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HUMAN RIGHTS COMMITTEE
Forty-seventh session

VIEWS

Communication No. 282/1988

Submitted by:	Leaford Smith [represented by counsel]
Alleged victim:	The author
State party:	Jamaica
Date of communication:	15 February 1988 (initial submission)
Documentation references:	Decisions - CCPR/C/WG/32/D/282/1988 (Working Group rule 86/91 decision, dated 21 March 1988) - CCPR/C/37/D/282/1988 (Decision on admissibility, dated 17 October 1989)
Date of adoption of Views:	31 March 1993

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

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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
- Forty-seventh session -

concerning

Communication No. 282/1988

Submitted by:	Leaford Smith [represented by counsel]
Alleged victim:	The author
State party:	Jamaica
Date of communication:	15 February 1988 (initial submission)
Date of decision on admissibility:	17 October 1989

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

Meeting on 31 March 1993,

Having concluded its consideration of communication No. 282/1988, submitted to the Human Rights Committee by Mr. Leaford Smith 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, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

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*/ Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's Views.

1. The author of the communication is Leaford Smith, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of violations of his human rights by Jamaica.

The facts as submitted by the author :

2.1 The author was arrested on 27 October 1980 and charged with the murder, on 26 October 1980 in the Parish of St. James, of one Errol McGhie. On 26 January 1982, he was convicted and sentenced to death in the St. James Circuit Court. The Jamaican Court of Appeal dismissed his appeal on 24 September 1984. A subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed in February 1987, on the ground that there was no written judgement of the Jamaican Court of Appeal. A second petition for special leave to appeal was prepared and filed by the author's *pro bono* representative in London; this was dismissed on 15 December 1987 on unspecified grounds.

2.2 At the trial, the brother of the deceased, Owen McGhie, testified that on the evening of 26 October 1980, he, the deceased and three other men were talking on the main road when the author came out of a field with a sawn-off shotgun and fired a shot into the group. The prosecution further relied on sworn evidence given during the preliminary inquiry, held between 16 January and 26 March 1981, by another brother of the deceased, Merrick McGhie, and by one Ephel Williams. Neither witness was present at the trial.

2.3 The author gave a sworn statement from the dock, testifying that the deceased and others, including Owen McGhie, had lain in wait for him with the gun because they suspected him of having warned a group of "labourites" (supporters of the Jamaican Labour Party) about a plan to attack them. The author further claimed that one Lloyd Smart had aimed the gun at him and that it had gone off accidentally, killing Errol McGhie, as he, Leaford Smith, tried to knock it out of Lloyd Smart's hand.

2.4 According to the author, the prosecution's evidence, according to which the fatal shot was fired from a distance of about 5 metres, was at odds with the medical evidence, which estimated that the fatal shot was fired from a distance of no more than two feet. Besides, the author states, a shot fired from a 24-inch sawn-off shotgun into a gathering of people would have certainly resulted in the death or injury of more than one individual.

2.5 As to the appeal, the author indicates that the Court of Appeal only gave an oral judgement; he was subsequently informed by the Jamaica Council for Human Rights that no written judgement was to be expected.

2.6 On 17 November 1987, a warrant was issued for the execution of the author on 24 November 1987. A request for stay of execution was submitted by the author's counsel to the Governor-General of Jamaica, on the ground that new evidence had been obtained, which would justify a re-trial. Excerpts of counsel's petition read as follows:

> ... "I have had an opportunity to read the Affidavit of Ephel Williams and having regard to all the circumstances surrounding this case, it would appear that his disclosures as to what really transpired on the night of 26 October 1980, would, at the very least, influence Your Excellency in Council to grant a stay of execution so that these said disclosures may be carefully and diligently investigated and studied.
>
> The evidence given by the investigating officer at page 40 of the trial transcript disclosed that, when Leaford Smith was cautioned at the Montego Bay Police Station, he stated: 'Me never mean to shoot him'. At page 41 and 46, this statement is repeated to the same effect.
>
> This development would have attracted a verdict of manslaughter if the truth had been uncovered then ....
>
> One has to bear in mind that at that time the unlawful possession of a firearm attracted a mandatory sentence of life imprisonment, hence the basis to fabricate and implicate each other, not being unmindful of the more serious charge of murder.
>
> While the Crown is not saddled with the burden of establishing 'motive', and no motive was established in this case, the Crown witnesses stated that there was a good relationship between Mr. Smith and Mr. Errol McGhie ....
>
> This fact would further underscore the credible nature of Ephel William's affidavit which is further buttressed by the pathologist's evidence in which he stated that Errol McGhie was shot within a distance of two feet as contrasted with the Crown's version of eighteen feet ...".

