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HUMAN RIGHTS COMMITTEE
Fifty-third session

DECISIONS

Communications Nos. 575/1994 and 576/1994

Submitted by:	Lincoln Guerra and Brian Wallen [deceased] [represented by counsel]
Alleged victims:	The authors
State party:	Trinidad and Tobago
Date of communications:	25 March 1994 (initial submissions)
Documentation references:	Prior decisions - Special Rapporteur's combined rule 86/rule 91 decision transmitted to the State party on 21 April 1994 (not issued in document form)
Date of present decision:	4 April 1995

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights - fifty-third session

concerning

Communications Nos. 575/1994 and 576/1994

Submitted by: Lincoln Guerra and Brian Wallen [deceased] [represented by counsel]

Alleged victims: The authors

State party: Trinidad and Tobago

Date of communications: 25 March 1994 (initial submissions)

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

Meeting on 4 April 1995,

Adopts the following:

Decision on admissibility

1. The authors of the communications are Lincoln Guerra and Brian Wallen, two Trinidadian citizens who, at the time of submission of their communications, were awaiting execution at the State Prison at Port-of-Spain, Trinidad and Tobago. Mr. Wallen died of AIDS in the State Prison on 29 July 1994. It is submitted that they are victims of violations by Trinidad and Tobago of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

Facts as submitted by the authors

2.1 The authors were arrested in January 1987 and charged with two counts of murder. They were found guilty as charged and sentenced to death in the Port-of-Spain Assizes Court on 18 May 1989. Their appeal against conviction and sentence was dismissed on 2 November 1993. On 21 March 1994, the Judicial Committee of the Privy Council dismissed their petition for special leave to appeal.

2.2 On 24 March 1994, at 2 p.m., warrants were read to the authors for their execution at 7 a.m. the following morning, 25 March. Lawyers in Trinidad, acting pro bono, immediately filed constitutional motions on the authors' behalf, claiming that the carrying out of the executions would violate their

constitutional rights. In the context, reference was made to the judgement of the Judicial Committee of the Privy Council in the case of Pratt & Morgan v. Attorney-General, a/ where it was held that execution after a long delay could constitute inhuman punishment and thus would be unlawful under the Constitution of Jamaica, a similar provision being contained in the Constitution of Trinidad and Tobago.

2.3 An application for a stay of execution was filed on the authors' behalf, pending determination of the constitutional motions. On 24 March 1994, at 10 p.m., the application was heard by a single High Court judge, who refused to grant a stay. Notice of appeal to the Court of Appeal was filed immediately. The appeal against dismissal of the request for a stay was heard by a single judge of the Court of Appeal at 1 a.m. on 25 March. At 3.25 a.m., this judge dismissed the appeal but granted leave to appeal to the Judicial Committee of the Privy Council, together with a stay of execution for 48 hours, pending determination of such an appeal. At 5.25 a.m., the Judicial Committee granted a conservatory order, staying execution for four days, pending the filing of a proper appeal to the Judicial Committee. At 6 a.m., the Attorney-General of Trinidad and Tobago applied to the full Court of Appeal to set aside the 48-hour stay granted by the single judge. On reading a faxed copy of the order of the Judicial Committee, the Court of Appeal adjourned the hearing of the Attorney-General's motion until 28 March 1994. On 28 March, the Judicial Committee adjourned the hearing of the petition for leave to appeal from the single judge's decision until 25 April 1994, and extended the order for a stay of execution until after the determination of the petition on 25 April 1994.

2.4 On 31 March 1994, the Court of Appeal heard the application of the Attorney-General. It concluded that the single judge had erred in granting the authors leave to appeal to the Judicial Committee, without recourse to the full Court of Appeal, but decided not to set aside the judge's order, since the Judicial Committee was already seized of the matter.

2.5 On 18 April 1994, the High Court rejected the authors' constitutional motions and refused to grant a stay of execution, pending the exercise by the authors of their right to appeal to the Court of Appeal. On 25 April 1994, the Judicial Committee's stay lapsed, but the Attorney-General gave an undertaking that no execution would take place until the hearing of an application for a stay to the Court of Appeal. On 29 April 1994, the Court of Appeal granted a conservatory order, directing that the death sentences not be carried out until after it had decided on the constitutional motions. The authors unsuccessfully tried to obtain an undertaking from the Attorney-General that no execution would take place pending any further appeal to the Judicial Committee.

