



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE  
Ninety fifth session  
16 March – 3 April 2009

**VIEWS**

**Communication No. 1512/2006**

<u>Submitted by:</u>	Mr. Allan Kendrick Dean (represented by counsel, Mr. Tony Ellis)
<u>Alleged victim:</u>	The author
<u>State party:</u>	New Zealand
<u>Date of communication:</u>	8 September 2006 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 November 2006 (not issued in document form)
<u>Date of adoption of views:</u>	17 March 2009

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\* Made public by decision of the Human Rights Committee.

*Subject matter:* Sentence of preventive detention; retrospectivity of sentencing regime; rehabilitation of prisoner in preventive detention

*Procedural issues:* Non-exhaustion of domestic remedies;

*Substantive issues:* Arbitrary detention; Access to courts to challenge lawfulness of detention; Right to rehabilitative treatment during detention; Right to benefit from lighter penalty.

*Articles of the Covenant:* 9, 10, 14 and 15.

*Articles of the Optional Protocol:* 2, 5(2)(b)

On 17 March 2009 the Human Rights Committee adopted the annexed text as Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No 1512/2006.

[ANNEX]

**ANNEX**

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights

Ninety-fifth session

concerning

**Communication No. 1512/2006\*\***

<u>Submitted by:</u>	Mr. Allan Kendrick Dean (represented by counsel, Mr. Tony Ellis)
<u>Alleged victim:</u>	The author
<u>State party:</u>	New Zealand
<u>Date of communication:</u>	8 September 2006 (initial submission)

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

Meeting on 17 March 2009,

Having concluded its consideration of communication No. 1512/2006, submitted to the Human Rights Committee on behalf of Mr. Allan Kendrick Dean under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopted the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication, dated 8 September 2006, is Allan Kendrick Dean, a New Zealand citizen currently in preventive detention (that is, indefinite detention until release by the Parole Board) in New Zealand. He claims to be a victim of violations by New Zealand of

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

An individual opinion signed by Committee member Mr. Krister Thelin is appended to the present Views.

articles 2, paragraph 3 (a) and (b); 7; 9, paragraphs 1 and 4; 10, paragraphs 1 and 3; 14, paragraphs 1, 2, 3 and 5; 15, paragraph 1; and 26 of the Covenant. He is represented by counsel, Mr. Tony Ellis.

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

2.1 On 24 June 1995, the author entered a cinema and sat down next to a 13-year old boy. He put his hand across the boy's lap and rested it on his crotch on top of his pants. The boy then moved away to another seat.

2.2 Prior to this incident, the author had received thirteen convictions for various incidences of indecency offences spanning nearly 40 years. He had been warned on two occasions that he might face a sentence of preventive detention if he came before the Court again on similar charges.

2.3 The author was charged with an offence of "indecency with a boy between 12 and 16 years old". He pleaded guilty on this account during summary proceedings in the District Court, in whose jurisdiction he faced a maximum sentence of three years' imprisonment. However, the District Court, in accordance with section 75 of the Criminal Justice Act 1985 (since repealed), declined the jurisdiction as to sentence upon the ground that it had reason to believe that the author was liable to preventive detention. The author's case was then transferred to the High Court for sentence. On 3 November 1995, he was sentenced to preventive detention, with eligibility for parole on 22 June 2005, in accordance with the law applicable at the time which fixed a minimum ten year non-parole period.

2.4 The author's appeal was initially dismissed, without reasons, on 23 November 1995. He had not been granted legal aid for his appeal. Following judgements by the Privy Council<sup>1</sup> and the Court of Appeal<sup>2</sup> that the appeal procedure, which had also been followed in the author's case, was flawed, the author applied for a rehearing of his appeal. He was granted legal aid. The Court of Appeal dismissed the appeal on 17 December 2004. The author's application for leave to appeal to the Supreme Court was rejected on 11 April 2005.

### **The complaint**

3.1 The author complains that the sentence of preventive detention was manifestly excessive given the gravity of the offence and thus failed to respect his right to be treated with dignity in breach of article 7, or alternatively article 10, paragraph 1. The author submits that the concept of proportionality in punishment lies at the heart of the prohibition of cruel, inhuman and degrading punishment<sup>3</sup>. The author submits that the uncertainty inherent to preventive detention has serious adverse psychological effects which render the sentence cruel and inhumane.