2.7 The stay of execution was granted; pursuant to Section 29, paragraph 1(a), of the Judicature (Appellate Jurisdiction) Act, the Governor-General referred the case

back to the Court of Appeal for review.1/ Subsequently, the Court of Appeal granted leave to adduce new evidence in the case and a hearing was set for 29 February 1988; the hearing was postponed, reportedly on the ground that some of the relevant documents could not be located.

2.8 Under cover of a letter dated 10 January 1989, the author forwards a letter from his counsel which indicates that, on 5 December 1988, the Court of Appeal rejected the new evidence. Three affidavits were presented to the Court, all of which contradicted the evidence presented by the prosecution and the defence during the author's trial. Thus, the affidavits filed by Merrick McGhie and by Ephel Williams contradicted their own sworn evidence in support of the prosecution's case. Neither Mr. McGhie nor Mr. Williams can be located by the authorities. The third affidavit, by one Angela Robinson, contradicts in part the author's evidence. Although this witness was present in court on 5 December 1988, the judges declined to hear her, holding that the affidavits did not satisfy the test for the admissibility of fresh evidence.2/

2.9 The authors of the above-mentioned affidavits deny that Mr. Smith had emerged from the yamfield and fired into a group of people including the deceased. The affidavit of Merrick McGhie, dated 1 December 1987, states, in particular, "[t]hat any story about the killing of my brother that suggests that he was shot at deliberately is not true .... The insistence of my brother Owen that Leaford Smith shot my brother Errol intentionally was done only out of a desire to avoid implicating himself in the offence of

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1/ Section 29, paragraph 1(a), of the Judicature (Appellate Jurisdiction) Act, states: "The Governor-General ... may, if he thinks fit at any time, refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted".

2/ The Court of Appeal allows fresh evidence to be adduced if the evidence is relevant, credible and was not available at the trial. It would appear that the Court of Appeal was not satisfied with the credibility of the affidavits of Ephel Williams and Merrick McGhie, as they contradicted their sworn testimony at the preliminary inquiry: Ms. Robinson's evidence would appear to have been excluded on the ground that she had not seen what actually transpired at the *locus in quo*. This is all hypothetical, however, as the Court of Appeal has not issued in writing its reasons for rejecting the new evidence, although the Court stated at the hearing that it would do so.

unlawful possession of a firearm".

2.10 Ephel Williams, in his affidavit dated 8 August 1984, states: "The first time that I was called to give evidence at the Gun Court, I ... did not attend. On the second occasion, I was served a subpoena. I did not go to give evidence at the trial because I could not continue to be part of the plot to blame Leaford Smith for shooting Errol ... and I also feared, on good grounds, that if I attended court and told the truth, all Errol's relatives, especially Owen McGhie, would hurt me badly. ... That Owen, Merrick, Errol, Leaford, Junior James and I have lived fairly close to one another as we stand for and support socialism as a political belief and out of loyalty to them, but

more so out of fear of reprisal I went along with that story and this is the reason why I previously told an untrue story. That neither Owen nor Leaford told the truth to the court. The gun went off when it was being passed from Leaford Smith to Owen McGhie who wanted to look at it".

The complaint:

3.1 The author alleges that his trial was unfair. He contends that he had inadequate time to prepare his defence. He submits that he could only consult with his lawyer on the opening day of the trial. Furthermore, he was informed that one of the jurors was seen at the home of the deceased the night before the start of the trial. The judge, apparently, did not investigate the matter. In this context, he points out that although his trial lasted two days, it took the jury less than 20 minutes to return their verdict. The author further complains that the trial judge did not address the discrepancy between the evidence of the main witness for the prosecution and that of the pathologist. It is submitted that, although there were at least five potential witnesses to the shooting, only two were summoned to the trial, of whom only Owen McGhie said he had seen the actual shot being fired.

