



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2739/2016\*\*\*, \*\*\*

<i>Communication submitted by:</i>	M.S. (represented by counsel, Thomas Dieben and Gwen Jansen)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Netherlands
<i>Date of communication:</i>	25 February 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 22 March 2016 (not issued in document form)
<i>Date of adoption of the decision:</i>	8 November 2019
<i>Subject matter:</i>	Access to court and to effective review by a higher tribunal
<i>Procedural issues:</i>	Victim status; level of substantiation of claims
<i>Substantive issue:</i>	Fair trial
<i>Article of the Covenant:</i>	14 (1) and (5)
<i>Article of the Optional Protocol:</i>	2

\* Reissued for technical reasons on 17 December 2019.

\*\* Adopted by the Committee at its 127th session (14 October–8 November 2019).

\*\*\* The following members of the Committee participated in the examination of the communication:  
Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, 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 and Héléne Tigroudja.



1. The author of the communication is M.S., a national of the Netherlands born on 24 April 1990. He claims that the State party has violated his rights under article 14 (1) and (5) of the Covenant. The Optional Protocol entered into force for the Netherlands on 11 March 1979. The author is represented by counsel.

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

2.1 On 22 May 2008, the juvenile court judge of Amsterdam District Court convicted the author for making a verbal threat, stealing a bicycle and insulting a police officer, and sentenced him to 17 days in juvenile detention, 14 of which were suspended conditionally, and 70 hours of community service. On 27 October 2008, the Amsterdam Court of Appeal considered the author's appeal and sentenced him to 16 days of imprisonment, 13 of which were suspended conditionally, and 60 hours of community service. However, on 5 October 2010, the Supreme Court of the Netherlands admitted the author's appeal on points of law and ruled that the lower court had wrongfully applied the criminal law for adults instead of that for juveniles. It therefore referred the case back to the Court of Appeal, exclusively for the purpose of administering a new penalty.

2.2 During the hearing before the Court of Appeal, the counsel for the author<sup>1</sup> raised several defense arguments regarding the author's right to be tried without undue delay. Those arguments were included in a memorandum of oral pleadings that was handed to the court clerk at the end of the hearing. On 30 June 2011, the Court of Appeal rejected the various arguments submitted by the author and sentenced him to 66 hours of community service, 30 of which were suspended conditionally.

2.3 The author contested the decision before the Supreme Court. On 3 July 2012, the Supreme Court sent a copy of the relevant case papers to the author's counsel.<sup>2</sup> Counsel noted that the memorandum of oral pleadings was missing and therefore requested the registrar to provide a copy. On 27 August 2012, the Supreme Court provided counsel with a copy of the memorandum, mentioning that, according to a statement of the clerk of the Court of Appeal, page 3 of the memorandum was missing and could not be retrieved.

2.4 According to the case law of the Supreme Court, when a memorandum of oral pleadings is (even partially) missing from the case file, the hearing in appeal and the judgment based thereon are null and void.<sup>3</sup> On that basis, on 7 September 2012, counsel filed a memorandum of cassation containing one formal ground of cassation. On 5 March 2013, the Advocate-General at the Supreme Court filed written conclusions arguing that the ground for cassation was well-founded because non-compliance with procedural requirements – i.e. losing page 3 of the memorandum of oral pleadings – constituted such a violation of the principles of due process that it rendered the appeal hearing and the judgment delivered on the basis of that hearing null and void.

2.5 On 25 March 2013, counsel received from the Supreme Court a copy of the memorandum of oral pleadings, including part of page 3, and an indication that she would be given additional time (until 5 April 2013) to amend or supplement the memorandum of cassation or withdraw one or more grounds of cassation. In light of that letter, on 5 April 2013 counsel filed a supplementary memorandum of cassation that mainly argued that the memorandum of oral pleadings was still incomplete. Were the Supreme Court to rule otherwise, counsel submitted two additional grounds of cassation: one in respect of the author's right to be tried without undue delay in appeal and one in respect of his rights to be tried without undue delay in the cassation proceedings.

