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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2684/2015*, **

Communication submitted by:	T (represented by counsel, Tony Ellis)
Alleged victim:	The author
State party:	New Zealand
Date of communication:	2 June 2015 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 20 November 2015 (not issued in document form)
Date of adoption of decision:	29 March 2019
Subject matter:	Trial of a defendant with intellectual disability
Procedural issues:	Exhaustion of domestic remedies; abuse of the right of submission; admissibility *ratione temporis*
Substantive issues:	Cruel, inhuman or degrading treatment or punishment; arbitrary arrest – detention; fair trial
Articles of the Covenant:	7, 9 (1), 10 (1), 14 (1) and (3) (a) (d) (f) and (g)
Articles of the Optional Protocol:	3 and 5 (2) (b)

* Adopted by the Committee during its 125th session (4–29 March 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

1.1 The author of the communication is T, a citizen of New Zealand born in 1976. He claims that the State party has violated his rights under articles 7 and/or 9 (1), 10 (1) and 14 (1) and (3) (a) (d) (f) and (g) of the Covenant. The Optional Protocol entered into force for the State party on 26 August 1989. The author is represented by counsel.

1.2 On 14 March 2016, following the State party's request dated 19 January 2016, the Committee, acting through its Special Rapporteur on new communications and interim measures, and pursuant to rule 97 of the its rules of procedure, decided to consider the admissibility of the communication separately from the merits.

Factual background

2.1 At the time of submission of the communication, the author had an intellectual disability with an intelligence quotient (IQ) score of 62, putting him in the bottom 1 per cent among his peers of the same age.

2.2 On 27 May 2004, the author was arrested by the police for disorderly behaviour at a train station. He was taken to the Johnsonville Community Policing Centre, where he confessed to robbery at a liquor store. Then he was taken to Porirua Police Station, where he was interviewed again and signed the notes from the interview as "correct and true". Later the same morning, he was presented before Porirua District Court on a charge of aggravated robbery. In the presence of a duty solicitor, the court remanded the author in custody until 1 June 2004.

2.3 On 31 May 2004, Dr. B-W – a consultant psychologist – met with the author in the Rimutaka Prison. On the same day, he wrote to the District Court that the author suffered from mild intellectual disability, and substance abuse, and displayed antisocial and borderline behaviour. Dr. B-W recommended that the District Court seek a report under section 121 (2) (b) (i) of the Criminal Justice Act (which deals with the power of courts to require a psychiatric report). On 1 June 2004, the District Court extended the author's custody until 15 June 2004 for a psychiatric assessment to be conducted. On 2 June 2004, the prison superintendent requested psychiatric assessment of the author, on the basis of his self-harming behaviour as he had bitten off and eaten a piece of flesh from his arm. The author appears to have been admitted to Porirua Hospital on the same day. On 11 June 2004, a psychiatric report was made by Dr. B-W under section 121 of the Criminal Justice Act. The report concluded that the author was fit to plead, but that he suffered from intellectual disability, to an unknown extent because the psychiatrist had not reviewed any neuropsychological tests.

2.4 On 29 June 2004, on the advice of a State-appointed counsel, the author pleaded guilty to aggravated robbery charges. On 13 August 2004, Wellington District Court sentenced him to three years and six months of prison.

2.5 On 29 July 2005, the author became eligible for parole. On 23 February 2006, while the author was still in prison, the Family Court (a branch of the District Court) ordered his detention in compulsory intellectual disability care under section 45 (on jurisdiction to make a compulsory care order) of the Intellectual Disability Act 2003. The Family Court's decision was based on the finding that the author had an intellectual disability. The end of the detention was set for the same date as the end of his prison term, that is, 29 November 2007. Despite this order, the author remained in prison. On 6 April 2006, the Parole Board authorized the author's release on parole as of 19 April 2006. The author was to reside at Timata Hou, a care facility, where the compulsory care order of the Family Court applied. On 12 October 2006, the Family Court increased the level of supervision of the author at Timata Hou. On 15 May 2007, the Family Court ordered cancellation of the compulsory care order with effect from 29 May 2007. Its decision was based on a report of 26 January 2007 by Dr. W, an expert intellectual disability assessor, that the author no longer needed special care.

2.6 At Timata Hou, the author began relations with a female staff member and at some point moved in with her. The relationship ended at the end of January 2007 when the author was reported for using threatening language. He pleaded guilty, and on 31 January 2007 the Parole Board recalled him to prison. On an unspecified date in 2007, the High Court

granted an interim habeas corpus order, requested by the author's present counsel, returning the author to the jurisdiction of the mental health authorities.