3.2 The author further claims that the disproportionateness of his sentence constitutes a violation of article 14, paragraph 1, of the Covenant. He submits that article 14, paragraph 1,

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<sup>1</sup> Taito v. R, 19 March 2002

<sup>2</sup> R v Smith, 19 December 2002

<sup>3</sup> In support of his argument, the author refers to the Privy Council judgement in *Forrester Browne (Junior) and Trono Davis v. The Queen* [2006] UKPC 10.

applies to the entire criminal proceeding, including sentencing<sup>4</sup>, and that a manifestly excessive sentence is not a fair sentence.

3.3 He further complains that his right to a fair trial was breached when he was transferred from the District Court to the High Court for sentencing, since the nature of the charge fundamentally changed when the sentence he faced increased from a maximum of three years' imprisonment to preventive detention. In this connection, the author submits that the nature of the charge includes also the maximum penalty that may be imposed, since this would influence the decision whether to plead guilty or not. In the instant case, the author pleaded guilty to a charge of indecency within the summary jurisdiction of the District Court. When the District Court then transferred his sentencing to the High Court, the author was not given an opportunity to reconsider his guilty plea and to decide whether to proceed to a trial. He claims that this constitutes a violation of article 14, paragraphs 1 and 3(a), as he was convicted in the summary jurisdiction without a jury trial, and then transferred to the indictable jurisdiction to face the most serious penalty permissible under the law without the necessary due process protections.

3.4 The author also claims that the delay in the hearing of his appeal, which was dismissed nine years after his appeal had been initially filed, constitutes a breach of article 14, paragraphs 3(c) and 5<sup>5</sup>. He claims that the appropriate remedy for the delay should have been a reduction in sentence from preventive detention to a finite term. The Court, however, refused to enter into this question, which was raised by counsel for the author at his appeal, according to the author because it considered that the author would be entitled to apply for parole six months later. The author claims that the consideration of his entitlement for parole was irrelevant to the question of whether he had suffered a breach and whether he was entitled to a remedy, and thus violated his right to a fair trial under article 14, paragraph 1.

3.5 He further claims that the appeal hearing violated article 14, paragraphs 1 and 3(d), because the Court of Appeal embarked on an inquisitorial fact finding investigation into the author's past offending and recovered the file related to a judgement of 24 July 1970. The author complains that this breached the principle of adversarial proceedings and that he was only given an opportunity to review the file after the Court had already formed its opinion. He moreover claims that the Court only produced part of the file and that the full file was only produced after his counsel so requested and that the appeal judgement in the case had gone missing.

3.6 The author further claims that his counsel's submissions were unreasonably dismissed by the Court of Appeal, in violation of article 14, paragraph 1. He claims a further violation of article 14, paragraph 1, because of the failure of the Court of Appeal to request an updated psychiatric report. The author submits that when he was sentenced in 1995, the Court had before it one psychological report of 1993 and one psychiatric report of 1995, which contained only two pages and was based on only one meeting with the author. He further submits that the psychiatrist who produced that report was being investigated for malpractice in his native state.

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<sup>4</sup> In this context, the author refers to the judgement of the European Court of Human Rights *Easterbrook v United Kingdom* [2003] ECHR 278.

<sup>5</sup> In support of his claim, the author refers to the Committee's jurisprudence in *Sextus v. Trinidad and Tobago* (2001) and *Johnson v. Jamaica* (1996)

The author submits that given the time elapse the Court of Appeal was duty bound to call for an up to date report in order to determine the appeal.

3.7 The author claims that he has been discriminated against by the judiciary on the basis of his sexual orientation, as he has been treated more harshly than non-homosexuals in respect of sentencing. In this context, he refers to the sentencing notes made by the judge who sentenced him to eight years' imprisonment in 1970, which show a clearly homophobic attitude. He also refers to section 140A (repealed) of the Crimes Act 1961, under which he was sentenced, which only criminalized indecent assaults by a man on any boy between 12 and 16 years' old. The section was only replaced with a gender neutral provision in 2003.