2.6 On 23 April 2013, the Supreme Court rejected the first ground of cassation regarding the incompleteness of the memorandum of oral pleadings. As to the other grounds of cassation, the Court first noted that they were submitted after the 60-day time limit provided by article 437 of the Code of Criminal Procedure of the Netherlands. It also noted that the judge in charge of the Supreme Court's list of cases had granted counsel additional time to

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<sup>1</sup> Thomas Dieben, who also represents the author in this communication before the Committee.

<sup>2</sup> Gwen Jansen, who also represents the author in this communication before the Committee and who works in the same law office as Mr. Dieben.

<sup>3</sup> The author cites five domestic judgments.

submit supplementary grounds for cassation. The Supreme Court stated that additional time for filing was only granted when taking note of the missing document was indispensable for drafting that ground of cassation. *In casu*, the Supreme Court found that taking note of page 3 of the memorandum was not indispensable for submitting the grounds related to the length of appeal and cassation proceedings and, as such, ruled that those grounds of cassation must be left undiscussed.

2.7 On 17 October 2013, the author lodged an application with the European Court of Human Rights. On 9 January 2014, that Court, sitting in a single judge formation, declared the application inadmissible because, in the light of all the material in its possession and in so far as the matters complained of were within its competence, the admissibility criteria set out in articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) had not been met.

### **The complaint**

3.1 The author claims a violation of his right to have access to a court and to an effective review by a higher tribunal, as guaranteed by article 14 (1) and (5) of the Covenant. The Supreme Court did not discuss the grounds for cassation despite the fact that the judge in charge of its list of cases had afforded additional time to his counsel. The Supreme Court invoked a precedent where no additional time had been requested, while the author's counsel did request additional time before the expiration of the legal time limit.

3.2 The author's rights and legitimate expectations were violated because, following the letter sent on 27 August 2012 by the Supreme Court, the author was justified in believing that the complete memorandum of oral pleadings had been lost. He was therefore also justified in believing that the filing of a formal ground for cassation would be sufficient because the appeal would already succeed on this ground. He was also justified in believing that, should the memorandum be found, he would be given the opportunity to supplement his memorandum of cassation with grounds for cassation concerning the merits of the previous judgment.

3.3 The letter sent on 25 March 2013 by the judge in charge of the Supreme Court's list of cases clearly indicated that the author would be given the opportunity, after a more complete version of the memorandum of oral pleadings had been found, to amend or supplement his memorandum of cassation. The author was thus justified in believing that a supplemental memorandum of cassation filed on his behalf, including additional grounds for cassation on the merits of the previous judgment, would be considered in full by the Supreme Court.

3.4 Therefore, by not considering his additional grounds of cassation, the Supreme Court denied the author the right to have his objections to the merits of the contested judgment examined, which is the essence of cassation proceedings. This limitation of his right to have access to a court and to effective review by a higher tribunal was neither necessary in the interests of the proper administration of justice nor legitimate or proportionate. The author claims to have exhausted all domestic remedies.

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

4.1 On 16 September 2016, the State party submitted its observations on admissibility and the merits. It considers that the communication should be declared inadmissible because the author is not a victim of a violation of article 14 (1) and (5) of the Covenant. Should the Committee declare the communication admissible, the State party submits that there has been no violation of article 14 (1) and (5) of the Covenant.

4.2 The communication relates only to a technical point of procedure, and the author has failed to demonstrate that he suffered any disadvantage as a consequence. He had sufficient and effective access to a higher tribunal, because article 14 (1) and (5) of the Covenant does not give a right to a review of the merits of all the grounds for appeal in cassation that have been presented, irrespective of whether they were submitted on time. The author could and should have also foreseen that the Supreme Court would apply the 60-day time limit to his second supplementary ground because the contents of the missing page were not essential for its formulation. It was the author's choice to adopt a strategy aimed at having declared the

appeal trial null and void because of the incompleteness of the case file, knowing that this entailed the risk that the Supreme Court might, in light of its case law, apply an exception to the general rule and not consider the second ground due to late submission.