2.7 The author brought two more habeas corpus requests. In one of them, he argued that the original ruling by Porirua District Court and its detention order, including the detention for psychiatric assessment in June 2004, were arbitrary. In the other one, he claimed that there had been a failure to follow statutory process when the initial compulsory intellectual disability care order was issued on 23 February 2006, and that his subsequent detention had been unlawful. Both applications were declined by the High Court. The author submitted two appeals, respectively, to the Court of Appeal. In a judgment of 28 May 2007, the Court of Appeal rejected the author's appeals on both issues. It found that the original sentence and the order by the Family Court should have been appealed through an ordinary appeal procedure, which the author had failed to do. The habeas corpus application was not an appropriate procedure for appealing the court decisions in question.

2.8 On 23 April 2007, the author submitted to the High Court an application for leave to appeal out of time against his conviction and sentence. He claimed, among other things, that because of his intellectual disability he had been unfit to plead before the Wellington District Court and that the District Court had not assessed properly the extent of his disability by not holding a separate hearing on his fitness to plead. He also claimed that he should have been provided with the assistance of an independent mental health expert to give evidence on his behalf when the District Court ordered a report under section 121 of the Criminal Justice Act.

2.9 Having examined the evidence before it,[1] the High Court rejected the application for appeal out of time, on 17 March 2009. The High Court concluded that the author had been fit to plead[2] and that no separate hearing on the matter was needed under the requirements of the Criminal Justice Act. Since the psychiatric report ordered by the Porirua District Court under section 121 of the Criminal Justice Act had found that the author was not under disability and had been fit to plead, the Wellington District Court had acted in accordance with it and was not obliged to hold a separate hearing on this issue.[3] The author's further allegations that he was unable to instruct counsel and that he was inadequately represented were also found by the High Court to be unsubstantiated. To the author's allegation that the detention of 14 days for a psychiatric assessment that lasted two hours was arbitrary, the High Court responded that the length of detention was not longer than the limit set in the legislation and that it was adequate for the purpose that it served. The High Court concluded that the author had failed to establish a miscarriage of justice such as to impugn

[1] The High Court examined the author's allegations in detail in order to determine whether there had been a miscarriage of justice by the District Court, on the basis of which it would be obliged to grant leave to appeal out of time. Among other things, the High Court considered 10 medical reports and evidence, concerning the author, from between 1995 and 2007. In addition, the High Court considered a report by Ms. C – a neuropsychologist commissioned by the counsel. The 10 reports found that the author was fit to plead, despite his intellectual disability. The conclusion in Ms. C's report was that the author was not fit to plead. The High Court found, however, that she had used a stricter test to arrive at her conclusion, which did not reflect the requirements of the Criminal Justice Act applicable in June 2004.

[2] The High Court found that under the legislation applicable in June 2004 (part 7 of the Criminal Justice Act), a person could not be found unfit to plead because of intellectual disability, unless he or she was also mentally disordered as defined in the Mental Health (Compulsory Assessment and Treatment) Act 1992. Section 2 of that Act defines mental disorder as being "an abnormal state of mind … characterized by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it poses a serious danger to the health or safety of that person or of others, or seriously diminishes the capacity of that person to take care of himself or herself". Intellectually disabled defendants were directly addressed only as of 1 September 2004, when the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and the Criminal Procedure (Mentally Impaired Persons) Act 2003 came into effect replacing part 7 of the Criminal Justice Act.

[3] Under part 7 of the Criminal Justice Act, the court has a duty, upon receiving a section 121 report, to decide whether there is an appearance of disability. If and only if this threshold is met, the court is required (under section 111) to obtain evidence from two medical practitioners, and then, if satisfied on the evidence of those two practitioners that the defendant is mentally disordered, to determine whether the defendant is in fact under disability. Where the section 121 report does not disclose an appearance of disability, and provided that the judge does not otherwise consider that there is an appearance of disability, the District Court is under no obligation to take the matter further.

his conviction or sentence, and declined his application for leave to appeal. On an unspecified date, the author appealed the High Court's refusal to grant leave to appeal out of time to the Court of Appeal. However, he retracted his appeal, acknowledging the respondent's submission on the point of jurisdiction. Later on, he submitted an application to the High Court to recall the High Court's decision of 17 March 2009. The High Court rejected that application on 14 June 2010. The High Court noted, among other things, that since the complaint concerned events from 2004, it would be of little use to consider it further. Instead, since there were new criminal proceedings against the author in the District Court, it could serve as a fresh opportunity for any concerns regarding the author's ability to stand trial to be considered anew.