2.6 The Court of Appeal reserved judgement on the authors' constitutional motions on 9 June 1994. Following the execution of Glen Ashby on 14 July 1994, the authors again sought an undertaking from the Attorney-General that no executions would be carried out pending the determination of appellate proceedings in respect of their constitutional motions. The Attorney-General, however, refused to give such an undertaking.

2.7 On 25 July 1994, the Judicial Committee heard the authors' petition for leave to appeal against the dismissal of their application for a stay of execution; on 26 July 1994, the Judicial Committee granted a conservatory order, directing that the death sentences not be carried out on the authors until it had decided on their appeal in respect of their constitutional motions. On 27 July 1994, the Court of Appeal of Trinidad and Tobago rejected the constitutional motions and refused to order a stay of execution. An appeal against the latter judgement remains currently (at the end of February 1995) pending before the Judicial Committee.

The complaint

3.1 For the claims under articles 6, 7, and 14, reference is made to the authors' sworn affidavits, and to the grounds argued on their behalf in the constitutional motions and in their petitions for a stay of execution.

3.2 Before the High Court of Trinidad, it was argued that no executions had been carried out in Trinidad and Tobago since 1979, that the authors had been confined to death row under appalling conditions since 1989, and that they had the legitimate expectation that the death sentences would not be carried out against them, pending the determination of the Advisory Committee on the Power of Pardon. It was noted in this context that the authors had not been given the opportunity to be heard by the Advisory Committee on the Power of Pardon or by the Minister of National Security, prior to the making of the decision not to recommend the granting of a pardon. It was also submitted that the authors had been denied such procedural provisions as would ensure the execution of the death sentence against them within a reasonable time. In the circumstances, it is argued that the execution of the death sentence after a long delay would amount to cruel and inhuman treatment and punishment, and would violate the authors' right to life, liberty and security of the person, their right not to be deprived thereof, except by due process of law, and their right to equality before the law guaranteed to them under the Constitution of Trinidad and Tobago.

3.3 It is submitted further (as had been argued before the Judicial Committee) that giving a mere 17 hours of notice of the date of the intended execution was improper in that it was wholly contrary to recognized practice, and that it denied the authors the right to have recourse to the courts, of making representations to the Human Rights Committee or the Inter-American Commission on Human Rights, and to prepare themselves spiritually to meet their death. Counsel notes that under the terms of the "practice" which existed in Trinidad in respect of death penalty cases, a condemned prisoner is informed on a Thursday that a warrant has been issued for his execution not earlier than the following Tuesday.

3.4 The authors contend that in the light of the Judicial Committee's judgement in Pratt & Morgan, as well as the subsequent commutation of over 50 death sentences, and because of the delay of 4 years and 10 months in the hearing of all the appeals in their criminal case, they were justified in believing that their sentence of death would also be commuted to life imprisonment.

3.5 As to the conditions of detention on death row, both authors submit that they are confined to a small cell measuring approximately 9 feet by 6 feet; there is no window, only a small ventilation hole. The entire cell block is illuminated by means of fluorescent lights which are kept on all night and affect [their] ability to sleep. The authors are kept in the cell 23 hours a day, except on weekends, public holidays and days of staff shortage, when they are locked in for the entire 24-hour period. Apart from the one hour of exercise in the yard, they are permitted to leave the cell only to meet with visitors and to have a bath once a day, during which time they can clean out the slop pail. Exercise is conducted with handcuffs on in a very small yard. The authors note that, since they have been on death row, they have witnessed the reading of death warrants to several inmates, and all scheduled executions were prevented by last minute stays of execution. As a result, they have lived in constant fear every day of their confinement to death row. Their incarceration in these circumstances has had serious adverse impacts on their mental health - they suffer from constant depression, have difficulties in concentrating and are extremely nervous.

