



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2072/2011

##### Decision adopted by the Committee at its 115th session (19 October-6 November 2015)

<i>Submitted by:</i>	V.S. (represented by Frank Deliu)
<i>Alleged victim:</i>	The author
<i>State Party:</i>	New Zealand
<i>Date of communication:</i>	27 June 2010
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 July 2011 (not issued in document form)
<i>Date of adoption of decision:</i>	2 November 2015
<i>Subject matter:</i>	Imprisonment of a journalist declared in contempt of court for publishing defamatory information on websites
<i>Procedural issues:</i>	Exhaustion of domestic remedies; substantiation of claims
<i>Substantive issues:</i>	Right to freedom of expression; right to a fair trial; prohibition of arbitrary arrest or detention
<i>Articles of the Covenant:</i>	9 (1), 14 (1) and 19 (2)
<i>Articles of the Optional Protocol:</i>	1-3 and 5 (2) (b)

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## Annex

### **Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (115th session)**

concerning

#### **Communication No. 2072/2011\***

*Submitted by:* V.S. (represented by Frank Deliu)  
*Alleged victim:* The author  
*State Party:* New Zealand  
*Date of communication:* 27 June 2010

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

*Meeting* on 2 November 2015,

*Having concluded* its consideration of communication No. 2072/2011, submitted to it by V.S. 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:

#### **Decision on admissibility**

1.1 The author of the communication is V.S., a national of New Zealand born in 1956. He claims to be a victim of a violation by New Zealand of his rights under articles 9 (1), 14 (1) and 19 (2) of the Covenant. He is represented by counsel, Frank Deliu. The Optional Protocol entered into force for the State party on 26 August 1989.

1.2 On 6 September 2011, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided to examine first the admissibility of the communication.

#### **Factual background**

2.1 The author is the owner, editor and publisher of the legal news websites **Error! Hyperlink reference not valid.** [www.kiwisfirst.co.nz](http://www.kiwisfirst.co.nz) reporting on judicial news and judicial conduct affairs.

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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 Jelić, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

2.2 On 5 May 2005, the Auckland High Court issued an interim gag injunction against the author requiring him not to publish any information containing allegations of criminal or unethical conduct or improper personal enrichment by a receiver appointed to administer a company of which the author was managing director.<sup>1</sup> By decision of the Court of Appeal of New Zealand of 13 December 2005, the injunction was upheld and the author was found in contempt of court for breaching the injunction and sentenced to pay a fine. The author was found in contempt of court a second time on 13 July 2007 and sentenced to six weeks' imprisonment. On 23 December 2008, the injunction was made permanent by the the Auckland High Court.

2.3 On 19 July 2007, the Solicitor-General of New Zealand sent a letter to the author's company requesting that certain material, which was considered to be defamatory of judges of the High Court and Court of Appeal, be removed from the kiwisfirst websites.<sup>2</sup> The letter also noted that the websites contained a link to another website that had been recently found to breach the 2005 High Court injunction, and advised that "anyone who knowingly assisted in breaching the injunction ... may also be liable in contempt for that breach". On 31 July 2007, a second letter was sent by the Solicitor-General arguing that the author's website contained material that was "in clear breach of the injunction". The matter was not pursued.

2.4 On 28 January 2008, the Solicitor-General filed an application for contempt of court with the Auckland High Court, in which he sought the indefinite imprisonment of the author for continuing to publish information against the receiver in breach of the 2005 injunction. During the contempt proceedings before the High Court, the Solicitor-General put forward as witness an assistant counsel in the Crown Prosecutor's Office charged with monitoring the author's websites and printing any reference to the receiver. The author notes that this was the sole prosecution witness and source of evidence. By decision of 8 July 2008, the High Court convicted the author for contempt of court and sentenced him to six months' imprisonment. The execution of the sentence was suspended until 1 August 2008 to allow the author to remove the offending material from the websites if he undertook that it would not be placed back on any websites, failing which the sentence would be enforced.

