



**International covenant
on civil and
political rights**

Distr.
RESTRICTED*

CCPR/C/96/D/1366/2005
18 August 2009

ENGLISH
Original: SPANISH

HUMAN RIGHTS COMMITTEE
Ninety-sixth session
13-31 July 2009

VIEWS

Communication No. 1366/2005

<u>Submitted by:</u>	Mr. Rocco Piscioneri (represented by counsel, Mr. José Luis Mazón Costa)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Spain
<u>Date of communication:</u>	9 August 2004 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 23 February 2005 (not issued in document form) CCPR/C/93/D/1366/2005, decision on admissibility adopted on 2 July 2008
<u>Date of adoption of decision:</u>	22 July 2009

* Made public by decision of the Human Rights Committee.

Subject matter: Right to review of conviction by a higher tribunal

Procedural issues: Exhaustion of domestic remedies - Claim insufficiently substantiated - Claim already examined by the Committee

Substantive issue: Right to review of conviction and sentence by a higher tribunal

Article of the Covenant: 14, paragraph 5

Articles of the Optional Protocol: 2 and 3

On 22 July 2009 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. 1366/2005.

[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-sixth session

concerning

Communication No. 1366/2005*

Submitted by:	Mr. Rocco Piscioneri (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	9 August 2004 (initial submission)
Decision on admissibility:	2 July 2008

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

Meeting on 22 July 2009,

Having concluded its consideration of communication No. 1366/2005, submitted by Mr. Rocco Piscioneri 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. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

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

1.1 The author of the communication, dated 9 August 2004, is Rocco Piscioneri, an Italian national born in 1950. 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 Spain on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

1.2 On 13 May 2005, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, agreed to the State party's request to separate the consideration of the admissibility and merits of the communication.

Factual background

2.1 On 11 January 1999, the Provincial High Court in Barcelona sentenced the author to a prison term of 8 years and 10 months for trafficking in hashish and for forgery. The author submitted an appeal in cassation to the Supreme Court,¹ a remedy that does not allow reconsideration of the evidence on which a conviction is based. On 9 October 2000, when the Court had not yet ruled on the application, the author requested the Supreme Court to suspend the proceedings.² On 11 October 2000, the Second Division of the Supreme Court rejected the author's request, whereupon the author instituted *amparo* proceedings, which were dismissed by the Constitutional Court on 11 December 2000. On 8 June 2001, the Supreme Court upheld the Provincial High Court sentence. The ruling on the cassation appeal partially recognized the ground for cassation relating to the applicability of aggravating circumstances under article 370 of the Criminal Code and reduced the sentence imposed on the author by six months. On 16 July 2001, the author again applied for *amparo*; his application was denied in a decision dated 28 October 2002. In both cases the author cited the Committee's Views in *Gómez Vázquez*³ but the courts did not take them into account.

2.2 The author submitted a communication under the Optional Protocol on 11 May 2000⁴ claiming, inter alia, a violation of article 14, paragraph 5, of the Covenant. The author maintained that, on that occasion, his complaint was not based on the Supreme Court's failure to review his conviction but on its refusal to entertain a request by the defence for suspension of the cassation proceedings until such time as the State party had brought its legislation into line with the *Gómez Vázquez* ruling. In its decision of 7 August 2003,⁵ the Committee ruled, with respect to article 14, paragraph 5, of the Covenant, that "the mere suspension of an on-going proceeding cannot be considered, in the Committee's opinion, to be within the scope of the right protected in

¹ The author submitted an appeal in cassation on six grounds, including the violation of his right to the presumption of innocence and the improper application of article 370 of the Spanish Criminal Code (aggravating circumstances).

² The author contends that he did so because he had learned that in the *Gómez Vázquez* case, the Committee had ruled that the remedy of judicial review or cassation ("casación") is not an effective remedy.

³ Communication No. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000.

⁴ The initial communication was supplemented on 5 January 2001.

⁵ Communication No. 956/2000, *Piscioneri v. Spain*, inadmissibility decision of 7 August 2003.

paragraph 5 of article 14 of the Covenant, which only refers to the right to a revision by a higher tribunal. Consequently, this part of the complaint must be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol”.⁶

The complaint

3. The author claims a violation of article 14, paragraph 5, of the Covenant inasmuch as he was denied a proper review of his conviction by the Supreme Court, since the remedy of cassation did not allow for a reconsideration of the evidence adduced against him.

State party's observations on admissibility

4.1 On 27 April 2005, the State party submitted comments on the admissibility of the communication. It argued that, in his appeal in cassation, the author did not raise the issues which he then put before the Committee and that his communication should consequently be declared inadmissible for failure to exhaust domestic remedies.

