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on Civil and Political
Rights**

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HUMAN RIGHTS COMMITTEE
Sixtieth session
14 July to 1 August 1997

DECISIONS

Communication N° 632/1993

Submitted by: Herbert Thomas Potter
(represented by Mr. Michael Kidd)

Victim: The author

State party: New Zealand

Date of communication: 6 April 1995 (initial submission)

Date of present decision: 28 July 1997

[ANNEX]

* Made public by decision of the Human Rights Committee.
Deci.632

ANNEX*

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL
TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
- Sixtieth session -

concerning

Communication N° 632/1995

Submitted by: Herbert Thomas Potter
(represented by Mr. Michael Kidd)

Victim: The author

State party: New Zealand

Date of communication: 6 April 1995 (initial submission)

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

Meeting on 28 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Herbert Thomas Potter, a New Zealand citizen at present imprisoned at Mount Eden prison in Auckland, New Zealand, spiritual leader of an organization named "Centre point Community Growth Trust". He claims to be the victim of violations by New Zealand of articles 9, paragraph 3, and 14, of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Michael Kidd.

* The following members of the Committee participated in the examination of the communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

The facts as submitted by the author:

2.1 In 1990, the author was convicted and sentenced to three and a half years imprisonment for possession and supply of drugs. Shortly before his release he was charged with rape, a charge then downgraded to indecent assault, perjury and a further drug conspiracy charge. In all he has been sentenced to a total of thirteen years and four months imprisonment¹.

2.2 The author appealed his second sentence; his appeal was dismissed in April 1993. The author did not appeal to the Judicial Committee of the Privy Council in London, as he was denied legal aid for this purpose on 24 February 1994. For this reason, counsel contends that an appeal to the Privy Council is not a domestic remedy to be exhausted, within the meaning of article 5, paragraph 2, of the Optional Protocol.

The complaint:

3.1 The author claims that his rights under article 9, paragraph 3, of the Covenant have been violated: although the police had sufficient evidence against him in 1990, it was not until he had completed his previous sentence for drug related charges and was about to be paroled, that he was charged with indecent assault against minors, and was sentenced to seven and a half years of imprisonment. The sentences imposed on him were cumulative. Counsel was informed that the author received a further two year cumulative sentence for drug conspiracy and another four months cumulative sentence for perjury charges, arising from the first trial in 1990. Counsel alleges that Mr. Potter has been treated as a "special class of prisoner", indicating that his cumulative sentence makes him one of the longest serving prisoners in New Zealand.

3.2 The author claims a violation of article 14, in that he did not have a fair trial. He claims that he was informed by Mr. Peter Williams, counsel for the first trial, that the trial Judge had made an "anti-Centrepoint joke". There is nothing in the file to support this allegation which, therefore, remains unsubstantiated. Further, the author alleges that all the pre-trial publicity made it difficult to obtain an impartial jury; in this respect counsel points out that New Zealand does not have a system of interrogatories for jury members. Counsel further argues that the charges on which the author was convicted arose over twelve years ago and did not involve violence. The author alleges that witnesses against him, who were members of his congregation, had received sums of money as compensation from a Government Agency prior to his trial. It is further alleged that the modification of a rape charge, for which there is a short statute of limitation, to the lesser charge of indecency, in order to overcome the statute of limitations constitutes a violation of article 14 of the Covenant.

3.3 The author claims that he was subjected to ill-treatment while in prison. He has been denied adequate dental treatment for broken teeth caused by the

¹ From the State party's submission it appears that the author was convicted and sentenced a second time, on 27 November 1992, to 7 ½ years of imprisonment for indecent assault on minors; a third time, on 28 January 1994, to 2 years' imprisonment for drug related offences and a fourth time, on 8 February 1994, to 4 months' imprisonment for perjury.

assault he suffered at the hands of a fellow inmate; was refused vitamin supplements, as well as being denied proper reading glasses. His correspondence is interfered with, he receives his mail with delays, is subjected to full body searches on routine visits, and has restrictions for visits from others. Furthermore, counsel alleges that the authorities failed to provide protection when he was assaulted by another inmate in 1993 and that this assault was not investigated.

