



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1788/2008

Decision adopted by the Committee at its 107th session (11–28 March 2013)

<i>Submitted by:</i>	B.W.M.Z. (not represented by counsel)
<i>Alleged victims:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communications:</i>	26 June 2007 (initial submissions)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 8 May 2008 (not issued in document form)
<i>Date of adoption of decision:</i>	25 March 2013
<i>Subject matter:</i>	Conduct of disciplinary proceedings
<i>Substantive issues:</i>	Independence and impartiality of the tribunal; right to be heard
<i>Procedural issue:</i>	Non exhaustion of domestic remedies; lack of substantiation
<i>Article of the Covenant:</i>	14
<i>Articles of the Optional Protocol:</i>	2; 5, para. 2 (b)

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (107th session)

concerning

Communication No. 1788/2008*

Submitted by: B.W.M.Z. (not represented by counsel)
Alleged victims: The author
State party: The Netherlands
Date of communication: 26 June 2007 (initial submission)

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

Meeting on 25 March 2013,

Adopts the following:

Decision on admissibility

1. The author of the communication is B.W.M.Z., a Dutch national. He claims to be a victim of a violation by the Netherlands of his rights under article 14 of the Covenant.¹ The author is not represented.

The facts as submitted by the author

2.1 The author is a lawyer practising in the Netherlands. In March 2003, Mr. and Mrs. L.H. filed two complaints against the author with the Disciplinary Council of the Amsterdam jurisdiction. In complaint 03-354H they claimed that the author had acted in violation of section 46 of the Legal Profession Act by: (a) letting them enter into an agreement for legal assistance by exerting undue influence, error and deceit; (b) hardly doing any work on the case submitted to him; and (c) stipulating a flat fee of 10,000 euros exclusive of value added tax (VAT) to be paid in advance and in addition 25 per cent of the amount potentially to be received in due time. Complaint 03-055H concerned a violation of section 46 of the Legal Profession Act owing to the author's refusal to return the advanced fee after having merely summarily dealt with the case for a period of nine weeks.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Cornelis Flinterman did not participate in the adoption of the present decision.

¹ The Optional Protocol entered into force for the Netherlands on 11 December 1978.

2.2 In a decision of 29 September 2003, the Disciplinary Council dismissed the claim under section (a) of the first complaint, as it considered that it was beyond its competence to decide on the legal validity of a contract between a lawyer and his client, unless the invalidity would be absolutely evident. However, the Council upheld sections (b) and (c) of complaint 03-054H as well as complaint 03-055H and imposed a disciplinary sanction of reprimand on the author. Mr. and Mrs. L.H. appealed the decision before the Disciplinary Appeals Tribunal, which in a decision of 4 June 2004, dismissed the decision of the Disciplinary Council as regards complaint 3-054H (a) and suspended the author from practising for three months, ordering him to return to the complainants the amount of 11,900 euros.

2.3 In the meantime, a new complaint against the author was filed with the Disciplinary Council. On 20 October 2003, Mr. and Mrs P. claimed violations by the author of the Legal Profession Act, as he had allegedly breached an agreement regarding the manner in which he would operate and wrongfully retained files belonging to the complainants. The Disciplinary Council upheld the complaint and imposed on the author a conditional one-month suspension. On appeal by the author dated 19 November 2003, the Disciplinary Appeals Tribunal upheld the Council's decision on 10 June 2004.

2.4 According to the author, under the Legal Profession Act, the Disciplinary Appeals Tribunal is the highest instance on disciplinary matters. Accordingly, domestic remedies have been exhausted in the present communication. Furthermore, the author brought the case before the European Court of Human Rights. On 23 March 2005 the author was informed that the Court, sitting as a committee of three judges, had decided to declare the application inadmissible because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or the Protocols thereto.

The complaint

3.1 The author claims that the proceedings before the Disciplinary Appeals Tribunal violated article 14 of the Covenant. First of all, on 22 March 2004, he informed the Tribunal by phone that he would not be able to attend the hearings on 4 June 2004 because his father's health had suddenly deteriorated. The Court should have postponed the consideration of the case and given the author the opportunity to be heard, but it did not. Thus, the author was not able to invoke article 14 of the Covenant before the Court. As a result, the Court imposed a heavy penalty on him, based on the sole statement of the complainant. Furthermore, the punishment, compared to other cases, was disproportionate.

3.2 Secondly, the Court suspended the author from practising his profession for three months, of which one month would be conditional to the author paying 10,000 euros to Mr. and Mrs. L.H. However, the decision about the payment was unlawful, as the appropriate jurisdiction to deal with claims regarding payments is a civil court, not a disciplinary court.

3.3 Thirdly, one of the members of the Court deciding his case was Mr. V.B., who was at that time involved in civil proceedings against the author. Mr. V.B. was the legal representative of a person who had filed a complaint against the author because he had refused to represent her in court and, as a result, she had attempted suicide. This complaint had been rejected by the Amsterdam Court of Appeal. The author claims that Mr. V.B.'s law firm harbours animosity against him for this reason. In addition to that, Mr. V.B. may have been prejudiced against the author because of action taken in the past by the author against a judge of The Hague Regional Court and Court of Appeal who had family ties with Mr. V.B. Furthermore, three members of the Disciplinary Appeals Tribunal who decided his case work not only as lawyers but also as substitute judges. In the past, the author had criticized the system of substitute judges and, as a result, a bill was introduced in Parliament to abolish that system. Despite the Bill, the system has not disappeared

completely. For all these reasons the author claims that the Court was not impartial in his case.

