UNITED NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/74/D/880/1999
15 April 2002

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Seventy-fourth session
18 March – 5 April 2002

DECISION

Communication No. 880/1999

Submitted by:	Mr. Terry Irving (represented by counsel, Mr. Michael O'Keeffe)
Alleged victim:	The author
State party:	Australia
Date of communication:	5 October 1999 (initial submission)
Prior decisions:	- Special Rapporteur's rule 91 decision, transmitted to the State party on 25 October 1999 (not issued in document form)
Date of decision:	1 April 2002

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

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

Seventy-fourth session

concerning

Communication No. 880/1999[**]

Submitted by: Mr. Terry Irving (represented by counsel, Mr. Michael O'Keeffe)

Alleged victim: The author

State party: Australia

Date of communication: 5 October 1999 (initial submission)

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

Meeting on 1 April 2002,

Adopts the following:

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Under rule 84 (a) of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the present communication.

A dissenting opinion co-signed by Committee members Mr. Louis Henkin and Mr. Martin Scheinin is appended.

Decision on admissibility

1.1 The author of the communication, dated 5 October 1999, is Terry Irving, an Australian national, born in 1955. The author claims to be the victim of a violation by Australia of article 14, paragraph 6, of the International Covenant on Civil and Political Rights. He is represented by counsel. The author's initial claim under article 9, paragraph 5, of the Covenant was abandoned by submission of counsel dated 29 May 2001.

1.2 Upon ratification of the Covenant, Australia entered a reservation to article 14, paragraph 6, of the Covenant to the effect that "the provision of compensation for miscarriage of justice in the circumstances contemplated in Paragraph 6 of Article 14 may be by administrative procedures rather than pursuant to specific legal provision".

The facts as presented by the author

2.1 On 8 December 1993, a jury in the District Court of Cairns convicted the author of an armed robbery of a branch office of the ANZ bank in Cairns, committed on 19 March 1993; he was sentenced to eight years of imprisonment. He applied for legal aid to appeal the decision, but Legal Aid Queensland turned down his request. He appeared without legal representation before the Queensland Court of Appeal, which dismissed the appeal on 20 April 1994.

2.2 On 3 May 1994, the author applied for legal aid to fund an application for special leave to appeal to the High Court of Australia. On 28 May 1994, the Queensland Legal Aid Office refused the application. In July 1994, the author further applied to the Legal Aid Review Committee for review of that decision. In August 1994, the District Committee once more refused legal aid. The author then unsuccessfully pursued appeals to other bodies, including the Queensland Criminal Justice Commission, the Queensland Law Society and the Queensland Ombudsman.

2.3 The author applied again to the Legal Aid Review Committee, seeking legal aid for an application for special leave to appeal. In January 1995, the Committee granted legal aid to refer the matter to counsel for advice on the prospects of an appeal. In April 1995, the author was refused further legal aid. On 17 July 1995, the Queensland Prisoners Legal Service refused the author's request for assistance. On 28 August 1995, the ACT Legal Aid Office refused the author's application for legal aid.

2.4 In August 1995, the author was served with documents naming him as the respondent in compensation proceedings instituted by the three bank tellers of the ANZ bank he denies robbing. On 22 September 1995, appearing in these proceedings, the author stated that he was wrongly convicted of the offence. On 24 November 1995, he was refused permission to adduce further identification evidence in the same proceedings, and an order of compensation was made.

2.5 After exhausting all possible avenues of representation and assistance known to him, the author considered that he had no alternative but to represent himself in the High Court of Australia,

notwithstanding his previous failure as a self-represented applicant in the Queensland Court of Appeal. On 2 May 1996, the High Court accepted the documentation compiled by the author in custody as an application for special leave to appeal. On 8 December 1997, four years to the day from his original conviction, the High Court at once granted the author's application for special leave to appeal, allowed the appeal, quashed the conviction and ordered a retrial. The Court accepted the Crown's concession at the hearing that the author's original trial had been unfair. The Court observed that it had "the gravest misgivings about the circumstances of this case", that "it is a very disturbing situation" and that "in all of this, the accused has been denied legal aid for his appeal". On 11 December 1997, the author was released from prison on bail. On 2 October 1998, the Director of Public Prosecutions of Queensland indicated that the author would not be re-tried, and entered a *nolle prosequi*.