3.4 Counsel alleges that Mr. Potter is the subject of discrimination by the parole authorities, in that his previous minimum security classification, his good behaviour and non-violence involved in the offences, were not taken into account for his parole. Counsel submits that Judge Cecilie Rushton, of the Parole Board, told Mrs. Potter that early release would not be considered for her husband when his non-parole period comes up for review in August 1998.

The State party's information and author's comments thereon:

4.1 By submission of 7 December 1995, the State party argues that the communication is inadmissible. As regards the author's claim of a violation of article 9, paragraph 3, because the police failed to bring all charges against him at once, and waited until he was eligible for parole after serving the time of his first sentence before bringing new charges against him, the State party argues that there is nothing to suggest that the author was not brought promptly before a judge and tried within a reasonable time in any of the four sets of charges against him.

4.2 The State party contends that the communication is inadmissible as incompatible with the Covenant, and that the author has failed to substantiate his allegations. In this respect, the State Party submits that:

- In 1989 the New Zealand police received information to the effect that the author was involved in the supply of drugs to adults and teenagers members of the Centrepoint Community. Following an investigation he was arrested and charged for supply of Lysergide (LSD) and possession and supply of Methylenedioxy-Methamphetamine (Ecstasy). The offences were alleged to have occurred between October 1988 and September 1989.

- The author was tried on 23 March 1990, found guilty and sentenced to three and a half years' imprisonment for the LSD supply charge and 2 years for the ecstasy supply charge, to be served concurrently.

- Towards the end of 1989 the police received a series of complaints against Mr. Potter, alleging sexual abuse of children and young persons at the Centrepoint Community. An investigation took place over the next 18 months, during which time more complaints of a similar nature were received. Mr. Potter was arrested and charged on 27 May 1991 with several counts of rape and indecent assault relating to the alleged sexual abuse of five different female complainants. The offences allegedly occurred between 1978 and 1984. All complainants had lived at the Centrepoint Community at the time and all were under the age of 16 when the offences were alleged to have occurred. The author's wife was jointly charged in relation with a number of these offences.

- Mr Potter was granted bail in relation to the sexual abuse charges on 20 December 1991, in anticipation of his possible early release from prison on parol with regard to the sentence received after the first trial.

- Prior to the second trial, several pre-trial applications were heard between 27 and 29 April 1992, relating to issues that are before the Human Rights Committee: delay between the dates of the alleged offences and the time at which the complaints were made, the question of consent in relation to the rape charges, the issue of what constitutes "assault" for the offence of "indecent assault", and questions relating to the admissibility of evidence.

- The author was tried on 29 October 1992 on 8 counts of rape and 13 counts of indecent assault. Mrs. Potter was jointly charged with her husband on 5 counts of rape and 5 counts of indecent assault. She pleaded guilty to 5 counts of indecent assault. The jury found Mr. Potter guilty on 13 counts of indecent assault. He was sentenced to a total of seven and a half years' imprisonment on 27 November 1992.

- On 2 June 1992, the author together with two other members of the Centrepoint Community, was charged with conspiracy to supply controlled drugs (Ecstasy). These offences allegedly occurred between 1 May 1988 and 25 May 1992. The author's involvement only became known to the police following a search of his cell, in particular the hard disk of his computer, at the Ohura prison on 24 May 1991. He was tried on 29 September 1993 and sentenced to two years' imprisonment on 28 January 1994.

- On 23 April 1992, the author was charged with 3 counts of perjury during his first drugs trial in 1990, in which he had testified that he had given members of the Centrepoint Community capsules of milk powder and sugar, and not ecstasy. He pleaded guilty and was sentenced to four months' imprisonment on 8 February 1994.

4.3 As to the allegation of a violation of article 14 of the Covenant, the State party argues that the author's allegations are uncorroborated assertions; a comment made by the trial judge when it was the jury which convicted the author, pretrial publicity together with the fact that New Zealand law does not provide for an interrogation of jurors, cannot be construed to constitute a denial of the author's right under article 14. The author's right to an appeal was respected, as his conviction was appealed and the New Zealand Court of Appeal, in an ex-parte decision, dismissed the application. The "point of law" raised (how the term assault should be interpreted in "sexual assault") was dealt with by the trial judge in his decision of 28 October 1992, and during pre-trial consideration in April 1992. In this respect, the State party contends that the author has failed to substantiate his claim.