3.8 The author claims a violation of article 15, paragraph 2, as he has been denied access to a more lenient penalty than that afforded to people who were sentenced after the enacting of the Sentencing Act 2002. He submits that all offenders sentenced to preventive detention prior to the Act, received automatic ten year non-parole periods, whereas those sentenced after received 5 year non-parole periods. In this context, the author submits that the determination of parole eligibility amounts to the imposition of a sentence.<sup>6</sup> The author also claims that the difference in treatment between offenders based solely on the sentencing date constitutes discrimination, in violation of article 26.

3.9 The author claims that New Zealand's preventive detention regime violates article 9, paragraph 1, of the Covenant, since it lacks safeguards to prevent arbitrary detention; article 14, paragraph 1, because the trial Court can only impose part of the sentence whereas the rest of the sentence is in the hands of an administrative body; article 14, paragraph 2, since it violates the presumption of innocence, and article 15, paragraph 1, as it imposes a discretionary sentence on the basis of evidence of future dangerousness and does not sanction past acts. He also claims a violation of article 9, paragraph 4, since his continued detention is not subject to regular review by a court, as the Parole Board lacks independence from the executive and does not provide the guarantees of judicial procedure. The author makes reference to the Committee's Views in *Rameka et al v. New Zealand*<sup>7</sup>, and notes that nine members in one way or another dissented from the majority opinion that preventive detention may be imposed if proper safeguards are in place to ensure compliance with the Covenant. The author refers to the views expressed by the dissenting opinions of six Committee members and states that the Committee's own jurisprudence shows that the Committee is not bound by precedent.

3.10 The author refers to the Committee's observation in *Rameka et al. v. New Zealand* that the authors had not advanced any reasons why the Parole Board should be regarded as insufficiently independent and impartial for purposes of article 9, paragraph 4, of the Covenant.<sup>8</sup> In this connection, the author submits that the members of the Parole Board are political appointees, and that the majority are lay persons. Moreover, the Department of Corrections exerts undue influence over the Parole Board members, as it organises and provides their formal training. The

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<sup>6</sup> The author refers to the submissions made by counsel in communication No. 1492/2006, *Ronald van der Plaat v. New Zealand*.

<sup>7</sup> Communication No. 1090/2002, Views adopted on 6 November 2003

<sup>8</sup> Communication No. 1090/2002, Views adopted on 6 November 2003, para. 7.4

author further states that the parole hearings are not public, and that the Parole Board is not an adversarial proceeding, and does not respect the right to legal representation.

3.11 The author claims that he is a victim of a violation of article 10, paragraph 3, since he has been unreasonably denied treatment to aid in his rehabilitation and release. He states that at his first parole hearing on 22 June 2005, the Parole Board concluded that he had done insufficient courses to address his offending, and that to release him would pose an undue risk to the community. The Board recommended that he be transferred to Auckland Prison to undergo relapse prevention treatment and to aid him in formulating a release plan. The author's transfer however did not materialize and after the Parole Board hearing on 23 June 2006, the Parole Board again recommended that he be transferred to Auckland Prison as soon as possible in order to develop a release plan. The Parole Board indicated that if a suitable release plan were to be in place at the time of the next hearing in November 2006, it would order his release. The author claims that the Department's policy that persons serving preventive detention are not scheduled for specific treatment until after they reach their parole eligibility date violates his right to rehabilitation.

3.12 The author claims that because of the Department's policy he has been arbitrarily detained beyond his parole eligibility date, in breach of article 9, paragraph 1, and that there is no possibility of review of his continued detention by a genuine independent and impartial tribunal. In this context, the author states that the Department of Corrections has no obligation to follow the recommendations of the Parole Board.

3.13 The author also claims that his right to equal treatment before the law is breached, on the grounds that the policy of the Department of Corrections discriminates against preventive detainees, who are not scheduled for treatment until after their parole eligibility date, in favour of offenders who are serving finite sentences, who are offered treatment when they have served 66% of their sentence. He states that a lack of resources cannot serve as a justification for a violation of a Covenant right.

3.14 The author states that following the dismissal of his application for leave to appeal by the Supreme Court on 11 April 2005, he has exhausted all available domestic remedies.

