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HUMAN RIGHTS COMMITTEE
Ninety-fourth session
13-31 October 2008

DECISION

Communication No. 1489/2006

Submitted by:	José Rodríguez Rodríguez (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	26 March 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 7 August 2006 (not issued in document form)
Date of adoption of decision:	30 October 2008
Subject matter:	Extent of the review of criminal case against complainant on appeal by Spanish courts

* Made public by decision of the Human Rights Committee.

Procedural issues:	Non-exhaustion of domestic remedies; failure to substantiate claims
Substantive issues:	Right to have the conviction and sentence reviewed by a higher tribunal according to law
Articles of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	2; 5, paragraph 2 (b)

[ANNEX]

Annex

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

Ninety-fourth session

concerning

Communication No. 1489/2006*

Submitted by: José Rodríguez Rodríguez (not represented by counsel)

Alleged victim: The author

State party: Spain

Date of communication: 26 March 2006 (initial submission)

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

Meeting on 30 October 2008,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 26 March 2006, is José Rodríguez Rodríguez, a Spanish national born in 1948. He claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is not represented by counsel.

1.2 On 9 November 2006, the Rapporteur on New Communications and Interim Measures decided that the admissibility of the communication should be considered separately from the merits.

* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè-Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Factual background

2.1 On the basis of information obtained by telephone tapping, on 23 November 2000, the Central Investigating Court No. 5 opened a criminal investigation against the author and two other persons allegedly involved in an international drug trafficking operation. Following the investigation, the case was referred to the fourth section of the Criminal Division of the National Court (Audiencia Nacional), where a trial was held. On 21 May 2003, the National Court sentenced the author and the two other persons to 20 years' imprisonment and ordered the payment of a fine of 18,783,775.25 euros and legal costs, finding them guilty of an offence against public health (trafficking in cocaine), aggravated by the large quantity of drugs confiscated (595 kg), their membership of a criminal organization and the extremely serious nature of the offence (Criminal Code, art. 370).[1]

2.2 On 30 October 2003, the author lodged an appeal in cassation with the Second Chamber of the Supreme Court, on 11 grounds. These included: dismissal of evidence; the right to have his conviction and sentence subjected to a full and effective review by a higher tribunal; the right to confidentiality of communications; and the improper application of article 370 of the Criminal Code.

2.3 In its judgement of 8 July 2004, the Supreme Court, having examined each of the grounds of the appeal in cassation, partially upheld the appeal insofar as the improper application of article 370 of the Criminal Code was concerned and consequently issued a new ruling maintaining the fine but reducing the sentence to 12 years' imprisonment. With regard to the complaint that the right to have the sentence and conviction reviewed by a higher tribunal had been violated, the Court stated:

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[1] Article 370. The penalty imposed shall be one or two degrees higher than the one established in article 368 when:

1. Minors under the age of 18 or persons with mental disabilities are used to commit these offences;

2. The person sentenced is a head, administrator or employee of an organization described in article 369, paragraphs 1 (2a) and 1 (3a);

3. The acts described in article 368 are of an extremely grave nature.

Cases of an extremely grave nature are cases in which the quantity of the substances referred to in article 368 is considerably greater than what is deemed significant, or in which vessels or aircraft have been used for transport, or the acts indicated have been carried out by simulating international commercial transactions, or involve international networks dedicated to such activities, or when three or more of the circumstances set out in article 369, paragraph 1, are present.

In the cases set out in paragraphs 2 and 3 above, those found guilty shall also be liable to a fine in an amount three times the value of the drugs that are the subject of the offence.

"Article 14.5 of the International Covenant on Civil and Political Rights does not refer explicitly to a second hearing, but rather to the right of every person convicted of an offence to have his or her conviction and sentence reviewed by a higher tribunal, according to law, which allows some leeway in the application of the provision in different legal systems … nor should it be understood as meaning that the provision obliges States to provide for a second hearing with a full retrial, thus implying not a review but new proceedings, with all the difficulties that this entails. It is for this reason that referring the conviction and sentence to a higher court cannot alter the nature of individual testimony, whose evaluation is based on the assumption of immediacy.

…[t]he right to an appeal in cassation must be viewed in the manner that is most favourable to the accused. One consequence of this requirement that the interpretation most favourable to the person on trial must be adopted has been that Spanish jurisprudence has been transformed by these decisions and has been broadened to an extraordinary degree insofar as the traditional limits of cassation recognized by the Supreme Court prior to the entry into force of the Constitution and the notion of matters of law that can be appealed are concerned. This has been accompanied by a corresponding reduction in questions of fact excluded from the remedy of cassation to those that would require the resubmission of evidence in order to permit its re-evaluation. Thus a decision on evidence can be corrected in appeal when the court that heard the case departed from the rules of logic, the axioms of experience or scientific knowledge."

