



**International covenant
on civil and political
rights**

Distr.
RESTRICTED*

CCPR/C/87/D/1387/2005
11 August 2006

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10 – 28 July 2006

DECISION

Communication No. 1387/2005

<u>Submitted by:</u>	Laureano Oubiña Piñeiro (represented by counsel, Mr. Jose Luis Mazón Costa)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Spain
<u>Date of communication:</u>	7 April 2004 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 29 April 2005 (not issued in document form)
<u>Date of adoption of decision:</u>	25 July 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Extent of review of criminal case on appeal (*cassation*) by Spanish courts.

Procedural issue: Failure to substantiate claim

Substantive issue: Right to have sentence and conviction reviewed by a higher tribunal according to law.

Article of the Covenant: 14, paragraph 5.

Article of the Optional Protocol: 2.

[ANNEX]

ANNEX

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

Eighty-seventh session

concerning

Communication No. 1387/2005*

<u>Submitted by:</u>	Laureano Oubiña Piñeiro (represented by counsel, Mr. Jose Luis Mazón Costa)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Spain
<u>Date of communication:</u>	7 April 2004 (initial submission)

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

Meeting on 25 July 2006

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication, dated 7 April 2004, is Laureano Oubiña Piñeiro, a Spanish national born in 1946. He claims to be a victim of a violation of article 14, paragraph 5, of the Covenant by Spain. The Optional Protocol came into force for the State party on 25 April 1985. The author is represented by counsel José Luis Mazon Costa.

Factual background

2.1 On 19 June 2002, the Criminal Chamber of the National Court (*Audiencia Nacional*) sentenced the author to six years and nine months' imprisonment and payment of a fine for trafficking in hashish. According to the judgment, in July 1997, the police had found some

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

packages with hashish in Pontevedra, Spain. The following day, agents of the Service of Customs Surveillance (*Servicio de Vigilancia Aduanera*), under the Ministry of Internal Affairs, arrested the author near a football ground in Vigo. The author insists that he was convicted on the basis of purely circumstantial evidence.

2.2 The author appealed (*casación*) to the Second Chamber of the Supreme Court, alleging a violation of the principle of presumption of innocence, because he was convicted notwithstanding insufficient evidence against him. He alleged that the court of first instance mistakenly assessed the facts of his case. On 25 September 2003, the Supreme Court rejected the appeal. The author contends that the Supreme Court expressly stated that the appeal (*casación*) “was not a second instance”.

2.3 The author appealed (*amparo*) to the Constitutional Court, alleging several violations of his constitutional rights, including the right to a second instance. The author contends that, as to the right to a second instance, the appeal (*amparo*) has no prospect of success, because the Constitutional Court’s jurisprudence is contrary to the Committee’s Views. He invokes a judgment of the Constitutional Court of November 2002, in which it reiterates that the appeal (*casación*), although limited in its scope, complies with the requirements of article 14, paragraph 5, of the Covenant. The same judgment allegedly rejects the possibility that the Committee’s Views could be an authentic interpretation of the Covenant.

The complaint

3. The author alleges a violation of his right to have his sentence and conviction reviewed by a higher court (article 14, paragraph 5). He invokes the wording used by the Court while rejecting one of the grounds of appeal, that the appeal (“*casación*”) was not a second instance. He contends that the Supreme Court did not review the evidence of the trial, and invokes the Committee’s Views in three cases against Spain¹.

State party’s submissions on admissibility and author’s comments:

4.1 On 30 June 2005, the State party contests the admissibility of the communication on the basis of non-exhaustion of domestic remedies and lack of substantiation. With regard to the first requirement, the State party argues that the author failed to demonstrate that he exhausted domestic remedies, because he did not provide copies of the judgment of the Constitutional Court in his *amparo* appeal. According to the State party, the author’s omission deprives the Committee of the opportunity to assess whether or not the Constitutional Court pronounced itself on the extent of the review carried out by the Supreme Court, especially taking into account that the Constitutional Court’s jurisprudence establishes the threshold that any court review should meet to comply with the requirements of article 14, paragraph 5, of the Covenant.