#### **The State party's submission on admissibility and merits**

4.1 By submission dated 5 June 2007, the State party challenges the admissibility and the merits of the communication.

4.2 With regard to the author's allegation that the offence for which he was convicted was discriminatory against homosexual males and that his sentence was higher because of his homosexuality, the State party submits that the author has failed to exhaust domestic remedies in this regard, as he has failed to raise this matter on appeal. The State party moreover rejects the allegation on its merits and submits that the failure in 1995 to have a specific offence of indecency by a woman against a boy does not amount to discrimination against the author. In this connection, the State party explains that, while in 1995 there was no specific offence in respect of indecency by a woman against a boy, in those circumstances the offender was charged with a more general offence such as assault. The State party further submits that the author has failed to substantiate his claim that the sentence imposed upon him was higher because he was a

homosexual male. It explains that the sexual activity of the author is criminalised, not because it is homosexual or heterosexual, but because it is committed against children. The State party notes that the sentencing notes referred to by the author relate to his conviction in 1970, prior to the entry into force of the Covenant and the Optional Protocol.

4.3 In relation to the nature of the sentence of preventive detention, the State party notes that the author essentially seeks to review the Committee's Views in *Rameka v. New Zealand*. The State party invites the Committee to follow its jurisprudence established in the *Rameka* case, especially because the author was sentenced under exactly the same regime as the authors in that case. If the Committee would be minded to depart from its Views in the *Rameka* case, the State party would wish to make full submissions. The State party also submits that the author has failed to exhaust domestic remedies in respect of some of his allegations. His allegations relating to the independence and impartiality of the Parole Board were not raised as part of the author's appeal and author's counsel expressly informed the Court of Appeal that he was not litigating these allegations. Further, the author has not sought judicial review in respect of the decisions of the Parole Board in his case, nor has he issued proceedings for breach of the New Zealand Bill of Rights Act. As to the merits, the State party argues that the criminal limb of article 14 does not apply to the Parole Board as the Board is not involved in the determination of a criminal charge. Nor is the proceeding before the Parole Board a 'suit of law' within the meaning of article 14, paragraph 1, of the Covenant. Whereas it is for the courts to determine guilt and to impose a sentence commensurate with the seriousness of the offense, the role of the Parole Board is merely to administer the sentence imposed by the court, as the focus of parole is not punishment, but safety for the community. In any event, the State party argues that when looked at globally, including the establishment of the Parole Board by Statute as an independent statutory authority, the statutory protections against bias and the availability of judicial review by the courts, the requirements of article 14 are met.

4.4 With regard to the author's allegations concerning the availability of rehabilitation programmes, the State party submits that the author has failed to exhaust domestic remedies since at no time has he sought review of the decisions of the Department of Corrections in this regard. During the appeal, counsel for the author expressly advised the Court that he was not litigating these allegations. On the merits, the State party argues that its penitentiary system meets the requirements of article 10, paragraph 3, as it provides a range of targeted rehabilitation programmes during imprisonment, prior to release and upon parole. The State party submits that article 10, paragraph 3, does not provide an absolute right of individuals to receive one-to-one psychological treatment or to participate in a particular rehabilitation programme. The State party provides details of the rehabilitation assistance received by the author during his numerous terms of imprisonment, including specialised rehabilitation programmes for child sex offenders and one to one psychological counselling. Notwithstanding, the author has continued to re-offend, including whilst on parole. The State party rejects the author's allegation that his release has been delayed because he has not been provided with rehabilitation during his current sentence and submits that the author has followed a number of rehabilitation programmes as well as one to one psychological counselling. In addition, in 2000 he was offered the opportunity to attend the Te Piriti programme, a pre-release programme for sexual offenders against children. According to the State party the author refused to participate in the programme because of the involvement of female psychologists and because the programme does not address his homosexual orientation. According to the State party, the relapse prevention treatment provided

in Auckland prison, mentioned by the Parole Board in 2005, is the Te Piriti programme which the author refuses to attend. The State party adds that the author was transferred to Auckland prison in July 2006, and that he re-appeared before the Parole Board in November 2006. The Board considered that the author had not yet produced a comprehensive release plan showing the supervision and support for his release and decided to adjourn the matter until March 2007. At counsel's request, the hearing has been adjourned until June 2007.

