UNITED
NATIONS

CCPR

International Covenant on Civil and Political Rights

Distr.
RESTRICTED*

CCPR/C/65/D/714/1996
4 May 1999

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Sixty-fifth session
22 March - 9 April 1999

DECISIONS

Communication Nº 714/1996

Submitted by:	A. Gerritsen (represented by Dr. M. W. C. Feteris)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	20 December 1995
Prior decisions:	- Special Rapporteur's rule 91 decision, transmitted to the State party on 11 February 1997 (not issued in document form)
Date of adoption of decision on admissibility:	25 March 1999

[ANNEX]

* Made public by decision of the Human Rights Committee.
Inad. 714

ANNEX*

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
- Sixty-fifth session -

concerning

Communication Nº 714/1996

Submitted by:	A. Gerritsen (represented by Dr. M. W. C. Feteris)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	20 December 1995

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

Meeting on 25 March 1999

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. A. Gerritsen, a Dutch citizen, born on 23 October 1921. He claims to be a victim of a violation by the Netherlands of article 14, paragraphs 1 and 5, of the Covenant on Civil and Political Rights. He is represented by Dr. M. W. C. Feteris of Coopers and Lybrand, a tax law firm in Amsterdam.

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*The following members of the Committee participated in the examination of the communication: Mr. Afbdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, and Mr. Maxwell Yalden.

Facts as submitted by the author

2.1 As a resident of the Netherlands, the author is subject to Dutch income tax. In April 1990, the tax inspector initially imposed tax assessments over the years 1987 and 1988, in comformity with the author's returns for these years. In the autumn of 1990, however, the inspector started an investigation to check whether the author's tax returns over the years 1987 and 1988 had been correct and complete.

2.2 The author states that during this investigation the tax inspector concluded that the increase of the author's net wealth in these years, taking account of his recorded private expenses, could not be explained by the taxable income as declared in tax returns. The author explained that he had won substantial amounts by placing money on horses and by selling coins and jewels, which would have been exempt from taxation. The inspector did not believe this and took the point of view that the increase in net wealth of the author had been caused by taxable income that had not been mentioned in the tax declarations. The tax inspector then imposed penalties amounting to approximately DFL 480,000 because of tax fraud.

2.3 The author states that he appealed against the penalties to the Tax Chamber of the High Court (Belastingkamer van het Gerechtshof) in Amsterdam. The Tax Chamber, in two similar decisions made in June 1995, materially upheld the decision of the tax inspector, but decided that because of special circumstances, such as the time that had elapsed since the charges were made, the penalties should be reduced to an amount of DFL 200,000 instead of DFL 480,000. The author emphasizes that this was a decision of the court in first instance.

2.4 The author states that he appealed against these decisions to the Supreme Court (Hoge Raad) on 20 November 1995. However, this appeal has the character of cassation proceedings and the assessment of the facts and the amount of the penalties are said to be outside the competence of the Supreme Court.

2.5 The author explains that because tax fraud occurs so often, the State decided to authorize tax inspectors to impose penalties without intervention of a court. When deciding about an assessment, the tax inspector has already been informed about many relevant facts concerning the case. A taxpayer failing to cooperate or intentionally giving false information, can be subjected to severe penalties. When a taxpayer disputes the assessment made by the tax inspector, the burden of proof is on him.

2.6 The author submits that he fulfils the admissibility criteria set out in article 5, paragraph 2 (b), of the Optional Protocol to the Covenant. He argues that no further domestic remedies are available, given prior decisions of the Supreme Court dated 3 May 1989[1] and 11 October 1989.

[1]The Supreme Court decided (1) that the Dutch legal system, according to which the tax inspector can impose penalties, is not incompatable with article 6 of the European Convention on Human Rights and (2) that it is beyond the competence of the judiciary to create a solution for a possible violation of article 14, paragraph 5, of the International Covenant on Civil and Political Rights.