2.5 On 9 March 2009, the Court of Appeal partly allowed the author's appeal against the High Court decision and considered that the High Court had imposed a sentence that was beyond its jurisdiction. The Court of Appeal cited section 24 (e) of the New Zealand Bill of Rights Act 1990, in which it is established that a defendant charged with an offence shall have the right to be tried by jury when the penalty for the offence is or includes imprisonment for more than three months. The High Court's order was quashed and replaced by an order committing the author to prison for a term of a maximum six months, subject to the proviso that the term of imprisonment would come to an immediate end if the author complied with the 2005 injunction. The Court of Appeal rejected the author's grounds of appeal concerning double jeopardy, considering that the breaches of the injunction occurred after 13 July 2007 and that the author had not previously been tried for those breaches. The Court of Appeal also rejected the author's arguments regarding a

<sup>1</sup> In August 2001, a settlement agreement put an end to a civil dispute between the author and the appointed receiver, whereby the parties agreed not to file any further claims against each other. Following the publication on the author's website of information against the receiver and his handling of the receivership, the latter applied to the Auckland High Court for an injunction requiring that the author remove such material and that the publication of further comments in breach of the settlement agreement be prohibited.

<sup>2</sup> According to the letter, the published information referred to "deliberate judicial misconduct, breach of judicial oath, corruption, or suggesting that judges had been motivated by an improper or unlawful purpose". However, in the letter, reference was not made to the specific information that was considered to be defamatory nor was the truthfulness of such information challenged.

breach of his right to natural justice, considering that the High Court had acted impartially and had duly identified both the part of the injunction that was breached and those words published that constituted a breach by quoting multiple passages from the websites.

2.6 On 7 August 2009, the Supreme Court of New Zealand heard an appeal against the imprisonment order on the ground that the author had been wrongly deprived of his right to trial by jury because of the summary procedure of trial by judges sitting alone in the High Court. By decision of 17 May 2010, the Supreme Court allowed the author's appeal and quashed the Court of Appeal's order, replacing it with an order committing the author to prison for a prison term of a maximum of three months, subject to the proviso that the term would come to an immediate end if he complied with the injunction.

2.7 On 4 June 2010, the author applied for a review of this sentence, supplying allegedly new evidence. By minute of 11 June 2010, the Supreme Court dismissed the author's review application, stating that it did not raise any matter that had not previously been considered in relation to the appeal. A second review application was filed with the Supreme Court on 14 June 2010 and was also dismissed by the Supreme Court by minute of 16 June 2010.

2.8 On 21 February 2008, the author's home was raided by the police showing a search warrant issued by the district court registrar and indicating that the police was looking for "the author's library card, a Hawaiian print shirt and anything that connected him to Urewera terrorist-accused or their lawyers". The author contends that he was detained in his house for five hours without an arrest warrant and was not allowed to drink until he answered police questions. The author's publishing and business equipment was seized along with personal financial records. The author argues that most of this material was never returned, even though no criminal charges were pressed against him. The High Court denied the author's application to see a copy of the affidavit used to support the search warrant against him. The author also applied to the Independent Police Conduct Authority complaining about the execution of the search warrant by the police and requesting that his seized property be returned. On 16 July 2009,<sup>3</sup> the Independent Police Conduct Authority responded that no police misconduct had been found and informing the author that he would have to apply to the High Court to recover any seized property.

### **The complaint**

3.1 The author claims that his rights under article 19 (2) have been violated. He argues that the Solicitor-General attempted to shut down his websites just because he had published information on corruption within the New Zealand justice system and of the Solicitor-General himself, and that the Government then tried to have him incarcerated to silence criticism of the judiciary and the Solicitor-General. The author notes that the accuracy of the information that he had published, which was supported by official court documents, was never challenged by the Government. The author also notes that he did nothing to incite violence or any other force majeure act that would require the Government to act and suppress his right to free speech. He argues that it is for the State party to show that the restriction on his freedom of speech was necessary and proportional. He claims that he is entitled to express his opinions about the Government of New Zealand publicly and that, as a journalist, his duty is to inform the public about issues that affect their lives, including issues of corruption by the judiciary and the executive, especially where this information has not been proven to be defamatory.

3.2 The author argues that allegations of defaming the judiciary were never pursued by the Solicitor-General in a court of law. Instead, the Solicitor-General attempted to shut down his websites administratively, without any court order or decree and without

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<sup>3</sup> The author argues that this response came 18 months after he had submitted his complaint.

providing a legal reason as to why the publication was unlawful, which also breached article 19 (2) of the Covenant.