4.3 The State party submits that the Committee should endorse the essence of the decision of the European Court of Human Rights and rule that the matter underlying the present communication either is such that the communication should be declared inadmissible or that the facts submitted do not constitute a violation of the rights enshrined in the Covenant. Should the Committee decide otherwise, the State party would be confronted with contradictory rulings by two treaty bodies on an identical issue.

4.4 As to the facts, the State party mentions that, when determining the sentence to be imposed on the author on 30 June 2011, the Court of Appeal did take into account that the reasonable time requirement had been breached in the appeal proceedings. Also when dismissing the appeal in cassation on 23 April 2013, the Supreme Court ruled *proprio motu* that the reasonable time requirement had been breached in the cassation proceedings but that there was no reason to attach any legal consequence to that breach.

4.5 As to victim status, the State party, while mindful of the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, considers that the communication relates only to a technical point of procedure, namely that in the second cassation proceedings just one of the three grounds for cassation was not reviewed on the merits because it was submitted after the deadline. The Supreme Court, as the author acknowledges, did review the merits of two of the three grounds for cassation. The author has not demonstrated that the Supreme Court's disregard for his second ground disadvantaged him or prevented effective access to a higher tribunal. The decision of the European Court of Human Rights supports this finding.

4.6 Insofar as the Committee might deem the author a victim of a violation of the Covenant, the State party submits that he did in fact have effective access to a higher tribunal. When considering the right to effective access to a court and to a higher tribunal, it is important to assess the proceedings involving the author in their entirety. The merits of the author's conviction and the sentence imposed were considered in three instances. In the cassation proceedings, the Supreme Court referred the author's case, though only as regards the sentence imposed, back to the Court of Appeal, which again deliberated on the sentence in new appeal proceedings. The author then lodged an appeal in cassation with the Supreme Court against this second judgment of the Court of Appeal, which dealt solely with the sentence imposed. The Court of Appeal reviewed the merits of the sentence again, imposed a lower sentence and, as shown by the official record and the judgment, took account of the fact that the reasonable time requirement had been breached in the appeal proceedings.

4.7 The State party considers that the right to have access to a court and the right to have a conviction and sentence reviewed by a higher tribunal do not present any obstacle to there being rules of procedure designed to ensure that proceedings are conducted efficiently. The application of the 60-day time limit in this case does not violate the rights enshrined in article 14 (1) and (5) of the Covenant.

4.8 In its judgment, the Supreme Court explained why, in accordance with the 60-day rule, it disregarded the grounds for cassation submitted in the supplementary statement of 5 April 2013. Even if the judge in charge of the Supreme Court's list of cases had granted counsel, upon request, a further delay to submit additional grounds for cassation, the practice of the Supreme Court established in a judgment of 14 November 2000 is such that an opportunity is only granted in so far as the examination of an additional document is essential in order to formulate that statement. In the author's case, drafting the supplementary grounds for appeal in cassation relating to the reasonable time requirement in the appeal or cassation proceedings did not essentially require an examination of page 3, which was sent later, of the memorandum of oral pleadings submitted at the appeal hearing.

4.9 Contrary to what the author argues, the State party is of the opinion that the Supreme Court did not wrongly apply its 14 November 2000 precedent. It is true that the author's situation differs from the case to which that judgment applies, most pertinently in the sense that counsel reported the missing part of the memorandum of oral pleadings to the Supreme Court promptly and in accordance with the applicable procedure. However, this does not

mean that the general rule concerning the granting of extra time to submit a supplementary statement of grounds for cassation, as laid down in the judgment of 14 November 2000, is not applicable in the present case.