3.4 The author also claims that the fact that a lawyer is judged by his own colleagues in disciplinary proceeding is in violation of article 14 of the Covenant. The fact that they all compete as professionals is in itself an impediment to an impartial and independent judgement. The Legal Profession Act is thus in defiance of article 14 in this respect.

State party's observations on admissibility and merits

4.1 On 10 December 2008, the State party submitted observations on admissibility and merits. The State party recalls the decision of inadmissibility adopted by the European Court of Human Rights and asks the Committee, for reasons of legal certainty, to take a similar approach, i.e., to declare that the communication is inadmissible or that it does not constitute a violation of the Covenant. Otherwise, the State party would be confronted with contradictory rulings by two international supervisory bodies on an identical issue.

4.2 The State party explains that both the Disciplinary Board and the Tribunal are composed of judges and practising lawyers. Appeals at the Tribunal must be heard and decided by a panel of five members of the Tribunal, consisting of three judges and two lawyers. The judges who serve at the Tribunal are appointed for a term of five years from among members of the judiciary charged with the administration of justice, while the lawyers are elected for five years by the Board of Delegates of the District Bars.

4.3 By letter of 28 November 2003, the Tribunal notified the author of the date of the hearing on the appeal. At the same time the author was informed that within the next few days he could request the registrar to set another hearing date. However, he did not make use of this opportunity. The author was also requested to respond in writing no later than six weeks before the hearing, to Mr. and Mrs L.H.'s statement of grounds for appeal. On 20 February 2004, the author was sent a definitive summons by registered letter with confirmation of receipt. This summons confirmed that the hearing would take place on 22 March 2004 and informed the author that his presence was expected at the hearing. A list of the documents included in the case file was enclosed with the summons and the author was informed of the possibility of requesting copies of the documents or of examining the case file if he chose. He was also requested once more to submit a written response to the statement of the grounds for appeal. Finally, the summons informed the author of the composition of the Tribunal that would hear the appeal. On 19 March 2004, the Tribunal informed the author that the composition of the Tribunal had changed. On 22 March 2004, the date of the hearing of the appeal, the author informed the registry of the Tribunal by telephone that he would not appear at the hearing. The author did not submit any written response to the statement of the grounds for appeal.

4.4 The author did not exhaust domestic remedies. In the national proceedings, he did not invoke article 14 of the Covenant or the substance of the complaints in this communication, thereby denying the Disciplinary Board and the Tribunal the opportunity to respond to these complaints. The author was present at the hearing before the Disciplinary Board and could also have put forward the substance of his complaints in connection with article 14 in a written response to the statement of grounds for appeal. He did not do so. Furthermore, he lodged the appeal in the proceedings concerning Mr. and Mrs. P's complaint. Yet, in his statement of the grounds for appeal he failed to put forward the substance of his arguments before the Committee.

4.5 While the exhaustion of domestic remedies does not require a resort to extraordinary remedies, the State party remarks that the author has not submitted any request for review of the decision. According to established case law of the Tribunal, the possibility of review exists in exceptional circumstances, when and in so far as a fundamental legal principle has been violated.

4.6 The author could have challenged the members' impartiality in proceedings before the Tribunal. Under section 56, subsection 6, of the Counsel Act in conjunction with articles 512–518 of the Code of Criminal Procedure, any of the members hearing a case can be challenged at the request of a party on the grounds of facts or circumstances that could be prejudicial to the impartiality of the court. The fact that the author was not present at the hearing before the Tribunal does not mean that he could not have challenged the members during the national proceedings. The author was informed twice of the composition of the Tribunal. He was therefore aware of the composition and could have submitted a challenge for bias as soon as any relevant facts or circumstances came to his attention. He has never claimed that he was not aware earlier of the reasons that he now puts forward to doubt the impartiality of the members of the Tribunal.

4.7 The allegations made by the author are highly speculative and the links he puts forward to substantiate his claim are not sufficiently relevant to the adjudication of his case to raise issues under article 14 of the Covenant. The State party therefore concludes that the author has also failed to substantiate his claims for the purposes of admissibility.

4.8 Regarding the merits of the communication, the State party takes the position that the communication is ill-founded. It observes that the author has not provided any evidence to substantiate his claim that the lawyer members of the Tribunal cannot be expected to be impartial in view of their professional background. The mere fact that members of the author's profession sit on the Tribunal neither objectively justifies fears of bias nor constitutes sufficient grounds for concluding that there is an appearance of bias. The manner in which the members of these bodies are appointed, combined with the rules on incompatibility of office under the Counsel Act, provide sufficient safeguards for their independence. The fact that the majority of the Tribunal's members are judges provides an additional safeguard for an independent and impartial consideration of appeals. The State party therefore believes that this part of the communication is not only inadmissible, since the author is not a victim within the meaning of article 1 of the Optional Protocol and has not exhausted domestic remedies, but also ill-founded.

