay, and its judgement of one and a half pages clearly demonstrates that the Court did not carry a meticulous and thorough investigation of the arguments he had put forward on appeal. He therefore considers that his right to have the conviction and sentence reviewed was violated. The right to appeal without undue delay and the right to have the conviction and sentence reviewed by a higher tribunal according to law are essential parts of a fair trial. The concept of a fair hearing protected under article 14 (1) necessarily entails that justice be rendered without undue delay, which is also provided under article 14 (3) (c) of the Covenant. The author refers to the Committee's jurisprudence, according to which the right of the accused to be tried without undue delay is not only designed to avoid keeping persons too long in a state of uncertainty about their fate, but also to serve the interest of justice.<sup>11</sup>

5.5 The author further argues that more than 15 years have passed since he was convicted and sentenced in the High Court of New Zealand. He insisted that he was not guilty, and then logically sought leave to appeal, which was the only remedy available for him at this stage. The author argues that he lost the opportunity of receiving a thorough

<sup>11</sup> See communication No. 1466/2006, *Lumanog and Santos v. The Philippines*, Views adopted on 20 March 2008, para. 8.4.

appeal by the Court of Appeal in 1996 as he was denied legal aid and declined the transcript of the summing-up, and his appeal dismissed by an ex parte decision. However, he (and 11 others) appealed the Privy Council where his right to legal aid was affirmed, and the Court longstanding and unlawful practice was condemned in the strongest terms. The State party dismissed the author's undue delay claim because "delay for which the State is not responsible [...] cannot be prayed in aid by the appellants". However, the author considers that in the present case, he had to suffer this long period of time until his claims were going to be heard and reviewed properly because of the State party's failure to guarantee fair trial procedures and the longstanding unlawful practice of the Court of Appeal. In this connection, the author refers to the jurisprudence of the Privy Council in which it was stated that *R v Taito* was "inconsistent with the proposition that the normal remedy for such a breach is the quashing of the conviction", and "a reduction of the sentence by nine months was a just disposal in the spirit of article 6(1)".<sup>12</sup> The author argues that the Committee has made clear that the right to a speedy trial applies to the appellate process as well.<sup>13</sup> He refers to the Committee's jurisprudence under which a four-year delay, from the time an appeal was rejected until the opinion stating the reasons for the rejection was issued, was considered undue;<sup>14</sup> a delay of over four years and seven months between conviction and the judgement on appeal was held to be excessive;<sup>15</sup> and even a delay of two and a half years in the hearing of the complainant's appeal was held to be a violation of the Covenant.<sup>16</sup>

5.6 The author considers that the undue delay he suffered resulted in the impossibility for him to obtain a fair appeal because relevant documentation went missing, and therefore to obtain an adequate defence. Additionally, such a lengthy delay caused anxiety to the author as to the uncertain outcome of the proceedings.

5.7 The author then reiterates his arguments with regard to the consequences of the fact that he was not given access to the trial judge's summing-up and to legal aid in 1996. He argues that the denial of the summing-up triggered a chain reaction of Covenant violations: he was deprived of his fundamental right to adequate facilities to prepare his defence; the right to a fair hearing, including appeal; the right to natural justice; the right to be treated equally before the courts; the right to have his conviction and sentence reviewed by a higher tribunal according to law; and the right to be treated without discrimination. He refers to the jurisprudence of the Committee, according to which "a remedy must be effective, as well as formally available", and entails the obligation for the State party to provide the convicted person with access to the judgements and documents necessary to enjoy the effective exercise of the right to appeal.<sup>17</sup>

5.8 The author also reiterates his arguments with regard to his allegations of a biased and discriminatory selection of the jury, of an incompetent conduct of his counsel at trial, and of the lack of independence and impartiality of the Tribunal. As he has already served his prison sentence, the author considers that the only realistic remedy for him would be adequate compensation.

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<sup>12</sup> See *Mills v Her Majesty's Advocate and Anor* [2002], UKPC D2, 22 July 2002, para 22.

<sup>13</sup> The author refers to Brian Farrel, "The right to a speedy trial before international criminal tribunals", *South African Journal on Human Rights*, Vol. 19 (2003).