4.10 According to the State party, the author could have foreseen the interpretation by the Supreme Court of its judgment of 14 November 2000 in this case and, contrary to what the author alleges, there has been no violation of the principle of legal certainty or of the principle of protection of legitimate expectations. On 25 March 2013, counsel received the Supreme Court's letter with which the memorandum of oral pleadings, including the missing page 3 (or a portion of it), was enclosed. In its letter, the Supreme Court also stated that, in consultation with the case list justice, it has been decided that in this case a further period will be granted in order to give you the opportunity, after examining this document, to amend or supplement the statement of grounds for cassation you submitted or to withdraw one or more grounds. In the State party's view, the letter could not have raised the expectation that *de jure* the Supreme Court would fully review the merits of a supplementary statement of grounds for cassation.

4.11 It is important to note that the letter was addressed to the authorized representative acting as counsel in the cassation proceedings. Someone with that level of legal expertise could and should have been expected to understand that the possibility of supplementing the statement of grounds for cassation applied only in so far as the additional grounds related to the part of page 3 of the memorandum of oral pleadings that had resurfaced. Missing page 3 contained the passage: "the [Convention on the Rights of the Child] and the special nature of juvenile criminal law mean that in the defendant's case the public prosecutor has lost the right of prosecution". The second and third grounds for cassation submitted by the author did not refer to that passage. Moreover, the passage adds nothing of substance to what was already known from the first two pages of the memorandum of oral pleadings and the discussion of the defence arguments relating to the sentence imposed by the Court of Appeal in the judgment of 30 June 2011. The Supreme Court was therefore right to conclude that examination of page 3 of the memorandum was not essential for formulating the additional grounds for cassation, and to disregard these grounds. They could have been submitted in the original statement of grounds for appeal in cassation dated 7 September 2012.

4.12 The role of the judge in charge of the Supreme Court's list of cases is procedural. The fact that the judge granted more time to submit grounds for cassation does not mean that the Supreme Court cannot take a different view on the basis of rules of procedure and case law. Counsel, given her expertise, should have taken this into account. She should have realized that the judge in charge of the Supreme Court's list of cases did not and could not yet have known the content of the additional grounds for cassation to be submitted and whether examination of the missing portion of the memorandum of oral pleadings was essential for the submission. Such a decision is taken by the Supreme Court only after additional grounds for cassation have been submitted.

4.13 The State party considers the author responsible for the fact that the Supreme Court did not review the additional ground for cassation on the reasonable length of appeal proceedings. His counsel made a procedural choice: to include only one ground for cassation in the statement of grounds for appeal in cassation, which was submitted within the time limit on 7 September 2012, instead of immediately submitting all the grounds for cassation. While the general rule in the Supreme Court's case law is indeed that the absence of a memorandum of oral pleadings in the documents sent to the Supreme Court is so contrary to the principle of due process that it renders the trial and the judgment based on it null and void, there are nonetheless a few examples in its case law where the Supreme Court, in the particular circumstances of a case, did not declare a contested judgment null and void even though a memorandum of oral pleadings was missing or incomplete. In such a situation, the Supreme Court has, in previous judgments, proceeded to review the merits of other grounds for cassation. Although these are exceptions to the general rule, they clearly show that counsel for the author could not and should not have assumed that the Supreme Court would not proceed to review the merits of additional grounds for cassation.

4.14 This is especially true given that the exceptions recognized in the Supreme Court's case law have in common that they concern cases comparable to that of the author. In those cases, the defence did not specify the defence argument or the request in the missing or

incomplete memorandum of oral pleadings that the court had not responded to. In addition, the Supreme Court considered whether the missing or incomplete memorandum of oral pleadings had been submitted by the same lawyer who had dealt with the cassation case or by a colleague at the same law firm. The State party assumes that the underlying reason for examining whether the memorandum of oral pleadings was submitted by the same lawyer or a colleague is that, in such a case, counsel had or could have had access to the memorandum not in the possession of the Supreme Court, or knew or could have known of its content. In view of these common features, the State party considers that counsel for the author could and should have foreseen that the general rule concerning the absence of a memorandum of oral pleadings leading to nullity might not be deemed applicable.