2.10 The author submits, for information, that in 2012 he suffered a brain injury caused by a beating. In 2014, after another beating, he lost an eye and his IQ further reduced to 56. In 2014, he was found unfit to stand trial and placed in secure care for 12 months.

The complaint

3.1 The author alleges violation of article 9 (1) of the Covenant on two accounts. First, he was arbitrarily detained for 14 days in June 2004 for the purposes of psychiatric assessment, which lasted no more than two hours. Second, his whole sentence to a term of imprisonment was arbitrary because the District Court had not properly assessed his intellectual disability and connected issues.

3.2 The author submits that sentencing him to prison constituted cruel, inhuman or degrading treatment in violation of articles 7 and/or 10 (1) of the Covenant, considering his intellectual disability and history of self-harm.

3.3 The author claims that article 14 (1) of the Covenant was violated because he had an unfair trial which did not properly assess his intellectual disability and lack of *mens rea*.

3.4 He further alleges a violation of article 14 (3) of the Covenant, because, due to his disability, he was not able to adequately communicate with counsel for the purpose of conducting his defence.

3.5 The author further claims a violation of article 14 (3) (a) (d) (f) and (g) of the Covenant, because neither the District Court nor Dr. B-W advised him that he had the right to consult and instruct a lawyer, and the right to silence while detained for a psychiatric assessment, and during the assessment.

3.6 Finally, the author claims that he was discriminated against on the basis of his intellectual disability in violation of article 26 of the Covenant.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 19 January 2015, the State party submitted its observations, arguing that the communication was inadmissible under article 3 of the Optional Protocol because the author's delay in bringing the communication before the Committee amounted to an abuse of the right of submission. The communication was also inadmissible under article 5 (2) (b) of the Optional Protocol because the author had failed to exhaust the domestic remedies available to him in a timely manner.

4.2 The State party submits that although the conviction and sentencing for aggravated robbery addressed in the communication occurred in 2004, the author did not apply for leave to appeal out of time until April 2007. The final judgment of the High Court rejecting his request for leave to appeal was issued on 14 June 2010. The author then submitted his communication to the Committee on 2 June 2015, that is, five years after he had finished pursuing domestic remedies, and provided no explanation for the delay.

4.3 The delay in submitting the present communication is significant, in particular since the conviction and sentence that the author challenges date back to 2004 and involve a challenge to the findings relating to the intellectual capabilities of the author at that time. Such delay is prejudicial to the State party's ability to respond to the author's claims in particular, because there may be a substantial amount of evidence that is no longer available due to the effluxion of time.

4.4 The State party notes the author's statement that he suffered a brain injury in the intervening period, with his IQ reducing further. As a result, he was found unfit to plead in relation to other convictions (brought against him in 2007). The alteration in the author's intellectual capacity makes it difficult now to address or test whether the psychiatric assessments of 2004 were correct. The delay is also prejudicial for the author in attaining an effective remedy.

4.5 The State party also submits that the author failed to appeal his conviction and sentence within the statutory limit of 28 days. Instead, two years and eight months after being sentenced, he submitted an application for leave to appeal out of time, which was rejected by the High Court on 17 March 2009. Had the author pursued his right to appeal within 28 days of his sentence, he would have had a hearing of the merits of his appeal in the High Court. If the appeal was unsuccessful, he could have appealed further to the Court of Appeal and the Supreme Court. Instead, having failed to lodge his application for an appeal in a timely manner, the author has limited the remedies available to him to the decision of the High Court regarding his application for leave to appeal out of time.

Author's comments on the State party's observations

5.1 On 23 February 2016, the author replied to the State party's observations. He claims that he failed to appeal his conviction in 2004 simply because he lacked the intellectual capacity to do so. He alleges that the State party has failed to explain how a man with an intellectual disability is supposed to appeal within the time limit – something he can only do once he has understood the sentencing process, and the right of appeal.

5.2 The author argues that he did exhaust domestic remedies, by seeking leave to appeal out of time to the High Court, and by submitting three different writs of habeas corpus, two of which he appealed. He also claims that the approach of the State party is discriminatory in criminal proceedings – in comparison to civil cases, which allow extensions to the time period in which intellectually disabled persons can bring lawsuits. He claims that such discrimination violates articles 14 (1) and 26 of the Covenant, by not providing reasonable accommodation as regards time.[4]

5.3 The author argues that the approach of the State party, if accepted, would have far-reaching effects for anyone needing to exhaust domestic remedies. He also claims that he had to rely entirely on his present counsel to act in many of the domestic hearings, and concerning the present communication, on a pro bono basis.