4.2 As to the alleged violation of article 14, paragraph 5, of the Covenant, the State party argues that the author has been able to exercise the right to have his sentence and conviction reviewed, since the trial court sentence was appealed in the Supreme Court and the Supreme Court's ruling was subsequently considered by the Constitutional Court. It points out that the European Court of Human Rights has accepted that the State party has a fully functioning system for the effective review of convictions.⁷

4.3 The State party further argues that, in this case, it is sufficient to read the judgement in cassation to see that the Supreme Court conducted a full review of the sentence handed down at first instance. Given this thorough reconsideration of the conviction and the sentence, it contends that there has clearly been no violation of article 14, paragraph 5, of the Covenant and that the communication is therefore manifestly unfounded. The State party asks for the communication to be ruled inadmissible as constituting an abuse of the purpose of the Covenant, under article 3 of the Optional Protocol.

Author's comments

5.1 The author replied to the State party's submission on 11 July 2005. He states that he explicitly cited the *Gómez Vázquez* ruling in his appeals but that the Supreme Court and the Constitutional Court ignored it. He therefore requested suspension of the cassation proceedings until such time as the State party had adapted its legislation, but his request was denied. He also contends that, as the Committee found in *Pérez Escobar*,⁸ the remedy of *amparo* is futile for the purposes of article 14, paragraph 5, of the Covenant.

⁶ Ibid, para. 6.7.

⁷ European Court of Human Rights, judgement of 30 November 2004 in respect of complaints Nos. 74182, 74186 and 74191 of 2001.

⁸ Communication No. 1156/2003, *Pérez Escobar v. Spain*, Views of 28 March 2006.

5.2 Moreover, the author states that his trial was based on facts, not legal issues, and yet the police statements on which the sentence was based could not be reviewed by the Supreme Court. As to the State party's reference to the case law of the European Court of Human Rights, the author argues that the European Court has no competence to rule on the compatibility of Spanish criminal cassation law with the right to a second hearing in criminal cases, since the State party has not ratified Protocol No. 7 to the European Convention on Human Rights.

Decision of admissibility

6.1 The Committee considered the admissibility of the communication on 2 July 2008 during its ninety-third session.

6.2 The Committee noted that the author had previously submitted a communication which it had considered on 7 August 2003. However, in the decision it reached in 2003 with respect to the claim under article 14, paragraph 5, of the Covenant, the Committee limited its consideration to the refusal by the Constitutional Court to review the Supreme Court decision to not suspend cassation proceedings; it did not consider the merits of the claim. The Committee observed that the claim put forward in the present communication is that the appeal in cassation was not an effective remedy for the review of the conviction as required by article 14, paragraph 5, of the Covenant.

6.3 With regard to the State party's argument that the author has not exhausted domestic remedies because he did not raise the issues in his appeal in cassation that he put before the Committee in his communication, the Committee noted that the author had invoked article 14, paragraph 5, of the Covenant in his application to the Supreme Court dated 9 October 2000 which he subsequently appealed in *amparo* to the Constitutional Court and in his appeal in *amparo* against the cassation ruling.⁹ It further noted that both applications were rejected. The Committee therefore concluded that domestic remedies had been exhausted.

6.4 The Committee considered that the author's complaint had been sufficiently substantiated insofar as the issues which it set out in relation to article 14, paragraph 5, and that those issues should be considered on the merits. It consequently declared the communication admissible.

State party's observations on the merits and author's comments

7. On 21 January 2009, the State party presented its observations on the merits of the communication. It referred to the jurisprudence of its Constitutional Court, according to which the appeal in cassation in criminal cases may meet the requirements of the Covenant, provided that the powers of review provided for by this remedy are interpreted broadly. In this regard, the State party invoked the Committee's jurisprudence,¹⁰ according to which the appeal in cassation was deemed to satisfy the requirements of article 14, paragraph 5, of the Covenant. The State

⁹ See para. 2.1.

¹⁰ See, *inter alia*, communications Nos. 1389/2005, *Bertelli Gálvez v. Spain*, decision of 25 July 2005; 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005; 1323/2004, *Lozano Araez et al. v. Spain*, decision of 28 October 2005.

party asserted that the cassation judgement discussed at length the facts and evidence upon which the conviction was based and that they were sufficient to override the presumption of innocence.

8. The author's response of 24 March 2009 reiterates his earlier claims that he did not obtain a full review of his sentence. He states that, as recognized by the Supreme Court, the assessment of the direct evidence is the exclusive responsibility of the court of first instance.

Issues and proceedings before the Committee

Consideration of the merits

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

9.2 The Committee takes note of the author's arguments in support of his assertion that the appeal in cassation does not constitute a full review as required by article 14, paragraph 5, of the Covenant. It also notes the State party's claims that the Court fully reviewed the Provincial Court ruling. The Committee observes that the Supreme Court's ruling of 8 June 2001 indicates that the Court reviewed each of the author's grounds of appeal, and reviewed the Provincial Court's assessment of the sufficiency of the evidence. The Committee further observes that the Supreme Court partially accepted the ground of appeal relating to the improper application of aggravating circumstances and consequently reduced the sentence initially imposed on the author. In addition, the Committee notes that, in this case, the Constitutional Court dismissed the *amparo* application on reasoned grounds and once again reviewed the Provincial Court's assessment of the sufficiency of the evidence. Consequently, the Committee concludes that the author has not 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.

10. 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 disclose a violation of article 14, paragraph 5, of the Covenant.

[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.]