4.15 There is also no indication that counsel invoked essential points in the missing part of the memorandum of oral pleadings in the appeal proceedings, which the appeal court wrongly failed to address in its judgment or which were incorrectly omitted from the official record. The State party clarifies that the rationale for the general rule that the absence or incompleteness of a memorandum of oral pleadings leads to nullity is that in those situations it is impossible to check whether any defence arguments were put forward at the hearing other than those referred to in the official record and the contested judgment or whether explicitly substantiated views were presented.

4.16 This was not the case in the present communication. Firstly, the author does not mention whether his counsel was familiar with the content of the missing part of the memorandum of oral pleadings at the time of the cassation proceedings. If counsel had indeed been familiar with the memorandum's content, which is very likely given that the memorandum had been submitted by a colleague at the same law firm, counsel could have provided the Supreme Court with the memorandum in accordance with the applicable procedure, had it contained significant elements that the appeal court had neglected.

4.17 Furthermore, there were no defence arguments raised during the appeal other than those mentioned in the official record or the contested judgment. This is supported by the fact that the author did not raise any defence arguments during the cassation proceedings. If the missing part of the memorandum had contained a significant argument to which the appeal court had not responded, counsel could have raised this in the cassation proceedings. Moreover, in the supplementary statement of grounds for cassation of 5 April 2013, counsel did not raise defence arguments covering any issues other than those raised in the official record and in the part of the memorandum of oral pleadings that was on file, namely the consequences of the lengthy duration of the criminal proceedings. Therefore, it may be assumed that the incompleteness of the memorandum of oral pleadings in the case file that the appeal court sent to the Supreme Court concerned only a technical point of procedure; moreover, the author has not demonstrated that he suffered a disadvantage as a consequence.

#### **Author's comments on the State party's observations on admissibility and the merits**

5.1 In his comments of 31 December 2016, the author maintains that his rights under article 14 of the Covenant have been breached. The State party has failed to appreciate the core of his complaint. What matters in the present case is not whether the memorandum of oral pleadings contained important points or not but whether the author was entitled to rely on the official letters sent by the Court of Appeal and the Supreme Court informing him that the original was missing. The author considers that he had this right and that when the memorandum all of a sudden resurfaced he should have been allowed to submit additional grounds of cassation. This is what was clearly indicated to him in the letter of the judge in charge of the Supreme Court's list of cases. The Supreme Court ruled otherwise and declined to consider his second ground of cassation which, if admitted, would have led to a reduction in his sentence.

5.2 It is not clear whether the European Court of Human Rights declared the author's application inadmissible on the merits or because one or more admissibility criteria were not fulfilled. In any event, the State party has not made a reservation to the Optional Protocol for matters already examined by the European Court.

5.3 The author disagrees with the State party's argument that the Supreme Court does not have to review all grounds of cassation irrespective of whether they were submitted within

the time limit. The State party does not cite any case law, nor is the author aware of such practice. That position contradicts even the essence of cassation proceedings because the Supreme Court must always review all grounds of cassation submitted before the deadline. It may however rule that the dismissal of one or all grounds does not warrant a reasoned decision. The only exception is when it quashes a judgment in full on the basis of one of the grounds and therefore does not consider the other grounds.

5.4 The author also disagrees that his case revolves around a technical point and that he was not disadvantaged by the decision of the Supreme Court. The State party disregards the fact that a violation of the right to be tried without undue delay should lead to a reduction in the sentence imposed. The longer the delay, the more important the reduction in the sentence.<sup>4</sup> Through the second ground for cassation, the author argued that the Court of Appeal had incorrectly calculated the total delay because it had taken into account only the length of the second appeal proceedings and first cassation proceedings – from 11 December 2008 to 30 June 2011 – instead of also adding the length of the first instance proceedings and first appeal proceedings – from 13 September 2005 to 11 December 2008. The sentence imposed was therefore too long, which represents a disadvantage.