4.5 With regard to the transfer of the proceedings from the District Court to the High Court, the State party submits that the author has failed to exhaust domestic remedies as he never sought to vacate his guilty plea or to appeal his conviction. The State party further submits that the author has failed to substantiate his allegation that he was unaware that he was facing a sentence of preventive detention. On the contrary, he had previously received a number of warnings that preventive detention might be imposed if he continued offending against children. The State party further notes that the author was represented by counsel throughout the sentencing process.

4.6 With regard to the author's allegations concerning his appeal against sentence, the State party submits that the length of time taken in rehearing the author's appeal does not amount to a breach of article 14, and that even if it did, a reduction in sentence would not be an appropriate remedy as there was no harm to the author arising from the delay, and the rehearing of his appeal constituted a remedy for the flawed procedure followed in the determination of the author's first appeal. The State party submits that the initial appeal was heard and determined within reasonable time, on 21 March 1996. The author did not challenge the procedure by which his appeal was determined. After other appellants had challenged the procedure and as a result of consequent legislative amendments, the author was provided with an opportunity for a rehearing. He filed an application for a rehearing on 21 May 2003. The rehearing took place on 10 November and 15 December 2004. As admitted by the author, 12 months of that delay was due to unavailability of counsel. The State party therefore submits that the delay of seven years and three months in the determination of the author's appeal cannot be solely attributed to the State party.

4.7 As to the conduct of the Court of Appeal in obtaining a court file relating to one of the author's previous offences, the State party asserts that this did not amount to a breach of article 14, as the Court obtained the file in relation to counsel's submission that the author was merely a 'nuisance' offender. Once the Court had obtained the file, which related to the author's 1970 conviction and sentence of eight years' imprisonment for sexual assault on boys under 16, it gave the author and the Crown another opportunity to be heard. As to the allegations concerning the decision of the Court of Appeal to reject the author's appeal, the State party submits that the author essentially seeks review of the Court's decision, and that this part of the communication is therefore inadmissible since the Committee's role is not to re-evaluate findings of fact or to review the application of domestic legislation. As to the court's reliance on a two year old psychological report, the State party notes that the author did not challenge the reliance on these documents in his appeal and that this part of the communication is thus inadmissible for failure to exhaust domestic remedies. The State party moreover explains that it would have been open to the author to produce his own psychological or psychiatric evidence to the Court.

4.8 With regard to the author's claim that the sentence of preventive detention imposed upon him was manifestly excessive and disproportionate, the State party refers to the Committee's Views in *Rameka v. New Zealand* and submits that the author essentially seeks a review of the substantive decisions of the domestic courts as to whether the sentence should have been imposed. His argument that the sentence was excessive was rejected by the Court of Appeal and the Supreme Court declined leave to appeal. In determining whether the sentence of preventive detention was appropriate the Court of Appeal took account of, inter alia, the author's long history of sexual offending, the three prior warnings as to the likelihood of a sentence of preventive detention being imposed if the author reoffended, the seriousness of the 1970 offending which demonstrated that the author, if given the opportunity, was more than a 'groper', the author's poor response to rehabilitation efforts and his failure to comply with his special conditions of parole on his last release which required him to undertake psychological counselling. The State party argues that the Committee is essentially asked to be a further level of appellate review of sentence and that the communication should thus be inadmissible. As to the merits, the State party argues that the imposition of the sentence in the author's particular circumstances did not amount to a breach of article 7 or 10, paragraph 1.

4.9 With regard to the non-retrospectivity of the Sentencing Act 2002, which came into force seven years after the author was convicted and sentenced, the State party submits that the author has failed to exhaust domestic remedies as he did not raise these issues upon appeal. On the merits, the State party submits that article 15, paragraph 1, does not extend to penalties enacted after a person has been convicted and sentenced, and that it does not require States parties to bring persons who have already been sentenced back before the Courts for re-sentencing. In this connection, the State party explains that the Sentencing Act 2002 does not provide for a 5 year non-parole period as alleged by the author but requires the sentencing court to impose a minimum term of imprisonment of at least five years. The State party submits that the author has failed to establish that he would have received a 'lighter penalty' had he been sentenced under the Sentencing Act, as it is not possible to speculate what minimum term of imprisonment would have been imposed by the Court. The State party further submits that the date of sentencing is not an 'other status' for the purposes of article 26.