3.2 As to the appeal, the author submits that although the Jamaican Court of Appeal is not bound by law to produce a written judgement, it ought to do so in the interest of justice, especially in capital cases. He further claims that the absence of a written judgement deprived him of an effective appeal to the Judicial Committee of the Privy Council, since that body dismissed his petition on the ground that the merits of an appeal against conviction could not be considered.

The State party's observations on admissibility :

4. In its submission, dated 7 December 1988, the State party contends that the communication is inadmissible on the ground of non-exhaustion of domestic remedies, as required by article 5, paragraph 2(b), of the Optional Protocol, without providing further explanations.

The Committee's admissibility decision :

5. On 17 October 1989, the Committee declared the communication admissible in respect of article 14 of the Covenant. It noted the State party's contention that the communication was inadmissible because of non-exhaustion of domestic remedies, and observed that the Judicial Committee of the Privy Council had dismissed the author's petition for special leave to appeal on two occasions, and that the Court of Appeal rejected the author's application to review his case on the ground that the evidence adduced was inadmissible. In the circumstances, the Committee found that there were no further effective remedies for the author to exhaust.

Review of admissibility decision:

6.1 By further submission of 7 January 1991, the State party reiterates that the communication is inadmissible because of non-exhaustion of domestic remedies. In respect of the alleged violations of article 14, it submits that the author can file for constitutional redress under Section 25 of the Jamaican Constitution, for violations of his rights protected by Section 20.

6.2 In reply to the State party's submission, counsel submits that a constitutional motion in the Supreme Court of Jamaica would inevitably fail, in the light of the precedent set by the Judicial Committee of the Privy Council's decisions in *DPP v. Nasralla* [(1967) 2 AER 161] and *Noel Riley et al. v. Attorney-General* [(1982) 3 AER 469], where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law. Since the author alleges unfair treatment under the law, and not that post-constitutional laws are unconstitutional, the constitutional remedy is not available to him.

6.3 Besides, counsel submits, if the State party were correct in asserting that a constitutional remedy was indeed available, at least in theory, it would not be available to the author in practice because of his lack of financial means and the unavailability of legal aid. Counsel affirms that it is extremely difficult to find a lawyer in Jamaica who is willing to represent applicants for purposes of a constitutional motion on a *pro bono* basis. Therefore, counsel concludes, it is the State party's inability or unwillingness to provide legal aid for such motions which absolved Mr. Smith from pursuing constitutional remedies.

7.1 The Committee has taken note of the State party's arguments on admissibility

formulated after the Committee's decision declaring the communication admissible, especially in respect of the availability of constitutional remedies which the author may still pursue. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

7.2 However, the Committee also recalls that by submission of 10 October 1991 concerning another case,3/ the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3(d), of the Covenant. In the view of the Committee, this supports the finding, made in the decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol. Accordingly, there is no reason to revise the decision on admissibility of 15 March 1990.

7.3 Furthermore, bearing in mind that the author was arrested in October 1980, convicted in January 1982, that his appeal was dismissed in October 1984 by the Court of Appeal and his petitions for special leave to appeal in 1987 by the Judicial Committee, and that furthermore the Court of Appeal of Jamaica rejected the author's application to review his case in December 1988, the Committee also finds that recourse to the Supreme (Constitutional) Court would entail an unreasonable prolongation of the application of domestic remedies which, together with the absence of legal aid, cannot be required of the author under article 5, paragraph 2(b), of the Optional Protocol. There is, accordingly, no reason to reverse the decision on admissibility of 17 October 1989.

Examination of the merits:

8. The State party contends that, as the author's claim of unfair trial is based on the contradictory nature of the evidence produced during the trial, it essentially raises issues of facts and evidence which the Committee is not competent to evaluate. In this connection, the State party refers to the Committee's jurisprudence.

9.1 Counsel submits that, prior to the trial, Mr. Smith had no opportunity to consult

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3/ Communication No. 283/1988 (*Aston Little v. Jamaica*), Views adopted on 1 November 1991.

his legal representatives about the preparation of the defence. He only had a brief interview with his counsel, during a brief postponement on the first morning of the trial. It is submitted that the inadequate time the author had for the preparation of the defence amounts to a violation of article 14, paragraph 3(b), of the Covenant.

