



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Ninety-second session
17 March-4 April 2008

VIEWS

Communication No. 1360/2005

Submitted by: Mr. Laureano Oubiña Piñeiro (represented by counsel,
Mr. Fernando Joaquín Ruiz-Jiménez Aguilar)

Alleged victim: The author

State party: Spain

Date of communication: 30 April 2003 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the
State party on 8 February 2005 (not issued in document
form)

CCPR/C/89/D/1360/2005: Decision on admissibility,
adopted on 7 March 2007

Date of adoption of Views: 3 April 2008

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Review of conviction and sentence in cassation.
<i>Procedural issues:</i>	Exhaustion of domestic remedies, insufficient substantiation of the alleged violations.
<i>Substantive issues:</i>	Right to have a sentence and conviction reviewed by a higher court.
<i>Article of the Covenant:</i>	14, paragraph 5.
<i>Article of the Optional Protocol:</i>	2

On 3 April 2008, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1360/2005.

[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-second session

concerning

Communication No. 1360/2005*

Submitted by: Mr. Laureano Oubiña Piñeiro (represented by counsel,
Mr. Fernando Joaquín Ruiz-Jiménez Aguilar)

Alleged victim: The author

State party: Spain

Date of communication: 30 April 2003 (initial submission)

Decision on admissibility: 7 March 2007

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

Meeting on 3 April 2008,

Having concluded its consideration of communication No. 1360/2005, submitted on behalf of Laureano Oubiña Piñeiro 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,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

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

1. The author of the communication, dated 30 April 2003, is Laureano Oubiña Piñeiro, a Spanish national born in 1946. He claims to be the victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel, Fernando Joaquín Ruiz-Jiménez Aguilar.

Factual background

2.1 On 28 February 1997, the court of Arenys de Mar opened an investigation into three persons suspected of drug trafficking. These three suspects were arrested on 21 June 1997. A number of kilos of hashish were found in the lorry in which the suspects were travelling and were impounded, along with their mobile phones.

2.2 The investigation was then assigned to the Senior Judge at the National High Court. On 7 January 1999, this court, at the prosecutor's request, opened an investigation into the author. The prosecutor based the request on a report by the telephone company Telefónica regarding calls made and received on the impounded mobile phones in June 1997. One of the calls was made to the telephone belonging to Ramón Lago, the author's father-in-law.

2.3 According to the author, the telephone records were illegally obtained, since the internal memories of the mobile telephones were tampered with by third parties and it was not possible to establish who had obtained the records or under whose authorization, casting doubt on the veracity of their content. The records were included in the investigation without the court registrar having certified who had handed them over and whether or not they were the originals. The prosecutor did not request an expert report on the origins of the records or on the manner in which they had been obtained. As proof that the records were false, the author points out that all the calls listed lasted for one minute and that one of the records listed a call made both from and to the telephone belonging to Ramón Lago.

2.4 The author maintains that the prosecutor fabricated the contents of the telephone conversations made from his father-in-law's telephone, accusing the author of having had conversations about transporting and supplying the impounded drugs.

2.5 The author claims that, during the oral proceedings, the other defendants did not implicate him in the events, the defendant denied his involvement, and the prosecution witnesses did not mention him. The prosecutor proposed a public reading of the telephone records, but the author's lawyer objected, questioning the validity of the evidence because of the alleged irregularities in the way it had been obtained, the manner in which it had been included in the investigation and the absence of an expert report. The court accepted the objection to a public reading of the records, and they were incorporated by reference, without being subjected to public scrutiny or challenged. The author maintains that there was no proof of his use of his father-in-law's telephone, the identities of the persons who used that telephone, or the content of their conversations.

2.6 The National High Court concluded that the author was a member of a gang involved in selling hashish; that on 19 June 1997 he had made a telephone call to confirm the supply of drugs for transport; that on 20 June 1997 he had made another telephone call to a co-defendant to

confirm that the latter had the trafficked drugs in his possession; that on 21 June 1997 he had again telephoned this co-defendant to discuss transporting the drugs; and that his father-in-law's telephone had been frequently used for calls between the author and the other defendants.

2.7 On 4 October 1999, the National High Court found the author guilty of an offence against public health and sentenced him to four years and four months' imprisonment and a fine of 2.4 billion pesetas (approximately 14.5 million euros).

2.8 On 28 January 2000, the author lodged an appeal in cassation with the Supreme Court, in which his sole complaint was that his right to be presumed innocent had been violated. He alleged that the lower court did not have sufficient evidence to conclude that he had committed the offence. He argued that there should be a suitable correlation or concordance between the evidence and the consequences, in order to rule out any arbitrariness in the court's conclusions. The author maintains that cassation has a limited scope, as the Supreme Court has consistently ruled that the appraisal of evidence and the presumption of innocence are separate issues.

2.9 The Supreme Court upheld the National High Court's sentence in its ruling of 5 July 2001. The author states that the Supreme Court concluded that the National High Court's arguments were based on its direct apprehension of the evidence, i.e., it was the judges' own perception that formed the basis of their evaluation and their determination of credibility, and that was not a matter for the remedy of cassation since it was a question of fact that the Supreme Court could not deal with owing to the "very procedure of the appeal".