2.6 On 6 July 1998, the author applied to the Queensland Attorney General, seeking ex gratia compensation for a miscarriage of justice occasioned by his wrongful imprisonment that lasted for over four and half years. He also requested the establishment of an independent Commission of Inquiry into the circumstances of his wrongful conviction and imprisonment. On 10 August 1998, 18 September 1998 and 21 December 1998, the author again applied to the Queensland Attorney-General.

2.7 On 11 January 1999, the Queensland Department of Justice referred allegations of official misconduct in the case to the Queensland Criminal Justice Commission. On 19 March 1999, the author initiated an action in the Queensland Supreme Court against the investigating officer and the State of Queensland, seeking damages for malicious prosecution and exemplary damages.

2.8 On 25 July 1999, the author again sought compensation from the Queensland Attorney-General. In August 1999, the Criminal Justice Commission replied that the author's matter was not one giving rise to a reasonable suspicion of official misconduct. The author thereupon again sought compensation from the Attorney-General. In September 1999, the Attorney-General's senior policy adviser informed the author that "[I]n view of the advice from the Criminal Justice Commission and of your decision to initiate legal action, the Attorney-General will not further consider your application for an ex-gratia payment of compensation , but will await the outcome of your legal action" . On 15 August 2000, the author complained to the Queensland Parliamentary Criminal Justice Committee. By early February 2002, no response to his complaint had been forthcoming from the Parliamentary Committee, and the matter was said to be still under investigation.

The complaint

3.1 The author contends that he has exhausted all available and effective domestic remedies, and that he has unsuccessfully made all reasonable efforts to obtain the payment of compensation for wrongful imprisonment from the Queensland Attorney General, as required under article 5, paragraph 2 (b), of the Optional Protocol.

3.2 The author contends that he fulfils all the conditions to obtain compensation under the terms of article 14, paragraph 6. Firstly, he was convicted of a criminal offence on 8 December 1993. Secondly, his conviction was subsequently reversed by the High Court of Australia on 8 December 1997. Thirdly, the decision of the High Court was a final one. Fourthly, the author submits that the conviction has been reversed on the ground that a new or newly discovered fact showed conclusively that there had been a miscarriage of justice, in particular the facts that he had not had a fair trial and that the Court had the gravest misgivings about the circumstances of the case. Finally, the author states that it has not been proved that the non-disclosure of the unknown fact in issue is wholly or partly attributable to him. As all the elements necessary for compensation under article 14, paragraph 6, have been met, the State of Queensland should have paid him compensation. Article 14, paragraph 6, was violated since this was not done.

State party's submissions on admissibility and merits

4.1 On the admissibility of the communication, the State party, by submission of 22 October 2000, observes that:

-- the author failed to exhaust available and effective domestic remedies. At the time of submission of the communication, he was pursuing two different actions, one for malicious prosecution and exemplary damages against the investigating detective and the State of Queensland, the other one seeking compensation for wrongful imprisonment from the Attorney-General of Queensland. The two procedures, according to the State party, are under active consideration, and thus said to be effective. There are no special circumstances which would absolve the author from exhausting these remedies. The State party submits that final determination of the complaints would, assuming diligent pursuit, take 12 to 18 months – it denies that Mr. Irving's pursuit of relief is being unreasonably delayed by the Queensland courts.

-- the author failed to show a violation of article 14, paragraph 6, as the final decision in his case, i.e. that of the High Court of Australia, did not constitute, nor affirm, the initial conviction. Since , for the purposes of article 14, paragraph 6, of the Covenant, the final decision must confirm the conviction, and in the instant case the judgment of the High Court had exactly the opposite effect, article 14,paragraph 6, is inapplicable in the circumstances of the case, and this claim should be declared inadmissible *ratione materiae*.

4.2 As far as the merits of the author's claims are concerned, the State party submits that:

-- article 14, paragraph 6, of the Covenant, was not violated because the author was not convicted by a "final decision", within the meaning of this provision. The State party recalls that a "final decision" is one that is no longer subject to appeal. The author's conviction was always subject to appeal under the mechanisms of the Australian judicial review system. In Australia generally, and in Queensland specifically, a decision of a trial court convicting a

person is not, at least initially, a final decision, since the convicted person always has a right of appeal against the conviction. The State party notes that the fact that the author successfully appealed to the High Court counters any argument that the decision of the Supreme Court of Queensland was a final one.