4.4 Concerning the author's assertions that he is unfairly treated, in that he is being treated as a "special class of prisoner", the State party denies that there is any evidence to suggest that the judicial process was applied to the author any differently than to other prisoners charged with similar offences. The allegation that all the events occurred over 12 years ago and did not involve violence is unfounded, as explained in para. 4.2 above. The assertion that sexual offences do not involve violence overlooks the violence

inherent in any sexual offence. The State party rejects counsel's allegation that the victims received money from a Government agency to testify against the author: rather, the victims received compensation for personal injury under the Accident Rehabilitation Act 1992, under which compensation is made available to victims of sexual abuse to assist them with their recovery from the effects of the abuse. Compensation under the Act is entirely separate from the conduct of the criminal proceedings and does not depend on these being brought against the alleged perpetrator, nor on whether the victim gives evidence in such proceedings.

4.5 With respect to the author's allegation of ill-treatment in prison, the State party contends that Mr. Potter relies on alleged violations of the United Nations Standard Minimum Rules for Treatment of Prisoners and that the Committee is only competent to examine alleged violations of the rights set forth in the International Covenant on Civil and Political Rights. The State party further argues that he has failed to exhaust domestic remedies as he could have had access to an administrative complaints procedure under the Penal Institutions Act 1954 and Penal Institutions Regulations 1961 (as amended), as well as to the Ombudsman. He could have pursued legal remedies invoking the New Zealand Bill of Rights Act before the local Courts, if he felt the prison authorities had failed to act diligently in protecting his integrity in prison.

4.6 With respect to the alleged discrimination by the Parole Board, the State party argues that the author has the right to judicial review of the Parole Board decisions in the High Court. It argues that the author wrote to the registrar of the Auckland District Court, regarding a possible review of the Board's decision, but did not actually lodge formal proceedings. Therefore he failed to exhaust domestic remedies in this respect.

5.1 In his comments, counsel reiterates his claims that the author has been treated as a "special class of prisoner", that he was not charged promptly, that his trial was unfair, that he was unable to submit an appeal to the Privy Council, that he was ill-treated in prison and that he has been discriminated against by the Parole Board. As to the exhaustion of domestic remedies, counsel contends that the remedies suggested by the State party are not available to the author as he is in prison, and therefore these need not be exhausted.

Issues and proceedings before the Committee:

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that the considerations for declaring a communication admissible include, *inter alia*, that the claims submitted are sufficiently substantiated and do not constitute an abuse of the right of submission. Concerning the author's claim that his trial was unfair because it took place many years after the offence and because he was tried on a charge of indecent assault at a time when a rape charge was time barred, the Committee notes that it appears from the trial transcript that the judge instructed the jury to acquit Mr. Potter on the rape charges for reasons of law. In this connection it also notes that the charges relate to a series of events extending

over a long period of time up to a recent date (1978 to 1992). The Committee therefore considers that the author's claim is not substantiated. As to the claim that the trial was unfair because of substantial pre-trial publicity, this matter could have been raised before the trial judge; failure to do so implies that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met. With regard to the remaining allegations of unfair trial, in particular that witnesses had been influenced by compensation received from a Government agency, this issue should similarly have been raised before the appellate courts. The author's failure to do so means that domestic remedies have not been exhausted in this respect either.

6.3 As to allegations of ill-treatment in prison, the Committee does not accept the State party's argument that it is not competent to examine the conditions of detention of an individual, if these are referenced in relation to the United Nations Standard Minimum Rules for the Treatment of Prisoners, since these constitute valuable guidelines for the interpretation of the Covenant. However, it transpires from the file that no complaint in respect of ill-treatment was ever filed by the author, either before the New Zealand judicial authorities or with the Ombudsman. For the purpose of article 5, paragraph 2 (b), of the Optional Protocol, an applicant must resort to all judicial or administrative avenues that offer him a reasonable prospect of redress. In this respect, therefore, the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

6.4 With regard to the author's allegation of discrimination by the Parole Board, the Committee notes the State party's argument that even though the author wrote to the Court Registrar enquiring into the possibility of a review of the Parole Board's decision, no formal review was ever initiated. The same considerations as under paragraph 6.3 above therefore apply.

7. The 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 of the communication.

[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.]