4.9 With respect to the author's claim that he was not heard by the Tribunal, the State party observes that although the case file contains the author's notification that he would not attend the hearing, it gives no indication that he actually requested the Tribunal to adjourn the hearing. Nor – assuming that he did make such a request – does it indicate that he supported such a request with the reason he now adduces: his father's sudden illness. In any event, this reason is not substantiated either by anything in the Tribunal's records or by any aspect of the present communication. Accordingly, the State party concludes that the Tribunal had no reason to adjourn the scheduled hearing and that there are no grounds for finding a violation of article 14.

4.10 There is no factual basis for the author's assertion that the Tribunal took its decision purely on the basis of the statements by the opposing party. The Tribunal bases its examination on the decision of the Disciplinary Board and the Board's case file. The fact that the author did not avail himself of the opportunity to submit a written response to the statement of grounds for appeal is entirely his own responsibility. Accordingly, this part of the communication is not only inadmissible for non-exhaustion of domestic remedies but also ill-founded.

4.11 With regard to the allegation that the Tribunal exceeded its competence, the State party observes that it has no factual basis. By decision of 4 June 2004, the Tribunal, in addition to ordering the suspension of the author's legal practice, imposed the obligation that the author pay the opposing party the sum of 11,900 euros within a month of the decision being sent to him. The Counsel Act does in fact provide a statutory basis for this specific obligation. Section 48b, subsection 1, in conjunction with section 57a of the Act provides that, in ordering the suspension of a lawyer's practice, the Tribunal may impose a

specific obligation on the lawyer concerned to pay compensation for the damage caused by his or her actions, either in full or to an extent determined by the Tribunal's decision, within a period of time determined by the Tribunal. Accordingly, the Tribunal's decision fell within the limits of its statutory competence. This part of the communication is therefore not only inadmissible for non-exhaustion of domestic remedies but also ill-founded.

Author's comments on the State party's observations

5.1 On 13 February 2009 the author provided comments on the State party's observations. Regarding the decision of the European Court of Human Rights on his case he recalls that it is only when the same matter is being examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. Furthermore, the Committee has its own autonomous authority to judge a case independently of the outcome of the same case before the Court. The Committee is not obliged morally or judicially to present compatible views with decisions of the Court.

5.2 The author reiterates his allegations regarding his right to be heard and states that there was no reason for the Tribunal not to postpone the hearings. Furthermore, there was no legal obligation for the author to put forward to the Tribunal the substance of his complaints in a written response. If he had been heard he would have been able to do so orally and the Tribunal would have had the opportunity to respond.

5.3 As the State party admits, the Counsel Act does not provide for the possibility of review. Such possibility exists in exceptional circumstances, according to the case law of the Tribunal. It is incumbent on the State party to prove the effectiveness of the remedies the non-exhaustion of which it claims, and the availability of the alleged remedy must be reasonably evident. In the present case, the State party gives no reasonable prospect that such review would be effective and evident.

5.4 The author reiterates his previous claims regarding the lack of independence and impartiality of the Tribunal and the fact that the Tribunal exceeded his authority. He was informed of the composition of the Tribunal on 20 February 2004 and of the modified composition on 19 March 2004, i.e., just two days before the hearing. Thus, the author would have had a short time to investigate the background and possible inappropriate links of the new members. In any case, Mr. V.B. knew the author and must have realized that he lacked the appearance of impartiality and independence to deal with the case. In spite of that, he did not withdraw as a member of the Tribunal. The fact that Disciplinary Boards and the Tribunal are established by statute, that their powers are regulated by statute and that the majority of its members are judges are formal guarantees, but in practice they do not function.

Issues and proceeding before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 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 matter in the present communication was considered by the European Court of Human Rights before being brought to the attention of the Committee. However, it is only when the same matter is being examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2 (a), of the Optional Protocol. Thus, this provision does not bar the Committee from considering the present communication.

6.3 The author claims that the Disciplinary Appeals Tribunal did not provide him with the possibility to be heard in proceedings against him and that some of its members were prejudiced against him and did not act in an impartial manner. The State party observes that the author was requested to respond in writing no later than six weeks before the hearing, on the grounds for appeal, but he never submitted a response and did not present evidence that he actually requested a postponement of the hearing; furthermore, he never initiated proceedings under section 56, subsection 6, of the Counsel Act, in conjunction with articles 512–518 of the Code of Criminal Procedures, to challenge the impartiality of the Court. As the author has not submitted convincing arguments to refute the State party’s observations the Committee considers that the author has failed to substantiate his claims regarding his right to be heard. This claim is therefore inadmissible under article 2 of the Optional Protocol. As to the claim regarding the impartiality of the Court, the Committee considers that the author’s arguments are speculative and notes that he did not avail himself of any procedure for the protection of his rights in this respect. Accordingly, the Committee considers that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for non exhaustion of domestic remedies. All other claims raised by the author are also unsubstantiated and thus inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

[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.]