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

5.1 As far as the admissibility of his communication is concerned, the author contends that:

--- the tort remedies which he has initiated cannot be considered to constitute available remedies within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, as they are not effective. Moreover, the mere *possibility* of ex-gratia payments for wrongful imprisonment in the event of the dismissal of his claims also cannot be said to constitute a remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, because it depends on the exercise of the discretion of the State party's authorities. Finally, Mr. Irving submits that the application of remedies has been "unreasonably prolonged" by the judicial authorities of Queensland.

5.2 As an alternative to his initial argument relating to article 14(6), Mr. Irving now argues that the High Court's decision did not constitute a "final decision" in the sense of this provision, but the reversal of his conviction. He notes that the grant of special leave to appeal to the High Court is entirely discretionary and is obtained only if the High Court considers that an application relates to a question of law or is of public importance. As there is no mandatory right of appeal to the High Court, the author contends that he was convicted by the "final decision" of the Queensland Court of Appeal. He further contends that his appeal to the High Court could not be considered a normal appeal, because his conviction was quashed by the High Court following an application for special leave to appeal that was lodged two years after the expiry of the time within which such an application should normally be lodged. He was unable to lodge this appeal within normal deadlines because of the State party's refusal to grant legal aid. Thus, in the special circumstances of the case, it was the decision of the Court of Appeal of Queensland, which affirmed his conviction, was "final" within the meaning of article 14, paragraph 6.

Further submissions by the State party on admissibility and merits

6.1 As far as admissibility is concerned, the State party contends that the delays complained of by the author, in relation to progress of the two actions for malicious prosecution and for compensation for wrongful imprisonment, are primarily attributable to him, not to the State party. Furthermore, any delay of the Queensland Parliamentary Criminal Justice Committee in replying to the author cannot be attributed to the State party, as this parliamentary committee is not subject to the direction of the Queensland executive.

6.2 On the merits, the State party reiterates that there was no conviction by a "final decision", as required by article 14, paragraph 6, in the author's case. It contends that the fact that the High Court has discretion to refuse special leave to appeal from judgments of the Queensland Court of Appeal does not negate the normalcy of the appeal procedure, as a right to appeal is often subject to conditions relating to timing or standing: "the special leave requirement for appeals to the High Court is an ordinary part of the method adopted to give effect to the right of appeal guaranteed in the Australian Constitution".

6.3 Nor does the existence of statutory deadlines for the filing of special leave to appeal applications lead to a different conclusion: a failure to file an application within the normal 28 day period is not determinative of whether the High Court will hear the application. There are frequent delays with special leave applications, especially where legal aid is involved, and the High Court often grants extensions of time in which to file such applications. The State party therefore challenges the author's alternative argument that the judgment of the Court of Appeal of April 1994 constituted the "final decision" for the purposes of article 14, paragraph 6, of the Covenant.

Counsel's final submission

7.1 By supplementary submission of 5 February 2002, counsel emphasizes that the two actions against the arresting officer and the State of Queensland (March 1999) and against the Attorney-General of Queensland (December 1999) were initiated only after Queensland's refusal to honor its obligations under article 14, paragraph 6; furthermore, Queensland insists that it will not negotiate any settlement of the matter and that the author's actions be litigated, including conclusion of all possible appeals. Finally, the pursuit of domestic remedies must be considered to be "unreasonably prolonged", not only by virtue of the fact that more than seven years have already elapsed since the author's wrongful imprisonment, but also in light of Queensland's firm refusal to consider *ex gratia* compensation until the conclusion of all appeals.

7.2 Counsel takes issue with the State party's characterization of special leave to appeal to the High Court as a constitutionally guaranteed right. He points out that the High Court itself has stated[1] that a special leave application to the High Court is not in the ordinary course of litigation; that any application must exhibit features which attract the Court's discretion in granting leave or special leave; and that there is no right of special leave. Thus, criminal proceedings in Queensland are final once the Court of Appeal of Queensland has decided.

7.3 On the issue of the State party's reservation to article 14(6), counsel notes that the terms of the reservation only entitle the State party and Queensland to be exempt from *legislating* to give effect to the obligations under article 14(6), but not to be exempt from its obligation under article 2 to take necessary steps to adopt other measures to give effect to the rights enshrined in the Covenant. In that context, he notes that Queensland has issued no administrative guidelines to give effect to the obligations under article 14(6), and that the State party's (and Queensland's) additional requirements

[1] In the case of *Collins v. The Queen* (1975)B, CLR 120.

that any persons must demonstrate the existence of "exceptional circumstances", exemplified by the State party as 'serious wrongdoing' by the investigating authority, establishes prerequisites for compensation not envisaged by article 14(6).

