



Human Rights Committee

Communication No. 1921/2009

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

<i>Submitted by:</i>	K. S. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	16 April 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 9 December 2009 (not issued in document form)
<i>Date of adoption of decision:</i>	25 March 2013
<i>Subject matter:</i>	Changes in legislation imposing penalties after commission of a crime
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Alleged violation of article 15(1) of the Covenant
<i>Articles of the Covenant:</i>	15(1)
<i>Articles of the Optional Protocol:</i>	5, paragraph 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. 1921/2009*

Submitted by: K. S. (not represented by counsel)

Alleged victim: The author

State party: Australia

Date of communication: 16 April 2009 (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, dated 16 April 2009, is Mr. K. S., an Australian national born on 30 June 1966. He complains of a violation by Australia of article 15(1) of the Covenant. The Covenant and its Optional Protocol entered into force for Australia on 13 August 1980 and 25 September 1991 respectively. The author is not represented by counsel.

The facts as presented by the author

2.1 The author committed an offence on 8 November 1994 and was subsequently charged with wilful murder on 10 November 1994. He was convicted on 27 September 1995 and sentenced on 21 November 1995 to life imprisonment with a minimum of 17 years before being eligible for parole.¹ The Court ordered the sentence under section 40D2(d) of the Criminal Law Amendment Act 1994, which reads:

The court that sentences a person to life imprisonment for wilful murder must set a minimum term of at least 15 years and not more than 19 years that the person must serve before being released on parole.

* 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. Cornelis Flinterman, 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.

¹ Under section 282 of the Criminal Code and section 40D2(d) of the Criminal Law Amendment Act 1994.

2.2 Section 40D2(f) of the Criminal Law Amendment Act required a court imposing a life sentence to set a parole eligibility date according to this formula irrespective of whether the offence occurred on, before or after the entry into force of the provisions of that Act. The Criminal Law Amendment Act 1994 entered into force only on 20 January 1995, before the sentencing of the author but after the commission of the offence.

2.3 Prior to 20 January 1995, the applicable law related to sentencing was the Offenders Community Corrections Act 1963, which established a minimum non-parole period of 12 years. Section 34 of that Act stipulates that a prisoner undergoing a sentence of life imprisonment imposed on or after the commencement date under section 282(a)(ii) or (c)(ii) of the Criminal Code, as was the case for the author, would be eligible to have a report on the prisoner's eligibility for parole furnished on the date of expiration of a period of 12 years after the prisoner was sentenced.

2.4 The author highlighted the fact that section 10 of the Sentencing Act 1995 reads:

If a statutory penalty for an offence changes between the time when the offender committed it and the time when the offender is sentenced for it, the lesser statutory penalty applies for the purposes of sentencing the offender.

2.5 In 2005, the author was informed of the possibility of challenging his past sentence on the basis of an incorrect application of the law. He sent a letter to the Department of Public Prosecutions (DPP) to challenge the sentence and the DPP agreed that there might have been an inconsistency. In March 2006, the author made an application to the Supreme Court of Western Australia for administrative re-sentencing under section 37 of the Sentencing Act 1995. Article 37 of the Sentencing Act 1995 reads:

If a court sentences an offender in a manner that is not in accordance with this Act or the written law under which the offence is committed, the court may recall the order imposing the sentence and impose a sentence that is.

2.6 On 17 March 2006, the Supreme Court, taking into account section 10 of the Sentencing Act 1995, altered the author's sentence from a 17-year to a 12-year minimum non-parole period. The DPP did not oppose the application at that time. As a result, the author was eligible for release on 20 November 2007.

2.7 The DPP later became aware of the provisions of section 40 D(2)(f) of the Criminal Law Amendment Act 1994. On 25 October 2007, the DPP sought leave before the Court of Appeal of Western Australia to set aside the decision of the Supreme Court.²

2.8 On 4 December 2007, the Court of Appeal of the Supreme Court of Western Australia set aside the Supreme Court's judgement and confirmed the original sentence of life imprisonment with a minimum 17-year non-parole period. The Court of Appeal concluded that there was no contention by either party that the original sentence was deficient or inappropriate, noting that "section 37(1) of the Sentencing Act empowers a court to recall an order imposing a sentence only in a case in which the offender was sentenced in a manner that was not in accordance with the Sentencing Act or the written law under which the offence was committed. The section had no application in this case in which the offender was properly sentenced under the then applicable legislation."³

² *The State of Western Australia v Seel* [2007] WASCA 271.