3.3 Regarding the contempt proceedings initiated by the Solicitor-General, the author claims that his rights under article 14 (1) were violated. The sole witness put forward by the Solicitor-General was a junior lawyer in the Crown Prosecutor's Office, who testified that her only role was to print pages off the websites and not to give a legal opinion or even read what she had been directed to print, and the only reference came from that witness. The author was not allowed to question the prosecution witness, that being an important element of a fair trial. Therefore, he was denied his right to be presumed innocent. The judgement rendered by the High Court relied on information from his websites that had long been censored. The author contends that the High Court predetermined the outcome of his trial.

3.4 With regard to the proceedings before the Supreme Court, the author notes that, although he produced evidence to prove that the Crown Law Office and the Domain Name Commissioner had acknowledged that his websites were compliant with the injunction, the Supreme Court refused to analyse this evidence. Instead, the Supreme Court upheld his contempt committal on the basis of a blinkered quotation from the Crown's legal submissions and without any evidence to support the finding of his guilt. He adds that he was sentenced to the maximum punishment available before he could assert his right to trial by jury.

3.5 The author claims to be victim of a violation of article 9 (1) of the Covenant because he was detained for five hours in his house by the police, who exhibited a search warrant but failed to indicate the name of the Deputy Registrar of the District Court who had signed the order, and because the Auckland High Court denied his application to see a copy of the affidavit used to support the search warrant. Therefore, the police failed to prove that the search warrant was legal and his detention in his house was not arbitrary. Additionally, the police confiscated his property and refused to return it, despite the fact that he was not charged with any offence. He adds that, although three eyewitnesses had supported his unlawful detention complaint, the Independent Police Conduct Authority failed to interview any of them before dismissing his complaint. The author notes that the fact that there was such a serious raid of his house without any evidence to argue that he had any "terrorist ties" shows the underlying political motivation to quell his criticism of the judiciary and the Solicitor-General.

3.6 The author proposes that the Committee request whatever remedies may be appropriate to ensure that he is able to practise journalism in New Zealand without fear of persecution, protecting his reputation and preventing future unlawful incarcerations, and that the State party is appropriately sanctioned for its actions.

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

4.1 On 1 September 2011, the State party provided its comments on the admissibility of the communication.

4.2 The State party contends that the author's allegations under article 9 have not been brought at the domestic level and domestic remedies have therefore not been exhausted. It notes that the validity of a search warrant or the unlawful conduct of a search may be challenged through the courts. The State party adds that, with regard to the allegation of inappropriate questioning during the police raid, the issue was investigated by the Independent Police Conduct Authority,<sup>4</sup> which concluded that the police officers acted under a duly issued warrant and were entitled to restrict the author's movements so far as necessary to prevent the obstruction of that search. It found the conduct of the police officer

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<sup>4</sup> An independent agency whose members are appointed by the Governor-General on the recommendation of the Parliament and who have quasi-judicial tenure.

who prevented the author from making coffee before he answered police questions to be “unwise” but that his actions did not amount to “serious misconduct”. As there is no basis on which to question that finding, the allegation is inadmissible as insufficiently substantiated. As to the allegation that seized property was not returned, the State party notes that this relates to the right to property and is therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.3 As to the author’s claims under article 19 (2) regarding the Solicitor-General’s request to remove material from his website, the State party argues that this claim has never been raised before national courts and domestic remedies have not been exhausted. The State party adds that it is also inadmissible under article 1 of the Optional Protocol as the request was never granted and therefore the author cannot claim to be victim of an actual breach.

4.4 With regard to the author’s allegations under articles 14 (1) and 19 (2) concerning the domestic court proceedings, the State party notes that the author is seeking that the Committee revisit findings as to the assessment of evidence and application of national law by domestic courts. The State party claims that this part of the communication is inadmissible as it has not been sufficiently substantiated and/or is incompatible with the Covenant. It notes that the author’s allegations of unfair trial relate to evidential, procedural and legal determinations by national courts and the author has failed to assert any adequate basis on which to establish manifest injustice or arbitrariness that would warrant reconsideration of the findings of the High Court.

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

5.1 In his submission of 30 November 2011, the author notes that, since he submitted his communication to the Committee, he has again been found in contempt of court and sentenced to a term of imprisonment for publishing a judgement that denied the right to trial by jury in a renowned case of “unsuccessful terrorist prosecution”. He argues that a campaign has been brought against him by various branches of government to oppress him.