Issues and proceedings before the Committee

8.1 Before considering any claims 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.

8.2 The facts laid out in the communication, which have not been contested by the State party, show that Mr. Irving was subject to manifest injustice. It would appear that they raise a serious issue regarding compliance by the State party with article 14, paragraph 3 (d), of the Covenant, as Mr. Irving was repeatedly denied legal aid in a case in which the High Court of Australia itself considered that the interests of justice required such aid to be provided. It would therefore appear that Mr. Irving should be entitled to compensation. The only claim made by the author of the communication was a claim based on article 14, paragraph 6, of the Covenant and the question before the Committee is therefore whether this claim is admissible.

8.3 The Committee recalls the conditions of application of article 14, paragraph 6:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

8.4 The Committee observes that the author's conviction in the District Court of Cairns of 8 December 1993 was affirmed by the Court of Appeal of Queensland on 20 April 1994. Mr. Irving applied for leave to appeal this decision before the High Court of Australia. Leave to appeal was granted and on 8 December 1997 the High Court of Australia quashed the conviction on the ground that the author's trial had been unfair. As the decision of the Court of Appeal of Queensland was subject to appeal (albeit with leave) on the basis of the normal grounds for appeal, it would appear that until the decision of the High Court of Australia, the author's conviction may not have constituted a "final decision" within the meaning of article 14, paragraph 6. However, even if the decision of the Court of Appeal of Queensland were deemed to constitute the "final decision" for the purposes of article 14, paragraph 6, the author's appeal to the High Court of Australia was accepted on the grounds that the original trial had been unfair and not that a new, or newly discovered fact, showed conclusively that there had been a miscarriage of justice. In these circumstances, the Committee considers that article 14, paragraph 6, does not apply in the present case, and this claim is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;
(b) that this decision shall be communicated to the author, his counsel and to the State party.

[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.]

Appendix

Individual Opinion by Committee members Mr. Louis Henkin
and Mr. Martin Scheinin (dissenting)

We believe that there was a violation of article 14, paragraph 6. That provision reads:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

The Committee's conclusion that the State party had no obligation to provide compensation was based on either of two separate grounds. We disagree.

(a) We are of the opinion that the conviction of Mr. Irving was "final". In our opinion, the word "final" in article 14, paragraph 6, cannot be understood to mean that only a conviction that cannot be reversed would be considered final. If that were the case, the reference to a final decision being reversed would have no meaning. We believe that, due to differences between legal systems, there cannot be a single criterion of what, in this context, is a final conviction. Therefore, the Committee must make a case-by-case assessment whether the conviction had become final.

In the present case Mr. Irving was convicted by the District Court of Cairns in December 1993. The Queensland Court of Appeal dismissed his appeal in April 1994. Further appeal to the High Court of Australia was available only by a special leave of appeal, for which purpose Mr. Irving unsuccessfully sought legal aid. Throughout the appeal proceedings, Mr. Irving apparently served his prison sentence.

In our opinion the conviction of Mr. Irving became "final" when the ordinary period during which leave of appeal was to be sought expired, and, due to the denial of legal aid, Mr. Irving was not able apply for leave of appeal. In the normal course of proceedings, this unspecified date in 1994 is the point of time when the conviction became "final". It was only in December 1997 that the High Court quashed the original conviction and ordered retrial.

As an alternative ground on which to determine whether a conviction was final, we refer to an earlier case decided by the Committee, *W.J.H. v. the Netherlands* (communication N° 408/1990). In this case the Committee took the position that a conviction by a court of first instance was not to be considered final, *inter alia* because the author "did not suffer any punishment" as a result of that conviction (paragraph 6.3).

(b) The text of article 14, paragraph 6, is unclear as to whether the words "new or newly discovered fact" relate only to a pardon or refer also to the case of reversal. In the present case, the majority of the Committee adopted the view that article 14, paragraph 6, requires a new or newly established fact both as regards reversal and as regards pardon.

We believe that properly interpreted this requirement applies only to pardon and not to reversal. In our opinion, this approach was confirmed by the Committee in the case of *Paavo Muhonen v. Finland* (communication N° 89/1981) where the Committee read the provision in question as treating the case of reversal independently of the requirement of a new or newly established fact (paragraph 11.2).

[Signed] Louis Henkin
[Signed] Martin Scheinin

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