2.10 On 27 July 2001, the author submitted an application for *amparo* to the Constitutional Court, again alleging a violation of his right to the presumption of innocence. The Constitutional Court rejected this appeal in its ruling of 28 October 2002.

Complaint

3.1 The author alleges that his right to have his conviction and sentence reviewed by a higher court was violated. He maintains that the Supreme Court considered only whether the law had been correctly applied, basing its finding on the facts established in the lower court ruling.

3.2 The author maintains that the legislation of the State party provides for the review of sentences by a higher court in the case of minor offences and ordinary offences. However, for serious offences, the only appeal possible is cassation, with its restricted scope under the criminal procedure legislation. An appeal in cassation may be based only on an infringement of constitutional provisions or the erroneous application of substantive rules of law, on the basis of the facts declared proven in the sentence. Facts are corrected only in exceptional cases. The aim of cassation is to check the application of the law by the courts and to harmonize legal precedents. To achieve this, the Judiciary Organization Act introduced the further aim of ensuring compliance with constitutional guarantees. Cassation does not provide for a review of the facts, guilt, classification of the offence or the sentence. The Supreme Court has stated that ruling on the credibility of the evidence produced in the lower court does not fall within its remit. The author cites the Committee's concluding observations on the periodic report of Spain (CCPR/C/79/Add.61) and the Committee's Views in the case of *Gómez Vázquez v. Spain*

(communication No. 701/1996, Views adopted on 20 July 2000). He also cites the declaration made by the Criminal Division of the Supreme Court, meeting in plenary on 13 September 2000 after learning of the Committee's Views in the *Gómez Vázquez* case, asserting that cassation complies with article 14, paragraph 5, of the Covenant.

3.3 The author maintains that, in his case, the Supreme Court ruling did not review the lower court's appraisal of the evidence, which consisted of mere suspicions against him without sufficient proof of his involvement.

State party's observations on the admissibility of the communication

4.1 In its note verbale dated 19 April 2005, the State party questioned the admissibility of the communication, alleging that domestic remedies had not been exhausted as required by article 5, paragraph 2 (b), of the Optional Protocol, given that the author did not include the argument of the violation of his right to have his conviction reviewed in his *amparo* application to the Constitutional Court.

4.2 The State party added that an *amparo* application to the Constitutional Court was now materially effective in matters such as the one analysed in this communication, coming as it did after the Committee issued its Views in *Gómez Vázquez v. Spain* (communication No. 701/1996), and the Court was therefore aware of the arguments therein. An appeal to the Constitutional Court would thus not be futile.

4.3 The State party considered that the communication was clearly without merit under article 3 of the Optional Protocol, since the National High Court's ruling was reviewed by the Supreme Court and even by a third instance, the Constitutional Court. The right to a second hearing did not include the right for the matter to be resolved in accordance with the complainant's wishes. Consequently, the State party considered that the communication constituted an abuse of the right to bring complaints before the Committee.

Author's comments

5.1 On 12 July 2005, the author replied to the State party's observations, saying that, before bringing the matter before the Committee, he had exhausted domestic remedies with his appeal in cassation to the Supreme Court against the National High Court ruling of 4 October 1999 and his *amparo* application to the Constitutional Court against the Supreme Court ruling of 5 July 2001. The author dismissed the arguments concerning the Constitutional Court's awareness of the Committee's Views in *Gómez Vázquez v. Spain*, since the Court had declared his 100-page appeal inadmissible in a two-page ruling drafted in general and formal terms, without considering the reported violations on the merits. He added that the Human Rights Commission of the Spanish Bar Association had made a presentation to the United Nations Economic and Social Council in which it had called for pending procedural reforms to be implemented so that in Spain all persons would be entitled to have their sentence and conviction reviewed by a higher court.

5.2 The author stated that the Committee itself considered it unnecessary to exhaust extraordinary remedies before the Constitutional Court prior to submitting a communication under the Optional Protocol.¹

Additional comments by the State party on admissibility and on the merits

6.1 In a note dated 8 August 2005, the State party added that, contrary to the author's statement, the Constitutional Court, in rulings such as that of 3 April 2002, expressly referred to the Committee's Views in the case of *Gómez Vázquez v. Spain* (communication No. 701/1996) and consequently accepted the appeal and ruled on the merits. The author blamed his own mistake in failing to submit his argument concerning the violation of his right to have his conviction reviewed using the mechanisms available to him in the national legal system and subsequently submitting a complaint about the Constitutional Court's ruling to the Committee. The State party requested that the communication should be declared inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

6.2 Additionally, the State party maintained that the communication was without merit as the author has enjoyed the right to a second hearing and even a third one, as the National High Court ruling was reviewed by both the Supreme Court and the Constitutional Court.