9.2 Counsel further submits that, as a result of the author's inability to consult with his legal representatives, a number of key witnesses for the defence were not traced or called to the trial, constituting a violation of article 14, paragraph 3(e), of the Covenant. Thus:

(a) According to Owen McGhie, the principal witness for the prosecution, five men were present at the time of the shooting. Of the four potential prosecution witnesses only Owen McGhie and one Junior James were called. Only Owen McGhie said that he saw the actual shot fired; Junior James gave circumstantial evidence. Neither Ephel Williams nor Merrick McGhie were called to give evidence at the trial; although both had made statements at the preliminary inquiry, L.B., the police officer in charge of the inquiry, denied at the trial that he had been able to contact either man. The affidavits of the two men indicate that, had they been available for examination and cross-examination at the trial, their evidence could have been crucial;

(b) Owen McGhie suggested that one F. was present at the *locus in quo*, and L.B. testified at the trial that F. had been arrested and charged in the case, but was subsequently acquitted. It is submitted that the defence had no opportunity to interview F., or to call him as a witness, due to lack of time for the preparation of the defence;

(c) The author maintained throughout his trial that, the day after the shooting, he went to the Spring Mount police station together with one F.W. in order to make a statement about what had happened. However, the officer on duty refused to take the statement, saying that he had already heard that he, Leaford Smith, had shot the deceased. He was then taken into custody. On 28 October 1980, he saw L.B. at the police station, giving the above-mentioned officer an order to transfer him to the Montego Bay police station. L.B., however, initially testified that he had first seen Mr. Smith, on 10 November 1980, at the Montego Bay police station, when the latter was charged with the murder of Errol McGhie; under cross-examination, L.B. later admitted that he had seen Mr. Smith some time earlier, at the Spring Mount police station. It is submitted that this important discrepancy was not effectively pursued by the defence at the trial. Furthermore, counsel submits that, due to the inadequate time available for the preparation of the defence, no investigations were carried out in respect of the author's claims, and that neither F.W. nor the officer involved was called to give evidence;

(d) The author further contended that F. was not present at the *locus in quo*; he claimed that Lloyd Smart was present and that he was detained but later released. Under cross-examination, Owen McGhie admitted that Lloyd Smart was detained in connection with the shooting; L.B., however, denied that he had ever been held. According to counsel, this was an important conflict of evidence, tending to cast further doubt on the honesty of L.B; yet the relevant police custody records were not checked by the defence due to inadequate time for the preparation of the case.

9.3 Counsel notes that the author was only tried 14 months after he was arrested. In particular, there was a delay of 10 months after the preliminary inquiry was closed; during this time, the author had no legal assistance, but since he was kept in police custody, he was unable to carry out his own investigations in order to prepare his defence.

9.4 Counsel further notes that it took another 32 months before the appeal was heard and dismissed, and that to date no written judgement has been issued by the Court of Appeal. In this context, counsel submits a letter, dated 20 June 1986, from the Registrar of the Court of Appeal indicating that no written judgement was to be expected in the author's case. The failure of the Court of Appeal to issue a written judgement within a reasonable time is said to amount to a violation of article 14, paragraphs 3(c) and 5, of the Covenant, as it deprived the author of an effective appeal to the Judicial Committee of the Privy Council. Counsel points out that under rule 4 of the Privy Council rules, a reasoned judgement of the Court of Appeal is required if the Judicial Committee is to entertain an appeal. As to the further appeal hearing on 5 December 1988, counsel affirms that the author's representative was assured that the Court of Appeal would put its reasons in writing at a later date, but that no such document has been produced some four years later. Thus, it is submitted, the author is again prevented from effectively petitioning the Judicial Committee of the Privy Council, contrary to article 14, paragraphs 3(c) and 5.

9.5 Finally, with reference to the Committee's jurisprudence, counsel submits that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As there are no further remedies available to the author, and the final sentence of death was passed after a trial that did not meet the requirements of the Covenant, article 6 of the Covenant is said to be violated in the author's case.