#### **Author's comments on the State party's submission**

5.1 The author challenges the State party's submission that parts of his communication are inadmissible for failure to exhaust domestic remedies. He claims that no effective remedies are available in New Zealand for violations of Covenant rights, since the Covenant has not been incorporated into domestic legislation and section 4 of the New Zealand Bill of Rights prevents the Courts from undertaking any inquiry into the question whether any legislation violates the rights contained in the Bill of Rights<sup>9</sup>. The author refers to a decision of the Court of Appeal<sup>10</sup>,

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<sup>9</sup> Section 4 of the New Zealand Bill of Rights reads:

"No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), --

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective, or

(b) Decline to apply any provision of the enactment –

by reason only that the provision is inconsistent with any provision of the Bill of Rights.

rejecting a challenge to the regime of preventive detention on the basis that it violated sections 9, 22, 23 and 25 of the Bill of Rights and articles 7, 9, 10, 14 and 15 of the Covenant, reasoning that it was prevented by section 4 of the Bill of Rights to undertake an inquiry into the desirability or otherwise of the preventive detention regime. The Supreme Court declined leave to appeal, stating that the suggestion that the sentence of preventive detention is unlawful in itself cannot withstand section 4 of the New Zealand Bill of Rights Act.

5.2 The author moreover notes that as far as article 10, paragraph 3, is concerned, no equivalent provision exists in the New Zealand Bill of Rights, and domestic remedies are thus not available. The author states that, since the submission of his original communication, he has in vain requested the Department of Corrections to help him construct a release proposal which would allow him to be released. He also had to seek the services of a private psychologist as the Department had refused to engage one. In the absence of a sufficient release plan, the Parole Board declined to release the author.

5.3 The author withdraws the part of his communication relating to the independence of the Parole Board, in light of the fact that the issue has not yet been fully challenged in the domestic courts.

5.4 With regard to his claim that the nature of the preventive detention regime violates articles 7, 9, 10, 14 and 15 of the Covenant, the author acknowledges that this is the same claim as raised in *Rameka v. New Zealand*, but states that he is relying on the individual opinions appended to the Committee's Views and asks the Committee to revisit its decision. The author states that he raised the excessiveness of the sentence on appeal, and that in any event no effective remedy is available as the regime cannot be challenged before the courts because of section 4 of the Bill of Rights. Relying on the Committee's earlier jurisprudence<sup>11</sup>, the author therefore argues that this part of the communication is not inadmissible for failure to exhaust domestic remedies.

5.5 In regard to his claim that the offence for which he was convicted was discriminatory against homosexual males and that his sentence was higher because of his homosexuality, the author states that he could not have raised the 1970 comments on appeal as he became only aware of it during the hearing of the appeal, after he obtained a copy of the file that had been obtained by the Court of Appeal. The author disputes the State party's claim that he has failed to substantiate his claim that the sentence imposed upon him was higher because he was a homosexual male and refers to expert reports which found that sentences of preventive detention are imposed almost four times more frequently for homosexual offending than for heterosexual offending.

5.6 The author reiterates his claim that the transfer of his case from the District Court to the High Court breached his rights under article 14 of the Covenant and states that it was the Court's

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<sup>10</sup> *Exley*, CA279/06 [2007] NZCA 393

<sup>11</sup> *Pratt and Morgan v. Jamaica*, CCPR/C/35/D/225/1987, Views adopted on 6 April 1989, para. 12.5; *Lansman et al. v. Finland*, CCPR/C/52/D/511/1992, Views adopted on 26 October 1994, para. 6.2; *Faurisson v. France*, CCPR/C/58/D/550/1993, Views adopted on 8 November 1996, para. 6.1

duty to inform him of his increased jeopardy and advise him of the possibility of changing his plea.

5.7 The author reiterates that he is the victim of undue appellate delay. He explains that he did not seek special leave to petition the Privy Council as no legal aid was available and special leave was only granted in exceptional circumstances.

5.8 As to the procedure before the Court of Appeal, the author reiterates his claim that the Court did not have the power to search the 1970 file and that they nevertheless did was detrimental to his right to fair hearing. With regard to the State party's suggestion that he could have presented his own psychological report to the Court of Appeal, the author submits that it was incumbent on the Court to decline to act on an outdated 10-year old report and that he should not have been sentenced to preventive detention on the basis of this report. The author moreover points out that since 2002 two reports are required before preventive detention can be imposed, and that, since his appeal was heard after 2002, these standards should have been applied. In the absence of such second report, the author claims that his sentence of preventive detention is arbitrary.