6.3 The State party took the view that, in this particular case, the conviction was reviewed by the Supreme Court, which ruled on all the issues raised by the author in his appeal, including those referring to factual and evidentiary aspects. While the author based his appeal on the violation of his right to be presumed innocent, on the grounds that the lower court had not proved the causal link between the proven acts and the author, the Supreme Court reviewed the circumstances that permitted a link to be established between the defendant and the offence, in such a manner that it was proven that there was a variety of concordant pieces of evidence concerning a time period that coincided exactly with the time the offence was committed, which were listed in the judgement and which corresponded to the circumstances of the case.

6.4 The State party was of the view that the circumstances of the current case were similar to those addressed in the Committee's Views on *Parra Corral v. Spain* (communication No. 1356/2005), and that the same decision should be made.

Additional comments by the author

7. On 14 October 2005, the author submitted additional observations in which he stated that it was the Supreme Court itself that dismissed any question of reviewing the appraisal of the evidence and acts declared proven, citing passages from the ruling of 5 July 2001.

¹ The author cites the Views of the Committee on communications Nos. 493/1992, 526/1993, 864/1999, 986/2001, 1006/2001, 1007/2001, 1073/2002 and 1001/2002.

Committee's decision on admissibility

8. On 7 March 2007, at its eighty-ninth session, the Committee decided that the communication was admissible since domestic remedies had been exhausted and the complaint under article 14, paragraph 5, had been sufficiently substantiated.

State party's additional observations on the merits

9.1 On 17 October 2007 the State party reiterated its argument that the Committee had on many occasions recognized that the remedy of cassation in a criminal case was sufficient to meet the requirements of article 14, paragraph 5, of the Covenant. It emphasized that, in the case in question, the Supreme Court had analysed and fully responded to the sole ground for cassation cited by the author, extensively examining the facts on which the conviction at first instance had been based. In the light of that examination, the Court had concluded that "the frequency of the telephone contacts, the supply of the telephones to the principals by the complainant himself and, above all, the payment of the telephone charges by a person connected with him, as well as the fact that one of the principals knew that those telephones came from a Galician contact with whom participation in the affair had been discussed, go to make up a set of circumstances that permit a link to be established between the defendant and the offence in a manner which is not at variance with the principles governing circumstantial evidence, since the evidence is varied and also concordant, concerns a time period that coincides exactly with the time the offence was committed, is listed in the judgement and corresponds to the circumstances of the case".

9.2 The State party added that the author had not specified how he wished the conviction and sentence to be revised, so that analysis of the adequacy of the judgement in cassation must focus exclusively on the internal consistency of the judgement, and on the description and opinion of the appeal set out in the judgement itself.

Additional comments by the author

10.1 On 11 January 2008, the author contended that, although in some cases the Committee had rejected certain appeals based on the lack of review in cassation, in other cases it had held that article 14, paragraph 5, of the Covenant had been breached.

10.2 The author pointed out that the Supreme Court conducts a review in cassation of judgements handed down in sole instance by the Provincial or National High Courts on grounds which are limited to infringements of constitutional provisions or the erroneous and improper application of substantive rules of criminal law, on the basis of the facts declared proven in those judgements. He also pointed out that the Supreme Court itself had acknowledged that only the legislature had the power to bring the remedy of cassation into line with article 14, paragraph 5, of the Covenant. Despite the Committee's requests to the State party to rectify its failure to comply with the Covenant, Spain had not modified its legislation in that direction to date and did not appear to have any plans to do so. It was thus ignoring the Committee's request and its international obligations.

10.3 In the case in question, the author holds that the Supreme Court has not made any substantive changes in its case law which would make cassation a genuine second instance in criminal matters and enable the slightest review and modification of the facts declared to be

proven by the lower court. The author quotes part of the judgement in question, in which the Supreme Court points out that “there is abundant case law in this Court which has established in a general manner that statements by persons documented in the proceedings in the form of testimony, reports or other types of statement cannot be cited as indicating an error in the interpretation of documentary evidence. At the same time the case law has highlighted the fact that in the context of article 849.2 of the Criminal Procedure Act, the only documents to be considered are those whose probative value is binding for the trial court, and the Court has repeatedly stated that the documents cited by the complainant lack such probative value ... Consequently, the issue is extraneous to the purpose of the remedy of cassation, since technically it is only a question of fact that this Court cannot deal with owing to the very procedure of the appeal”.

Committee’s consideration on the merits

11.1 The Committee has examined the substance of the present communication in the light of all the information furnished by the parties.

11.2 The Committee notes the author’s allegation that the evidence for the prosecution was not reviewed in cassation by the Supreme Court. It further notes the State party’s observations to the effect that the Court fully reviewed the National High Court ruling. The Committee observes that the Supreme Court’s ruling of 5 July 2001 shows that the Court reviewed the National High Court’s appraisal of the evidence. Consequently, the Committee cannot conclude that the author has been denied the right to have his conviction and sentence reviewed by a higher court in accordance with article 14, paragraph 5, of the Covenant.

12. In the light of the above, 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 do not reveal any violation of article 14, paragraph 5, of the Covenant.

[Done 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.]