10.1 As to the substance of Mr. Smith's allegations, the Committee notes with concern that the State party has confined itself to the observation that the facts relied upon by the author seek to raise issues of facts and evidence that the Committee is not competent to evaluate. The State party has not addressed any of the author's specific allegations concerning violations of fair trial guarantees. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith all the allegations of violations of the Covenant made against it and its judicial authorities, and to make available to the Committee all the information at its disposal. The Committee is of the opinion that the summary dismissal of the author's allegations, as in the present case, does not meet the requirements of article 4, paragraph 2. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

10.2 The Committee does not accept the State party's contention that the communication merely seeks to raise issues of facts and evidence. The communication raises other issues concerning the law and practice of Jamaica in regard to capital cases which require examination on the merits. The Committee reaffirms its jurisprudence that it is in principle for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case or to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury or the judge's conduct of the trial are clearly arbitrary or amount to a denial of justice. Having reviewed the trial transcript, the Committee notes that the medical evidence strongly suggested that the deceased was shot from a very close range. This medical evidence was brought to the attention of the jury by the judge, and the jury chose not to take this evidence into account. The Committee therefore does not consider that the guarantees of a fair trial were violated in this regard.

10.3 In respect of the author's claim that the jury, or one of its members, was biased, the Committee notes that this issue has not been further substantiated and therefore does not reveal a violation of article 14 of the Covenant.

10.4 As to the author's claims that he was not allowed adequate time to prepare his defence and that, as a result, a number of key witnesses for the defence were not traced or called to give evidence, the Committee recalls its previous jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation

of the principle of equality of arms.4/ The determination of what constitutes "adequate time" requires an assessment of the circumstances of each case. In the instant case, it is uncontested that the trial defence was prepared on the first day of the trial. The material before the Committee reveals that one of the court-appointed lawyers requested another lawyer to replace him. Furthermore, another attorney assigned to represent the author withdrew the day prior to the trial; when the trial was about to begin at 10 a.m., the author's counsel asked for a postponement until 2 p.m., so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before. The Committee notes that the request was granted by the judge, who was intent on absorbing the backlog on the court's agenda. Thus, after the jury was empanelled, counsel had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner. This, in the Committee's opinion, is insufficient to prepare adequately the defence in a capital case. There is also, on the basis of the information available, the indication that this affected counsel's possibility of determining which witnesses to call. In the Committee's opinion, this constitutes a violation of article 14, paragraph 3(b), of the Covenant.

10.5 It remains for the Committee to decide whether the failure of the Court of Appeal to issue a reasoned judgement violated any of the author's rights under the Covenant. Article 14, paragraph 5, of the Covenant guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law".5/ For the effective exercise of this right, a convicted person must have the opportunity to obtain, within a reasonable time, access to duly reasoned judgements, for every available instance of appeal. The Committee observes that the Judicial Committee of the Privy Council dismissed the author's first petition for special leave to appeal because of the absence of a written judgement of the Jamaican Court of Appeal. It further observes that over four years after the dismissal of the author's appeal in September 1984 and his petitions for leave to appeal by the Judicial Committee in February and December 1987, no reasoned judgement had been issued, which once more deprived the author of the possibility to effectively petition the Judicial Committee. The Committee therefore finds that Mr. Smith's rights under article 14, paragraph 3(c) and article 14, paragraph 5, of the Covenant, have been violated.

4/ See Communications Nos. 253/1987 (*Paul Kelly v. Jamaica*), Views adopted on 8 April 1991, paragraph 5.9; 283/1988 (*Aston Little v. Jamaica*), Views adopted on 1 November 1991, paragraph 8.3.

5/ See Communication No. 230/1987 (*R. Henry v. Jamaica*), Views adopted on 1 November 1991, paragraph 8.4.

10.6 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, and which could no longer be remedied by appeal, constitutes a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal".6/ In the instant case, since the final sentence of death was passed without having met the requirements for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

6/ See CCPR/C/21/Rev.1, page 7, paragraph 7.

11. 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 the Committee disclose violations of article 14, paragraphs 3(b) and (c), the latter in conjunction with paragraph 5, and consequently of article 6 of the Covenant.

12. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The Committee is of the view that Mr. Leaford Smith, a victim of violations of article 14 and consequently of article 6, is entitled, according to article 2, paragraph 3(a), of the Covenant to an effective remedy, in this case entailing his release.

13. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's Views.

[Done in English, French and Spanish, the English text being the original version.]

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