The State party's information and observations

4.1 In its submission under rule 91 of the rules of procedure, dated 23 June 1994, the State party submits that the communications are inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the authors submitted their case to the Inter-American Commission on Human Rights, where it was registered as communication No. 11279. This complaint alleges that they were victims of violations of articles 5 and 8, sections 1 and 2H of the Inter-American Convention on Human Rights, namely, the right to be free from cruel or inhuman treatment or punishment, the right to a fair trial within a reasonable time, and the right to appeal in a criminal case. Therefore, this complaint raises substantially the same questions as have been raised before the Human Rights Committee (violations of articles 7 and 14 of the Covenant).

4.2 For the State party, the authors have failed to specify the manner in which their rights under articles 7 and 14 of the Covenant were allegedly violated. It notes that, given the authors' reliance on the judgement of the Judicial Committee in Pratt & Morgan, it appears that they are arguing that the delays in determining their criminal appeals were so inordinate that the execution of the death sentence at this juncture would be in violation of articles 7 and 14. The State party denies that there has been an "inordinate delay" within the meaning of the Judicial Committee's judgement in the authors' case. It adds, "nevertheless, a constitutional motion may be brought for relief on these grounds, as was the case in Pratt & Morgan".

4.3 The State party argues that an effective domestic remedy remains available to the authors: "In Pratt & Morgan, relief was granted to [the] appellants, namely, the commutation of the sentence of death. ... Such relief would be available to the authors if the Court were to hold that there had been a violation of the authors' constitutional rights".

4.4 The State party notes that the authors did file constitutional motions (High Court Actions Nos. 1043 and 1044 of 1994), which were dismissed on

18 April 1994. The authors' appeal to the Court of Appeal was dismissed at the end of July 1994. A right to appeal to the Judicial Committee remains open to them. In the circumstances, the State party contends that the case is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.5 As to the request for interim protection under rule 86 issued by the Committee's Special Rapporteur for New Communications on 21 April 1994, the State party notes that it continues to be bound by the conservatory order issued by the Court of Appeal on 29 April 1994. In the circumstances, the State party "is not prepared ... to give the undertaking requested by the Committee".

4.6 In another submission dated 7 September 1994, the State party recalls the terms of the Judicial Committee of the Privy Council's conservatory order of 25 July 1994:

> "(a) ... in the event of the Court of Appeal dismissing the (authors') appeal and not granting immediately thereupon the authors' application dated 25th July 1994 for a conservatory order staying their execution; and
>
> "(b) on the (authors') undertaking by Counsel in such an event to appeal to the Judicial Committee of the Privy Council against the order dismissing their appeal and to file all relevant documents in accordance with the time limits set out in the relevant rules:
>
> "A conservatory order be granted directing that the sentence of death be not carried out on the (authors) until after the determination of such appeal by the Judicial Committee of the Privy Council".

In the light of the above, the State party reiterates that the communications are inadmissible on the ground of non-exhaustion of domestic remedies.

4.7 The State party further confirms that Mr. Wallen died in hospital on 29 July 1994, and notes that the post-mortem examination showed that death was due to meningitis caused by AIDS.

5.1 In her comments, counsel observes that the plea of non-exhaustion of domestic remedies advanced by the State party is inconsistent with the clearly manifested intention of Trinidad and Tobago to execute the authors on merely 17 hours' notice, within three days after the confirmation of their conviction, irrespective of their desire to make representations to the Mercy Committee for commutation of their death sentences, to apply to the courts of Trinidad for relief staying their execution and to apply to the Human Rights Committee.

5.2 Counsel contends that the determination of the State party to execute Mr. Guerra irrespective of undetermined violations of the author's constitutional rights or rights under the Covenant is demonstrated by the events surrounding the execution of Glen Ashby in July 1994; Mr. Ashby was executed after his case had been submitted to the Human Rights Committee.

5.3 It is submitted that domestic remedies within the meaning of the Optional Protocol must be effective in the sense of being reasonably available, rather

than a theoretical possibility. Measures designed to secure the availability of a remedy are said to include (a) giving the condemned person the possibility, after confirmation of conviction, to make representations to the Mercy Committee and to bring a constitutional motion to review judicially the refusal of commutation; (b) ensuring that executions are not carried out pending the hearing of such motions; and (c) providing for a reasonable opportunity to submit a communication to the Human Rights Committee.