5.2 With regard to the State party’s argument that he could have challenged the validity of the search warrant domestically, the author argues that such action would have been futile and ineffective. He notes that, although he was never charged as a result of the search warrant executed on his home and publishing business, his application to the High Court to see the affidavit that the State used to obtain the warrant was denied, so he was never able to check the validity of grounds of the warrant application. The author contends that it is disingenuous to posit that he has failed to exhaust domestic remedies when the Court refused him permission to even see the affidavit on which the search warrant was based. The author adds that he has sought to affirm his rights through, basically, every possible avenue but has been denied the right to a trial and has had claims repeatedly struck out and/or had security for costs imposed such as to preclude him from the opportunity to take his cases to trial because he could clearly not afford to pay the sums necessary to be granted a hearing date.

5.3 As to the State party’s arguments under articles 2 and 3 of the Optional Protocol, the author contends that the purpose of his claim is to ask the Committee to examine whether the conduct of the public officials involved in the decision-making was proper, as opposed to merely attempting to revisit findings of fact and of national law. He notes the distinction between the finding itself and the procedure or conduct of the judiciary that led to it.

5.4 With regard to the State party’s argument that the restitution of his confiscated property is an issue related to the right to property, the author notes that he did not make any argument centred around the right to property, but rather presented that information as a piece of evidence that further indicates the illegality of the police actions in the raid as a component of breaches of article 9.

5.5 Finally, as to the State party's argument that his claim regarding the Solicitor-General's conduct is inadmissible under article 1 of the Optional Protocol, the author notes that human rights instruments such as the Covenant should be interpreted broadly. The author adds that an attempt is just as reprehensible as a concluded act. Additionally, the Solicitor-General's actions were successful in temporarily "parking" his website until he was able to convince the web host that the Solicitor-General's demands were unlawful. Also, the Solicitor-General's actions have harmed his reputation.

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

#### *Consideration of admissibility*

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

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

6.3 The Committee takes note of the author's claims under article 19 (2) of the Covenant, relating to an alleged violation of his right to freedom of expression by the State party in an attempt to unduly silence his criticism of the judicial and executive branches of government. The Committee also takes note of the State party's argument that these claims were never raised before the national courts and domestic remedies have therefore not been exhausted. The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.<sup>5</sup> The Committee observes that, in the present case, according to the information available in the file, the author never raised the issue of freedom of expression before the national courts, either in the context of the contempt of court proceedings initiated against him or in the context of the appeals proceedings, and that he has not justified that existing remedies would have been ineffective in that regard. In these circumstances, and in the absence of any further information on file, the Committee declares this part of the communication inadmissible pursuant to article 5 (2) (b) of the Optional Protocol to the Covenant.

6.4 With regard to the author's claims under article 14 (1) relating to fair trial issues during the contempt proceedings, the Committee takes note of the State party's argument that these claims are inadmissible because they relate to the assessment of evidence and the application of national law by the domestic courts. The Committee recalls its jurisprudence that it is incumbent on the courts of States parties to evaluate the facts and the evidence in each case or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>6</sup> The Committee has examined the materials submitted by the author, including the decisions of the High Court, the Court of Appeal and the Supreme Court, and is of the opinion that those materials do not provide sufficient evidence to support the conclusion

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<sup>5</sup> See, inter alia, communications No. 1511/2006, *García Perea v. Spain*, decision of inadmissibility adopted on 27 March 2009, para. 6.2, and No. 1639/2007, *Zsolt Vargay v. Canada*, decision of inadmissibility adopted on 28 July 2009, para. 7.3.

<sup>6</sup> See, inter alia, communications No. 1622/2007, *L.D.L.P. v. Spain*, decision of inadmissibility adopted on 26 July 2011, para. 6.3, and No. 2211/2012, *L.F. v. New Zealand*, decision of inadmissibility adopted on 30 March 2015, para. 6.4.

that the court proceedings suffered from such defects. Therefore, the Committee considers that the author has not sufficiently substantiated his claims for the purpose of admissibility and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's claims under article 9 (1) of the Covenant, the State party maintains that the author never challenged the validity of the search warrant before the national courts. The author has argued that doing so would be futile and ineffective considering that he was denied the possibility of seeing the affidavit on which the search warrant was based. However, the Committee considers that this fact alone cannot justify the author's inaction in attempting to bring his claims regarding various issues related to the search of his home before the national courts. Therefore, the Committee concludes that domestic remedies have not been exhausted regarding this claim and declares it inadmissible under article 5 (2) (b) of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible pursuant to articles 2 and 5 (2) (b) of the Optional Protocol;

(b) That the decision shall be transmitted to the author and the State party.

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