5.5 As to the foreseeable application of the 60-day deadline, the fact that the role of the judge in charge of the Supreme Court's list of cases is procedural does not make the procedural decisions taken by that judge any less binding, including on the full bench of the Supreme Court. Supreme Court correspondence on procedural matters may therefore be relied upon by counsel in cassation proceedings, no matter counsel's level of professional experience, and even when the deadline mentioned is clearly contrary to the time limit provided by the Code of Criminal Procedure of the Netherlands.<sup>5</sup>

5.6 As to exceptions to the Supreme Court's practice invoked by the State party, the author considers that the judgment cited by the State party does not apply to him because in that case there was no letter from the judge in charge of the Supreme Court's list of cases offering the opportunity to amend or supplement a memorandum of cassation. Moreover, in the author's case, there was only one hearing, and the missing page of the memorandum of oral pleadings related to that hearing. In the case mentioned above by the State party, the missing document referred to a hearing followed by several other hearings during which that claimant never complained about the missing document.

5.7 In one of the cases referred to by the State party, counsel for the accused in cassation proceedings – who was a colleague of counsel in appeal proceedings – had kept a copy of the memorandum in his own file and had provided the Supreme Court with it when the memorandum went missing at the Court of Appeal. In such cases, the Supreme Court accepts that it is a conformed copy. However, this practice cannot warrant the conclusion that in all cases where representatives in different proceedings are colleagues, they may have access to the memorandum.<sup>6</sup> Counsel for the author in appeal proceedings submitted his original to the Court of Appeal and did not make a copy because of some last-minute changes. Since the Word file could also no longer be retrieved, counsel had to inform the Court of Appeal that he was not able to provide a copy. In any event, there is no such obligation to provide a copy, which makes sense because the Supreme Court could not check whether that copy was identical to the original submitted to the Court of Appeal. Precisely for that reason, it does not matter whether the representative in cassation proceedings submits a copy or not.

5.8 The author concludes that the State party is trying to shift the blame. It is undisputed that the original memorandum of oral pleadings had been handed over to the Court of Appeal. It was its responsibility to take care of such an important document and make the necessary copies. Yet it failed to do so, hence the author does not agree that his counsel should be blamed for that.

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<sup>4</sup> The author refers to cases that resulted in sentences being reduced by 10–15 per cent.

<sup>5</sup> The author refers to a previous judgment of the Supreme Court.

<sup>6</sup> The author mentions that it is not uncommon for a memorandum of oral pleadings to be handwritten or to contain handwritten additions or changes.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether it is admissible under the Optional Protocol.

6.2 The Committee has to ascertain, as required by article 5 (2) (a) of the Optional Protocol, whether the same matter is not being examined under another procedure of international investigation or settlement. The Committee observes that, on 17 October 2013, the author presented an application based on the same facts before the European Court of Human Rights. However, on 9 January 2014, a single-judge formation of the Court rejected the application. The Committee observes that the matter is no longer pending before another procedure of international investigation or settlement and that the Netherlands has not entered a reservation to article 5 (2) (a) of the Optional Protocol. Therefore, the Committee is not precluded by article 5 (2) (a) of the Optional Protocol from considering the present communication.

6.3 The Committee notes the author's claim that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in that connection, the Committee considers that it is not precluded from examining the communication under article 5 (2) (b) of the Optional Protocol.

6.4 The Committee takes note of the author's claim under article 14 (1) and (5) of the Covenant that his right to have access to a court and to an effective review by a higher tribunal were violated because the Supreme Court dismissed some of his grounds for cassation as being out of time although a judge in charge of the Supreme Court's list of cases had previously granted him extra time to submit those grounds. The author argues that the decision to allow him extra time to submit additional grounds for cassation should have been binding for the full bench of the Supreme Court and that it is the essence of cassation proceedings that the Supreme Court must always review all grounds of cassation submitted on time. If his ground for cassation in respect of the length of appeal proceedings would have been admitted, he could have benefited from a reduction of his sentence.