## **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 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claims under article 14, paragraph 1 and 3 (a) of the Covenant, relating to the transfer of the proceedings in his case from the District Court to the High Court, the Committee notes that the author did not seek to vacate his plea, nor did he appeal his conviction. The Committee therefore considers that this part of the communication is inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2(b), of the Optional Protocol.

6.3 As to the author's claim that he was discriminated against on the basis of his homosexuality, under article 26 of the Covenant, the Committee notes that he was convicted for the crime of indecency with a minor and that he has failed to substantiate for purposes of admissibility, that he is a victim of discrimination on the basis of his sexual orientation. The Committee therefore considers that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.4 The Committee note the author's claims that the appeal hearing violated his rights under article 14, because the Court produced the file related to the author's 1970 conviction and failed to order an updated psychiatric report. It observes that the author was represented by counsel throughout the proceedings, that the file relating to his past convictions was provided in response to an argument made by his own counsel and that the author could have provided his own psychiatric report and made no objection during the proceedings to reliance upon the report in question. For these reasons, the Committee finds that the author has not substantiated his claims.

and that therefore this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 As to the author's claim under article 26 of the Covenant, the Committee finds that he has failed to demonstrate that the Department of Corrections discriminated against him in the provision of rehabilitation treatment. Thus, the Committee concludes that this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 The Committee notes that the author has withdrawn his claims in relation to the question of independence of the Parole Board.

6.7 The Committee notes the author's claim that he is a victim of a violation of articles 15 and 26 because the Sentencing Act 2002 has not been applied to him. He argues that the minimum non-parole period for preventive detention is five years, whereas when he was sentenced, the minimum non-parole period was ten years<sup>12</sup>. The Committee notes its jurisprudence on changes in sentencing and parole regimes that "it is not the Committee's function to make a hypothetical assessment of what would have happened if the new Act had been applicable to him", and that it cannot be assumed what a sentencing judge applying new sentencing legislation would in fact have concluded by way of sentence.<sup>13</sup> The Committee's jurisprudence has also noted the relevance of a prediction as to the author's own future behaviour to the duration of imprisonment.<sup>14</sup>

6.8 The Committee notes that, even assuming for the purposes of argument that article 15, paragraph 1, of the Covenant applies to the period after conviction and sentence and that changes in parole entitlements within a preventative detention regime amount to a penalty within the meaning of the same provision, the author has not shown that sentencing under the new regime would have led to him serving a shorter time in prison. The contention that the author would have been released earlier under the new regime speculates on a number of hypothetical actions of the sentencing judge, acting under a new sentencing regime, and of the author himself. The Committee therefore concludes, consistent with its earlier jurisprudence<sup>15</sup>, that the author has not shown that he is a victim of the alleged violation of articles 15, paragraph 1, and article 26, and this part of the communication is inadmissible under article 1 of the Optional Protocol.

6.9 The Committee has noted the submissions made by the State party and the author on the availability of domestic remedies. It considers that there is no obstacle to the admissibility of the remaining issues raised by the author in his communication and will proceed to examine these issues on the merits.

6.10 The Committee concludes that the claims based on violations of article 9, paragraph 1 (arbitrary detention); article 9, paragraph 4 (review of detention); article 10, paragraph 3 (rehabilitation); article 14, paragraph 3 (c) and paragraph 5 (relating to the issue of delay); articles 7, 10, paragraph 1 and 14 (relating to the alleged excessive nature of the sentence) of the Covenant have been sufficiently substantiated and should be considered on the merits.

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<sup>12</sup> Section 80 (repealed) of the Criminal Justice Act 1985.

<sup>13</sup> *MacIsaac v Canada*, op.cit, at paragraphs 11 and 12.

<sup>14</sup> *Van Duzen v Canada*, op.cit, at paragraph 10.3.