2.4 On 19 January 2005, the author submitted an application for *amparo* with the Constitutional Court, alleging, inter alia, violations of his right to a trial with all guarantees owing to a violation of the right to a second hearing set out in article 14, paragraph 5, of the Covenant, of the presumption of innocence and the confidentiality of telephone communications. In a decision dated 16 January 2006, the Constitutional Court rejected the application, maintaining, inter alia, that the Supreme Court had reviewed his conviction and sentence in accordance with the requirements of article 14, paragraph 5, of the Covenant.

Complaint

3. The author alleges that there is no higher court in the State party that can make a full and impartial assessment of the evidence and questions of fact raised during his initial hearing in the National Court (Audiencia Nacional). The remedy of appeal in cassation before the Supreme Court is only a partial review that does not meet the requirements of article 14, paragraph 5, of the Covenant, and thus he has been deprived of his right to have his conviction and sentence reviewed in full by a higher court.

State party's observations on admissibility

4.1 In its observations dated 6 October 2006, the State party argues that the author did not raise in either the Supreme Court or the Constitutional Court the question of the alleged limited nature of the review through the remedy of cassation. Consequently, it maintains that the communication should be considered inadmissible on the basis of a failure to exhaust domestic remedies.

4.2 The State party argues that, according to the jurisprudence of the Supreme Court,[2] appeal in cassation is not limited to a review of the applicable law. The State party refers also to decisions of the Committee[3] in which the adequacy of the remedy of appeal in cassation in the light of article 14, paragraph 5, of the Covenant is acknowledged.

4.3 The State party claims that the task at hand is not to formulate general and abstract opinions on its system of remedies but to determine whether, in the present case, the right to have one's conviction and sentence reviewed has been respected. It goes on to say that the communication does not specify which points or which evidence ought to have been reviewed but simply that a review ought to have taken place. The State party points out that, in the present case, the Supreme Court did review the sentence that had been appealed and modified the penalty imposed. On the basis of the foregoing, the State party concludes that the communication is clearly unfounded and constitutes an improper use of the Covenant, and should therefore be declared inadmissible under article 3 of the Optional Protocol.

Author's comments

5.1 On 23 January 2008, the author submitted his comments on the State party's observations on admissibility. The author claims that he raised the issue of a lack of a full review of his conviction and sentence before the State party's courts. In this connection, the author states that this complaint was the second ground set out in his application for an appeal in cassation before the Supreme Court, in which he cited the lack of a full and effective review by that Court, which could not reassess the evidence but could only consider the formal and legal aspects of his conviction. As for the remedy of *amparo* before the Constitutional Court, the lack of defence resulting from this absence of a review was cited as the first ground of the application. In the light of the foregoing, the author alleges that he has exhausted domestic remedies, and that it is for this reason that the violation of his right to a full review of his conviction was raised in every court to which he applied.

5.2 The author notes that the review of his conviction by the Supreme Court was limited to questions of form and legality. The modification of his sentence by the Supreme Court is a question of legality relating to the remedy of appeal in cassation that poses no impediment to his complaint relating to the absence of a second hearing.

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

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[2] The State party refers to the decision of 29 July 2002 in the *Banesto* case.

[3] These include communication No. 1356/2005, *Parra Corral v. Spain*, decision on admissibility of 29 March 2005, and communication No. 1389/2005, *Bertelli Galvez v. Spain*, decision on admissibility of 25 July 2005.

6.2 The Committee has ascertained, as required by article 5, paragraph 2 (b), of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee takes note of the State party's observations that the author did not exhaust all available domestic remedies. The Committee observes, however, that the author filed a complaint of violation of his right to a second hearing with both the Supreme Court and the Constitutional Court, and that both courts ruled against him.[4] The Committee therefore concludes that domestic remedies have been exhausted.

6.4 With regard to the State party's observation that the communication should be declared inadmissible due to lack of substantiation, the Committee notes that the decision by the Supreme Court makes it clear that the Court thoroughly examined each of the grounds for appeal adduced by the author, and that the Court considered that the author's claim regarding the improper application of article 370 of the Criminal Code was valid and accordingly reduced the penalty imposed on him from 20 years' imprisonment to 12 years. Consequently, the Committee is of the view that the complaint relating to article 14, paragraph 5, is not sufficiently founded for purposes of admissibility and therefore determines that it is inadmissible under article 2 of the Optional Protocol.[5]

7. The Committee therefore decides:

(a) That the communication is inadmissible in the light of article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the Spanish 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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[4] See paragraphs 2.3 and 2.4.

[5] See communication No. 1375/2005, *Subero Beisti v. Spain*, decision of 1 April 2008, para. 6.4; communication No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, para. 4.4; and communication No. 1059/2002, *Carvallo Villar v. Spain*, decision of 28 October 2005, para. 9.5.