5.4 On the matter of the delay in submitting the communication to the Committee, the author, in essence, claims that his intellectual disability, plus his subsequent beatings and brain injury, were sufficient explanation for such delay.

Issues and proceedings before the Committee

Consideration of admissibility

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

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.

6.3 The Committee notes the State party's observation that the communication constitutes an abuse of the right of submission under article 3 of the Optional Protocol because the author submitted his complaint to the Committee five years after the final court decision in his case and has failed to substantiate the reasons for such delay. The Committee notes the author's argument that his intellectual disability, which worsened after a brain injury, was sufficient reason for the delay. The Committee recalls that there are no

[4] The author refers to articles 2, 5 and 13 of the Convention on the Rights of Persons with Disabilities to define "reasonable accommodation".

fixed time limits for the submission of communications under the Optional Protocol and that mere delay in submission does not in and of itself entail abuse of the right of submission. However, in certain circumstances, the Committee expects a reasonable explanation justifying a delay.[5] In addition, according to rule 96 (c) of the Committee's rules of procedures, "a communication may constitute an abuse of the right of submission, when it is submitted after 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication".[6]

6.4 The State party submits that the final court decision in the author's case was the decision of the High Court dated 14 June 2010. It also notes that the author submitted his communication to the Committee on 2 June 2015. The Committee observes that, *stricto sensu*, the author submitted his complaint to the Committee some two weeks before the five-year deadline established in rule 96 (c) of the Committee's rules of procedure. The Committee thus considers that, accordingly, there has been no abuse of the right of submission in the present case.

6.5 The Committee notes the State party's observation that the author failed to exhaust domestic remedies because he did not submit an appeal against his conviction and sentencing within the statutory limit of 28 days. The Committee also notes the author's counterargument that he missed the deadline for appeal because of his intellectual disability, and that by applying for leave to appeal out of time to the High Court, as well as by submitting the habeas corpus applications, he did exhaust domestic remedies.

6.6 While considering whether domestic remedies have been exhausted, the Committee recalls that the function of the exhaustion requirement under article 5 (2) (b) of the Optional Protocol is to provide the State party itself with the opportunity to remedy the violation suffered by an individual.[7] In the present case, the author, although represented by counsel in the District Court, missed a 28-day deadline for submitting an appeal to the High Court. According to the State party, such appeal, if unsuccessful, could have been made to higher courts, that is, the Court of Appeal and even the Supreme Court. Having missed the possibility for ordinary appeal, the author applied for leave to appeal out of time in 2007, two years and eight months after his actual conviction. The refusal by the High Court to grant leave to appeal could only be appealed to the Court of Appeal, which the author did, but he withdrew the appeal, having agreed with the arguments of the respondent about the lack of jurisdiction. It is clear to the Committee that by missing the ordinary appeal option, the author did not give a chance to all the competent courts to consider his grievances.

6.7 In regard to the author's allegation that his applications for habeas corpus should be considered as an indication of exhaustion of domestic remedies, the Committee notes that both appeals submitted to the Court of Appeal were denied because the appropriate procedure for addressing the author's claims was the ordinary appeal procedure, and not applications for a writ of habeas corpus.

6.8 The Committee finds the author's argument that he missed the statutory time limit for appeal because of his intellectual disability unconvincing, especially taking into consideration that he was represented by professional counsel during the District Court hearing, and that he has not advanced any complaints before the Committee concerning the services provided to him by that counsel. The Committee notes that the author has pleaded guilty and might not have had an intention to appeal. In any case, there is nothing on file to explain why the author missed the opportunity to appeal in 2004 and decided to take such an opportunity in 2007.

6.9 The Committee also notes the author's argument that since he has an intellectual disability, he could not be expected to appeal within the time limit – which is something he could only do once he had understood the sentencing process, and the right of appeal. In this regard, the Committee notes that according to the information available to it on file,

[5] See *Gobin v. Mauritius* (CCPR/C/72/D/787/1997), para. 6.3.
[6] The rule applies to communications received by the Committee as of 1 January 2012.
[7] See *Celal v. Greece* (CCPR/C/82/D/1235/2003), para. 6.3.

including the psychiatric report by Dr. B-W and the decisions of the domestic courts, the author was able to understand the criminal proceedings and was found fit to plead. In the light of the information before it, which does not disclose any arbitrariness or bias on the part of the domestic courts, the Committee is unable to conclude that the intellectual disability of the author as established at the time that the events in question took place was of such an extent as to prevent him from appealing his sentence on time.

6.10 In light of the above considerations, the Committee concludes that the author failed to exhaust the domestic remedies available to him and that the present communication is inadmissible under article 5 (2) (b) of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;

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