<sup>14</sup> See communication No. 210/1986, *Pratt and Morgan v. Jamaica*, decision adopted on 24 March 1988.

<sup>15</sup> See communication No 818/1998, *Sextus v. Trinidad and Tobago*, Views adopted on 16 July 2001, paras. 3.4 and 7.3.

<sup>16</sup> See communication No 27/1978, *Pinkney v. Canada*, Views adopted on 29 October 1981.

<sup>17</sup> See communication No 333/1988, *Hamilton v Jamaica*, Views adopted on 23 March 1994, para. 8.3.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

6.2 The Committee has ascertained, as required under article 5 (2) (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. It also notes that it is undisputed that the author has exhausted all available domestic remedies, as required by article 5 (2) (b), of the Optional Protocol.

6.3 The Committee observes that the author's claims pertaining to the illegality of his *ex parte* appeal in March 2000 under articles 14 (3) (d)-(e) and (5); and 26 of the Covenant, was remedied by domestic Courts, following an appeal to the Privy Council, and the author was accordingly granted a new appeal in March 2005. This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

6.4 The Committee considers that the author has failed to substantiate, for purposes of admissibility, his allegations under articles 14 (1); and 26 of the Covenant, invoked in connection with the selection of the jury in the proceeding before the High Court. The Committee observes that such selection is done randomly through a process involving several stages. In the case under review, the information available does not reveal any form of discriminatory practice or decision by State party's authorities as regards the selection of the jury in charge of the author's case. The author demonstrates neither that the decision of the jury was discriminatory in itself, nor that the extent to which the alleged impossibility to discuss the potential jurors with his trial lawyer affected his right to prepare and present a defence, and would amount to a violation of article 14 (1) of the Convention. This claim is therefore inadmissible under article 2 of the Optional Protocol.

6.5 As regards the author's claim that the rejection of his appeal in March 2005 amounted to a violation of his rights under article 14 (1) and (5) of the Covenant, the Committee notes that the appeal before the Court of Appeal was conducted over two days of oral argument, with the author represented by experienced counsel. The Committee also notes that the Court reserved its decision and, on 1 March 2005, dismissed the author's appeal in an extensive written judgement that examined each of the claimed errors in details. The Committee thus declares this part of the communication inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

6.6 Similarly, the Committee finds that the author has not demonstrated how the contribution, by Justice Tipping and Chief Justice Elias — along with other judges — of evidence to members of Parliament in respect of amendments to the criminal appeal system, had any bearing on the consideration of the merits of his case. The Committee also considers that the author's allegation under article 14 (1) and (5) of the Covenant, *vis-à-vis* the participation of Justice Tipping and Chief Justice Elias in the Supreme Court proceedings of June 2005, is insufficiently substantiated for purposes of admissibility. The Committee notes that Justice Tipping and Chief Justice Elias were not members of the Court of Appeal, which dismissed the author's appeal in 2005. Additionally, the author has failed to demonstrate, for purposes of admissibility, that Justice Tipping and Chief Justice Elias, upon consideration of the author's application for leave to appeal, were not impartial

or otherwise harboured preconceptions about the case. The Committee thus declares this part of the communication inadmissible under article 2 of the Optional Protocol.<sup>18</sup>

6.7 As regards the author's allegations under article 14 (6) of the Covenant, the Committee observes that the author's conviction, as pronounced in the judgement of the High Court on 9 December 1995, has never been set aside by any later judicial decision, and that the author has never been pardoned. Accordingly, the Committee considers that article 14 (6) does not apply in the present case, and the author's claim is inadmissible *ratione materiae* under article 3 of the Optional Covenant.<sup>19</sup>

6.8 The Committee has noted the submissions made by the State party and the author on the availability of domestic remedies. It considers that there is no obstacle to the admissibility of the remaining issues raised by the author in his communication and will proceed to examine these issues on the merits.

6.9 The Committee concludes that the claims based on article 14 (1), (3) (b), (c) and (e), and (5) of the Covenant relating to the issue of defence and right to examine witnesses, to the issue of delay and to the issue of the access to the documentation necessary for the preparation of an appeal, have been sufficiently substantiated and should be considered on the merits.