³ *Ibid.*, p. 6.

The complaint

3. The author claims that the State party has violated his rights under article 15(1) of the Covenant by applying legislation that entered into force after the commission of the offence and that had the effect of extending the minimum years of imprisonment prior to being eligible for parole from 12 to 17 years.

State party's observations on admissibility

4.1 In a note verbale dated 14 October 2011 submitted after several reminders, the State party argues that the communication is not admissible on two grounds: the failure to substantiate that the author is a victim of a violation of article 15(1) of the Covenant; and the failure to exhaust domestic remedies.

4.2 In relation to the first claim, the State party argues that the author has not demonstrated that he has been a victim of any change in any of the terms – parole period or otherwise – of his sentence. The State party argues that the two parole regimes create different systems for assessing parole eligibility. The previous parole regime did not require the sentencing judge to give an indicative non-parole period but instead required a report to be furnished after 12 years to assess the prisoner's parole eligibility for parole, which might or might not then be granted. On the other hand, the second parole regime required the sentencing judge to indicate the non-parole period, which could not be before 15 years and which, in the present case, was 17 years.

4.3 The State party highlights the fact that the substantive change between the two parole regimes was that the first regime set the minimum period of imprisonment before consideration of parole at 12 years while the second regime set the minimum period at 15 years. However, in setting the minimum parole period at 12 years, this did not mean that the prisoner would be eligible for parole after 12 years, only that a report would be furnished to make an assessment of eligibility. To assess eligibility, the parole board must take into account a series of considerations, including such factors as the seriousness of the offence, the risk to the community and the prisoner's behaviour in custody.

4.4 The State party concludes that any possible difference in the duration of the author's custodial imprisonment under the first and second parole regimes is purely hypothetical. In referring to the comments of the original sentencing judge in 1995 as well as the re-sentencing judge in 2006, both of which underline the very serious nature of the author's offence, the State party argues that there is no evidence that the author's period prior to being granted parole would have been any shorter had the original sentencing judge applied the first parole regime. The author therefore cannot claim to be a victim of a violation of article 15(1).

4.5 Second, the State party submits that the author has not exhausted the appeal system in Australia. The State party argues that the author could have sought special leave to appeal to the High Court as a means to pursue his claim and, in not doing so, has not exhausted domestic remedies.

Authors' comments on the State party's observations on admissibility

5.1 By letter of 22 May 2012, the author argues that at the end of both 12 and 17 years, the reality of parole existed and that to begin an assessment for parole after 12 or after 17 years is vastly different and not hypothetical. He concludes that the State party's submission that the two systems simply create two means of determining parole eligibility is inaccurate: the only difference between the two regimes is the time factor. By implication, the author has therefore substantiated that he is a victim of a violation of article 15(1) of the Covenant.

5.2 In relation to the second claim of inadmissibility, the author denies that there has been a failure to exhaust domestic remedies, due to the fact that the High Court of Australia is financially out of reach for him. However, he does not provide any further details in this regard.

Issues and proceedings 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 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author has failed to exhaust domestic remedies as he did not seek special leave to appeal to the High Court of Australia against the decision of the Court of Appeal of Western Australia. The Committee notes the author's statement that that he did not have the finances to exhaust domestic remedies. The Committee recalls its jurisprudence according to which financial considerations do not, in general, absolve the author from exhausting domestic remedies.⁴ Accordingly, the Committee concludes that the requirements of article 5, paragraph 2(b), of the Optional Protocol have not been met.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 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.]

⁴ See: communication No. 397/1990, *P.S. v. Denmark*, decision of inadmissibility adopted on 22 July 1992, para. 5.4; communication No. 550/1993, *Faurisson v. France*, views adopted on 8 November 1996, para. 6.1; communication No. 1576/2000, *Yussuf N. Kly v. Canada*, decision of inadmissibility adopted on 27 March 2009, para. 6.4; communication No. 978/2001, *Dixit v. Australia*, decision of inadmissibility adopted on 28 March 2003, para. 8.3; communication No. 1012/2001, *Burgess v. Australia*, inadmissibility decision of 18 November 2005, para. 6.4; communication No. 1635/2007, *Tillman v. Australia*, views adopted on 18 March 2010.