4.2 The State party alleges that the communication is manifestly ill-founded because:

¹ Communication No701/1996, *Gómez Vázquez v Spain*, Views of 20 July 2000; communication No. 986/2001, *Semey v Spain*, Views of 30 July 2003; and communication No.1007/2001, *Sineiro Fernández v Spain*, Views of 7 August 2003.

- a) The author did not provide a copy of the appeal (cassation) which makes it impossible to know which matters he submitted for review to the Supreme Court.
- b) The Supreme Court stated that the author limited himself to reproducing the arguments he advanced in the court of first instance, without substantiating his allegations.
- c) The mere reading of the judgment of the Supreme Court demonstrates the broad extent of the review carried out by that court, both on issues of fact and law. The court extensively analyzed 21 grounds of appeal invoked by the author, including allegations related to: the right to an impartial tribunal; the handing down of the judgment beyond the time-limit stipulated in the Spanish Criminal Procedure Code; the conduct of the preliminary investigation in two separate settings; the exclusion as evidence of expert reports on issues of law; that the Customs Surveillance Agency has no competence to carry out arrests; the secrecy of private correspondence; the acceptance of telephonic wire-tapping and the transcripts of such tapping as evidence; the alleged absence of the telephones and the cassettes used in the tapping at the beginning of the oral hearing; the right to defence; the appropriateness of the evidence proposed by the author; the alleged erroneous weighing of the evidence and the violation of the presumption of innocence.
- d) In several passages of the judgment, the Court referred to the facts of the case and the evidence. The State party invokes and transcribes that part of the judgment in which the Court addresses the allegation of a violation of the principle of the presumption of innocence.

5.1 By submission of 20 September 2005, the author notes that, on 14 March 2005, the Constitutional Court dismissed his appeal (*amparo*). He adds that the Constitutional Court erred in concluding that the Spanish cassation system complies with the requirements of article 14, paragraph 5, of the Covenant. He insists that the judgment of the National Court (*Audiencia Provincial*) acknowledges that the appeal (*cassation*) is not a second instance.

5.2 The author insists that his conviction was based on purely circumstantial evidence and that he always denied involvement in the crime. He adds that defendants cannot freely raise allegations on appeal (cassation), but just those limited grounds allowed by the law. The appeal (cassation) does not allow for the review of facts, as the remedy of appeal does. He insists that he could not obtain a full review of his conviction because he could not raise any allegations on review of facts or mistakes in the weighing of evidence.

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 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2. With regard to the alleged violation of article 14, paragraph 5, the Committee notes that, contrary to the author's allegations, the Supreme Court did not state that it was not a higher tribunal in the sense of Article 14 paragraph 5 of the Covenant when deciding about an appeal. Rather, it used the phrase "forgetting that cassation is not a second instance", which the author relies on, in order to explain why the author could not, as he did, limit himself to reproduce, on appeal, claims he had submitted to the lower court (i.e. that the court of first instance was incompetent to try him), instead of substantiating them by reference to the judgment of the lower court. In reality, the Supreme Court did, as transpires from the text of the judgment, deal extensively with issues of facts, examined closely the National Court's assessment of the evidence, and explained in considerable detail why it considered that the evidence against the author was sufficient to outweigh the presumption of innocence. In the light of these considerations, the Committee concludes that the claim under article 14, paragraph 5, is insufficiently substantiated, for purposes of admissibility. It, therefore, concludes that the communication is inadmissible under article 2 of the Optional Protocol.²

6.3. Having reached such a conclusion, the Committee considers that it does not need to examine the other grounds of inadmissibility invoked by the State Party.

7 The Human Rights Committee therefore decides that:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the author.

[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.]

² I.e., Communications No. 1059/2002, *Carvallo v Spain*, Decision of 28 October 2005, para. 9.5; No. 1356/2005, *Parra Corral v. Spain*, Decision of 29 March 2005, para. 4.3; No. 1389/2005, *Bertelli v. Spain*, Decision of 25 July 2005, para.4.5; and No. 1399/2005, *Cuartero Casado v Spain*, Decision of 25 July 2005, para. 4.4.