<sup>15</sup> *Ronald van der Plaats v. New Zealand*, decision adopted on 7 April 2006

### Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The author has claimed that he is a victim of undue delay in the hearing of his appeal. The Committee notes that initially the author's appeal was heard in 1996, but that in 2002 a Privy Council and Court of Appeal judgement considered flawed the procedure applied in the hearing of the appeal. Subsequently the author was given an opportunity to apply for a rehearing of his appeal, which he did on 21 May 2003. The Court of Appeal rejected his appeal on 17 December 2004. In the specific circumstances of the case, the Committee considers that the delay in determining the author's appeal does not amount to a violation of article 14, paragraphs 3(c) and 5.

7.3 As regards the author's claim that the imposition of the sentence of preventive detention was manifestly excessive in his case, the Committee notes that the author has a long history of sexual assault and indecency offences, that he had been warned on several occasions that in case of re-offending he might be sentenced to preventive detention, and that he committed the offense for which he was convicted to preventive detention within three months of his release from prison after having been convicted for a similar offense. The Committee considers that in the circumstances of the present case, the sentence of preventive detention was not so excessive as to amount to a violation of either article 7, 10, paragraph 1, or 14 of the Covenant.

7.4 The Committee recalls that the sentence of preventive detention does not per se amount to a violation of the Covenant, if such detention is justified by compelling reasons that are reviewable by a judicial authority<sup>16</sup>. As to the claim under article 9, paragraph 4, the Committee observes that the maximum finite sentence for the author's offense was seven years' imprisonment at the time he was convicted<sup>17</sup>. Accordingly, the author had served three years of detention for preventive purposes, at the time of his first Parole hearing in 2005. The Committee refers to its finding in *Rameka*<sup>18</sup> and finds that the author's inability to challenge the existence of substantive justification for his continued detention for preventive reasons during that time was in violation of his right under article 9, paragraph 4, of the Covenant to approach a court for a determination of the lawfulness of his detention period.

7.5 The Committee notes that the author remains in detention following completion of the minimum ten year period of preventive detention, due to the absence of a sufficient release plan showing the supervision and support necessary for his re-integration in society. It notes that the author himself is responsible for the production of such a plan and chose not to attend certain rehabilitation programmes which would have been an important preliminary step in this process. While recognising that it is the duty of the State party in cases of preventive detention to provide

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<sup>16</sup> See the Committee's Views in *Rameka et al. v. New Zealand*, CCPR/C/79/D/1090/2002, Views adopted on 6 November 2003, para. 7.3.

<sup>17</sup> Section 140A (repealed) of the Crimes Act 1961

<sup>18</sup> See the Committee's Views in *Rameka et al. v. New Zealand*, CCPR/C/79/D/1090/2002, Views adopted on 6 November 2003, para. 7.2

the necessary assistance that would allow detainees to be released as soon as possible without being a danger to the community, it would appear that in the present case the author has contributed himself to the delay in putting the plan together thereby holding up the consideration of his release. The Committee concludes therefore that the author has failed to demonstrate violations of article 9, paragraph 1, and article 10, paragraph 3 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 9, paragraph 4, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[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.]

## APPENDIX

### Individual opinion of Committee member Mr. Krister Thelin (dissenting)

1. The majority has found a violation of the author's right under article 9, paragraph 4, of the Covenant. I respectfully disagree.
2. In line with the Committee's finding in *Rameka et al v. New Zealand*<sup>19</sup>, the majority correctly underscores, that a sentence of preventive detention under the State party's criminal legal system does not as such amount to a violation of the Covenant. Furthermore, the lawfulness of the author's sentence was reviewed upon appeal.
3. The fact that the author, having been sentenced by a court in a lawful manner, did not have recourse to additional judicial review of his continued detention for a number of years does not, in my view, constitute a violation of article 9, paragraph 4.
4. This provision should not be interpreted so as to give a right to judicial review of a sentence on an unlimited number of occasions (cf. dissenting opinion of Mr. Ivan Shearer et al in *Rameka et al. v. New Zealand*). No distinction should in this respect be made between a finite sentence of imprisonment, where questions of parole may later arise, or, as in the present case, when the sentence is of preventive detention with a fixed minimum period before the sentence may be reviewed.
5. For these reasons the Committee should have found a non-violation also of article 9, paragraph 4, of the Covenant.

[signed] Mr. Krister Thelin

[Done 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.]

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<sup>19</sup> Communication No. 1090/2002, Views adopted on 6 November 2003