The complaint

3.1 The author argues that, since the original penalties were imposed upon him by a tax inspector, who cannot be regarded as an independent judicial authority, and since the penalties had the character of criminal sanctions, his rights under article 14, paragraph 1, have been violated. The author claims that although the fiscal administrative penalties inflicted on him do not belong to the field of criminal law under the Dutch national legal system, this is not decisive when interpreting article 14 of the Covenant.[2] The author contends that these penalties are not imposed under the Dutch system of criminal law out of considerations of expediency.

3.2 The author claims that severe penalties imposed by a State organ other than a judicial authority as a consequence of the commission of a criminal offence are unacceptable. In his view, penalties that are criminal and therefore fall within the scope of article 14 of the Covenant, should be imposed by a judicial authority and should be susceptible of review by a higher tribunal; especially when the penalty is severe.

3.3 The author states that if administrative penalties were accepted, especially for serious offences, it would give States parties the freedom to abolish the traditional criminal procedure, except for the sentence of imprisonment, which must, according to article 9 of the Covenant, in all cases be imposed by a tribunal. This would create, according to the author, an undesirable situation.

3.4 The author states that a disadvantage of judicial intervention only after the penalty has been imposed, is that the penalty must in principle be paid, even if the case is brought before the court. Although an extension of payment can be granted, the taxpayer must pay interest over the penalty, also over the period before the court has decided on his appeal.

3.5 Furthermore, the author states that because there are many inspectors who may impose these penalties and because inspectors only deal with a specific area, there is a great risk that the amount of penalty may vary from inspector to inspector and objectively result in inequality of treatment. The author further complains that the legal safeguards during an administrative procedure are not comparable to those during a criminal procedure.

3.6 With regard to the right of appeal the author argues that the judgement of the High Court reflects materially a conviction and sentence for a crime and that since this conviction and sentence cannot be fully reviewed by a higher tribunal, article 14, paragraph 5, of the Covenant has been violated. In this connection, the author states that 'crime' in article 14, paragraph 5 must be interpreted in the same way as 'criminal charge' in article 14, paragraph 1.

3.7 The author states that although the judgement is open to a cassation appeal before the Supreme Court, its possibilities to reassess the conviction and the sentence are very limited. Because a conviction and a sentence are by their nature to a great extent based on the establishment of the facts, review by a higher tribunal which can merely judge on points of law, cannot, according to the author, be regarded as a review of the conviction and the sentence, since only procedural aspects of the evidence can be reassessed.

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[2] Human Rights Committee's Views of 7 April 1982, Van Duzen vs Canada, communication No. 50/1979.

State party's observations and counsel's comments

4. By submission of 11 April 1997, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. The State party submits that the Supreme Court, by judgement of 12 March 1997, quashed the judgement of the Amsterdam High Court, on the grounds that it had disregarded evidence. The author's case has been referred to the High Court in The Hague. Since the Court will re-examine the author's case, the State party thus argues that the communication is inadmissible.

5.1 By letter of 23 June 1997, counsel for the author emphasizes that the most important matter at issue in the communication is the question whether or not the tax inspector is allowed to impose serious fines, and that the State party's arguments do not address this question.

5.2 By further letter of 29 December 1997, counsel informs the Committee that the author and the Dutch tax authorities have reached an agreement on the amount of taxes and penalties to be paid by him under Dutch law. As a result of this agreement, the author has withdrawn his appeal from the tax chamber the High Court in The Hague. Accordingly, the author withdraws his claim under article 14, paragraph 5, of the Covenant.

5.3 He maintains however the primary complaint, regarding the question whether or not the tax inspector is allowed to impose serious fines. According to counsel, the fact that the author and the tax inspector have reached an agreement does not impede a decision by the Committee, since a continuation of the case before the Courts would not have any prospect of success and might even result in a higher fine for the author.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author has withdrawn his claim under article 14, paragraph 5, of the Covenant. This claim is therefore no longer before the Committee.

6.3 The Committee notes that the author of the communication has reached an agreement with the tax authorities over the amount of the penalties to be paid. Accordingly, the Committee is of the opinion that the author cannot claim to be a victim of a violation of article 14, paragraph 1, of the Covenant.

7. The Committee therefore decides:

a) that the communication is inadmissible under article 1 of the Optional Protocol;

b) that this decision shall be communicated to the State party and to the author's counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]