5.4 Counsel further argues, by reference to an affidavit from a Trinidadian lawyer, that legal aid is not granted with respect to constitutional motions staying the execution of a death sentence. b/ The fact that Mr. Guerra obtained the pro bono services of lawyers both in Trinidad and Tobago and in London does not, in counsel's opinion, make the remedy of a constitutional motion "available" within the meaning of the Optional Protocol.

5.5 Counsel notes that the stay granted by the Judicial Committee of the Privy Council in July 1994 may make it possible to clarify the law and whether in future the State party would be obliged to stay an execution while judicial proceedings are instituted, but submits that in the light of the judgement of the Court of Appeal of 27 July 1994 rejecting both constitutional motion and a stay of execution, it is difficult to argue that the State party's law and practice provides an effective remedy in respect of alleged violations of article 6 of the Covenant.

5.6 By a letter dated 19 October 1994, counsel informs the Committee that with regard to the communication of Mr. Wallen, she has been "unable to obtain any further instructions" and proposes that no further action should be taken in relation to his communication.

5.7 By a further submission dated 10 November 1994, counsel forwards a formal note by Mr. Guerra's representative in Trinidad, dated 8 November 1994 and addressed to the Inter-American Commission on Human Rights, informing the latter instance that Mr. Guerra does not wish to pursue his case before it since his communication is under consideration by the Human Rights Committee.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 91 of the rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has noted that Mr. Wallen died on 29 July 1994, and that his death is attributable to natural causes. It further notes that counsel has been unable to obtain further instructions in respect of Mr. Wallen's complaint. In the circumstances, the Committee concludes that it would serve little purpose to continue consideration of the case inasmuch as it relates to Mr. Wallen.

6.3 The Committee has noted counsel's statement that the case of Mr. Guerra has been withdrawn from consideration by the Inter-American Commission on Human Rights. While taking note of the State party's information of 23 June 1994 in

this respect, it concludes that it is not precluded from considering the case of Mr. Guerra on the basis of article 5, paragraph 2 (a), of the Optional Protocol.

6.4 The Committee has noted the State party's claim that available and effective remedies remain open to Mr. Guerra, as well as counsel's counter-arguments in this respect. While it is true that domestic remedies within the meaning of the Optional Protocol must be both available and effective, that is, have a reasonable prospect of success, the Committee does not consider that the securing of legal assistance for the purpose of constitutional motions on a pro bono basis necessarily implies that the remedy so initiated is not "available and effective" within the meaning of the Optional Protocol. In this context, the Committee notes that counsel herself concedes that the petition for leave to appeal currently pending before the Judicial Committee may make it possible to clarify the law; it further notes that counsel confirmed, by a call of 21 February 1995, that the hearing of the petition could not be expected for another three to four months, and that the arguments on Mr. Guerra's behalf were being prepared. In the circumstances, the Committee considers that the pursuit of a petition for leave to appeal before the Judicial Committee of the Privy Council cannot be considered ineffective and concludes that, in the circumstances, the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

6.5 The Committee deeply regrets that the State party is not prepared to give the undertaking requested by the Committee on 21 April 1994, apparently because it considers itself bound by the conservatory order issued by the Court of Appeal on 29 April 1994. In the Committee's opinion, this situation should have made it easier for the State party to confirm that there would be no obstacles to acceding to the Committee's request; to do so would, in any event, have been compatible with the State party's international obligations.

7. The Human Rights Committee therefore decides:

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

(b) The present decision may be reviewed pursuant to rule 92, paragraph 2, of the Committee's rules of procedure, upon receipt of information from Mr. Guerra or from his representative to the effect that the reasons for declaring the complaint inadmissible no longer apply;

(c) The present decision shall be communicated to the State party, to the author and to his counsel.

[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.]

Notes

a/ Decision of 2 November 1993, Privy Council Appeal No. 10 of 1993.

b/ The affidavit referred to, sworn by Ms. Alice L. Yorke-Soo Hon on 28 April 1994, states "... with respect to Constitutional Motions involving staying the execution of the sentence of death for prisoners on death row, so far as I am aware, during the period 1985 to [the] present, legal aid was granted in only two such matters, namely ... [in the cases of] Theophilus Barry and ... Andy Thomas/Kirkland Paul".