#### *Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

7.2 In respect of the author's claim that he was not adequately represented, the Committee notes the author's arguments stating that his legal aid lawyer did not dedicate sufficient time to his case; disregarded his instructions to call two witnesses; and did not contest the size and composition of the jury panel and its method of selection. The Committee recalls that, 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.<sup>20</sup> Notwithstanding the author's claim, the information available to the Committee does not enable the Committee to conclude that his trial lawyer's conduct was contrary to the interests of justice<sup>21</sup> and would amount to a violation of article 14 (1) and (3) (b) and (e).

7.3 The author further claims that his trial has suffered undue delay from 22 December 1995, the date of the High Court judgement, until 1 March 2005, the date of the Supreme Court final judgement. The Committee recalls that the reasonableness of the delay in a trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by

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<sup>18</sup> See communication 1758/2008, *Jessop v. New Zealand*, Views adopted on 29 March 2011, para. 7.20.

<sup>19</sup> See communications No. 408/1990, *W.J.H. v. The Netherlands*, Inadmissibility decision adopted on 22 July 1992, para. 6.3; No. 880/1999, *Irving v. Australia*, Inadmissibility decision adopted on 1 April 2002, para. 8.3; and No. 963/2001, *Uebergang v. Australia*, Decision on admissibility adopted on 22 March 2001, para. 4.3.

<sup>20</sup> See communication No. 667/1995, *Hensley Ricketts v. Jamaica*, Views adopted on 4 April 2002, para. 7.3.

<sup>21</sup> See communications No. 536/1993, *Perera v. Australia*, inadmissibility decision adopted on 28 March 1995, para. 6.3; and No. 618/1995, *Campbell v. Jamaica*, Views adopted on 20 October 1998, para. 7.3.

the administrative and judicial authorities.<sup>22</sup> In the present case, the Committee notes that the author was sentenced by the High Court on 9 December 1995, following two pretrial applications and jury trial. The Committee observes that, following the decision of the Privy Council of 19 March 2002, ordering the rehearing of the author's case, the Court of Appeal hearing took place in February 2005. The Committee notes that the delays referred by the author with regard to his appeal mainly resulted from his own requests for extension (three in total) to submit his grounds for appeal and to request legal aid. As regards the delays related to the procedure before the Privy Council, the Committee notes that the author waited more than three years before presenting his application for leave to appeal to the Privy Council together with 11 appellants. Taking into account these specific circumstances, the Committee considers that the delay in determining the author's appeal does not amount to a violation of article 14 (3) (c) and (5).<sup>23</sup>

7.4 The Committee also notes the author's argument that the unavailability of the 1995 trial judge's summing-up prevented him from having access to the documentation necessary for the proper preparation of his appeal, in violation of article 14 (1) and (5) of the Covenant. The Committee notes the State party's argument that the availability of the trial judge's summing-up is not a precondition for lodging an appeal; that the appellate court's findings relate to matters of fact and of national law; and that the Court of Appeal concluded that there was no real likelihood of a procedural error of significance or miscarriage of justice. The Committee recalls that article 14 (5) of the Covenant provides that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. As a result, the author should have obtained access to the court records and to those documents that are necessary to enjoy the effective exercise of the right to appeal.<sup>24</sup> The Committee notes that the author had access to a transcript of the proceedings, except the summing-up part. It also notes that the issue of the lack of a summing-up was the subject of specific consideration in the Court of Appeal and the Supreme Court, and that the author has not provided any information to explain in what respect the transcript of the summing-up was necessary for him to effectively exercise his right to appeal, or that it affected his right to a fair hearing. Accordingly, under the circumstances of this case, the Committee considers that the author has not sufficiently substantiated his claim and the Committee is therefore not in a position to find a violation of article 14 (1) and (5) of the Covenant.

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

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<sup>22</sup> See general comment No. 32 (2007) on the right to equality before the courts and to a fair trial, para. 35; and communication No. 1940/2010, *Eligio Cedeño v. Venezuela*, Views adopted on 29 October 2013, para. 7.7.

<sup>23</sup> See communication No. 1512/2006, *Dean v. New Zealand*, Views adopted on 17 March 2009, para. 7.2.

<sup>24</sup> See communication No. 662/1995, *Lumley v. Jamaica*, Views adopted on 31 March 1999, para 7.5.