6.5 The Committee also notes the State party's argument that the author does not have victim status because he has not suffered any disadvantage; that one of his two supplementary grounds for cassation dismissed as out of time was nonetheless examined *proprio motu* by the Supreme Court; that the author was not entitled to the examination of all of his grounds for cassation irrespective of procedural delays; that the missing page of the memorandum of oral pleadings was not essential for the author to formulate his grounds for cassation based on the length of proceedings; that the author should have foreseen the Supreme Court's interpretation of the procedural time limits; that in its ruling of 30 June 2011, the Court of Appeal did take into account the violation of the reasonable time requirement in the appeal proceedings; that the merits of the author's case were considered at three levels of court proceedings; and that the author's two supplementary grounds for cassation related to the part of the memorandum that was already on file, not to the missing part. The State party also accepts that the general rule in the national legal system is that the absence or incompleteness of a memorandum of oral pleadings from the file sent to the Supreme Court renders the previous judgment and proceedings null and void.

6.6 The Committee notes that most of the author's claims relate to the interpretation and application of domestic law and practice by the courts of the State party under article 14 (1) and (5). The Committee recalls that it is generally for the courts of States parties to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>7</sup>

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<sup>7</sup> General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26. See also *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; *Schedko*



6.7 In the present case, the Committee notes that the author already had his case examined at three levels of jurisdiction during the first set of proceedings. At the last level of the second set of proceedings, the author invoked three grounds of cassation: one was dismissed on the merits, while the remaining two were considered as being submitted out of time. In this connection, the Committee notes that even if a judge in charge of the Supreme Court's list of cases granted the author – in specific circumstances – an exception from the procedural rule providing for the time limit for submitting grounds for cassation, when examining the author's case, the Supreme Court ruled that those circumstances were not of a nature to allow for that exceptional additional time. The Committee notes that the Supreme Court, after taking into account the decision of the judge in charge of its list of cases, based its decision on the provisions of the Code of Criminal Procedure and on its own precedent. Therefore, the Committee is not in a position to conclude that the Supreme Court committed a manifest error or denial of justice.

6.8 The Committee also notes, on the one hand, the State party's argument that procedural decisions taken by the judge in charge of the Supreme Court's list of cases are not binding for the bench of Supreme Court judges who are examining the case and, on the other hand, that the author has not produced any evidence to support his argument that such procedural decisions are indeed unconditionally binding on the judges who examine a case. The Committee fails to see how the judge in charge of the Supreme Court's list of cases would be better placed in considering the particular circumstances of a case than the judges who are effectively dealing with that case.

6.9 The Committee further notes the author's statement that were his ground for cassation in respect of the length of appeal proceedings admitted, he could have benefited from a reduction of his sentence. In this respect, the Committee notes that the Supreme Court actually considered *proprio motu* the author's ground for cassation in respect of the length of cassation proceedings. Even if it found a violation in that respect, the Supreme Court did not consider necessary to reflect it on the sentence imposed on the author, as did the Court of Appeal, which took into account that the reasonable time requirement was breached in the appeal proceedings when determining the author's sentence. In this connection, the Committee notes that in his only ground for cassation that in practice was not considered by the Supreme Court, the author contested the way in which the Court of Appeal, in its judgment of 30 June 2011, calculated the total delay in appeal proceedings. However, the author has not explained why he was not able to contest that specific calculation on the basis of the judgment issued on 30 June 2011 and within the 60-day time limit to lodge an appeal in cassation. He also has not substantiated *in concreto* that the missing part of the memorandum of oral pleadings that was drafted and submitted by his own representative was essential to formulate his grounds for cassation in respect of the length of proceedings.

6.10 To conclude, in the present case, the Committee is not in a position, on the basis of the materials at its disposal, to conclude that, in deciding the author's case, the domestic courts acted arbitrarily or that their decision amounted to a denial of justice.

7. Accordingly, the Committee considers that the communication is insufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the present decision will be communicated to the State party and to the author.

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*v. Belarus* (CCPR/C/77/D/886/1999), para. 9.3; and *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6.