UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/83/D/1104/2002
25 May 2005

ENGLISH
Original: SPANISH

Human Rights Committee
Eighty-third session
14 March-1 April 2005

VIEWS

Communication No. 1104/2002

Submitted by:	Antonio Martínez Fernández (represented by counsel, Mr. José Javier Uriel Batuecas)
Alleged victim:	The author
State party:	Spain
Date of communication:	31 July 2001 (initial submission)
Document references:	Special Rapporteur's rule 97 (old rule 91) decision, transmitted to the State party on 25 July 2002 (not issued in document form)
Date of adoption of Views:	29 March 2005
Subject matter:	Scope of review of conviction and sentence on appeal in Spain
Procedural issues:	Same case submitted to another procedure of international settlement - reservation by the State party
Substantive issues:	Right of anyone convicted of a crime to have the conviction and sentence reviewed by a higher tribunal according to law
Article of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	2 and 5, paragraph 2 (b)

[ANNEX]

* Made public by decision of the Human Rights Committee.

GE.05-42086 (E) 070605 140605

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

Eighty-third session

concerning

Communication No. 1104/2002*

Submitted by:	Antonio Martínez Fernández (represented by counsel, Mr. José Javier Uriel Batuecas)
Alleged victim:	The author
State party:	Spain
Date of communication:	31 July 2001 (initial submission)

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

Meeting on 29 March 2005,

Having concluded its consideration of communication No. 1104/2002, submitted by Antonio Martínez Fernández 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. Nisuke Ando, Mr. Prafullachandra Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

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

1. The author of the communication, dated 31 July 2001, is Antonio Martínez Fernández, a Spanish citizen. 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, Mr. José Javier Uriel Batuecas.

Factual background

2.1 The author was a warrant officer in the Spanish army. He was sentenced by the Second Territorial Military Court on 26 March 1999, for the offence of disobedience, to 10 months' imprisonment, to suspension from official duties, and to suspension of voting rights. The author fractured his right hand in October 1995 and was placed on medical leave. In February 1996 he was ordered on three occasions to take a psychological and physical examination, but did not comply until the third time. On 1 March 1996 he was declared medically fit for duty and was told to report immediately to his military unit. Instead of complying, the author sent a number of documents certifying his temporary incapacity for duty. In late March 1996 he was again ordered to report for duty and again failed to appear, submitting instead a certificate of temporary incapacity.

2.2 The author filed an application for judicial review and annulment with the Fifth Chamber of the Supreme Court, convening as a military chamber. In the application the author referred to article 14, paragraph 5, of the Covenant. In a judgement of 29 December 1999, the Fifth Chamber rejected the appeal. Pursuant to article 325 of the Military Proceedings Act, which refers to articles 741 et seq. of the Criminal Procedure Act, the Chamber confined itself to hearing the arguments put forward in the appeal to decide whether or not they were well founded.

2.3 The author applied to the Constitutional Court for *amparo*, claiming violation of his right to review by a second court. In the application the author alleged that the Military Proceedings Act prohibited the Fifth Chamber of the Court from acting as a genuine court of appeal, in the sense of having full powers to review all past proceedings. He also referred to the Views of the Committee in the *Gómez Vásquez* case.[1] In a judgement of 9 May 2001, the Constitutional Court rejected the appeal.

2.4 On 27 July 2001, the author lodged a complaint with the European Court of Human Rights concerning the same case, also before the Committee. But on 12 September 2002, the author asked the European Court of Human Rights to withdraw his complaint, a fact which he communicated to the Committee on the same date. The secretariat of the European Court of Human Rights informed the Committee that in a decision of 3 December 2002 the Court had struck the author's complaint off the roll.

The complaint

3. The author claims that his right to have his conviction and sentence reviewed by a higher court was violated. He argues that, owing to the special nature of the appeal process, the Chamber may not hear or review the entire proceedings of the court of first instance, but only

analyse the grounds referred to by the applicant to decide whether or not they are in conformity with the law. The author asserts that the Chamber may rule only on irregularities in the judgement, and may not deal fully with the "rights" [sic] involved, but must confine itself to examining the applicant's arguments to determine whether or not they are well founded. The author maintains that there is no review by a higher tribunal, as provided for by article 14, paragraph 5, of the Covenant.

State party's observations on admissibility and merits

4.1 With regard to the admissibility of the communication, the State party maintains that there is no conclusive evidence that the European Court of Human Rights accepted the author's application to withdraw his complaint. It adds that the author has acknowledged having lodged simultaneous complaints with the Committee and the European Court of Human Rights and that this action by the author is contrary to article 5, paragraph 2 (a), of the Optional Protocol and renders the communication inadmissible. Even if proceedings before the European Court of Human Rights had concluded, they would have been conducted at the same time as proceedings before the Committee. The State party concludes that, even if the complaint before the European Court of Human Rights has been withdrawn, the reservation made under the Optional Protocol, as interpreted by the Committee in its inadmissibility decision on communication No. 1074/2002 (*Ferragut v. Spain*, decision of 28 March 2004) is applicable.

4.2 On the merits of the communication, the State party maintains that article 14, paragraph 5, does not establish the right for an appeal court to reconduct the trial *in toto*, but concerns the right to review by a higher tribunal of the proper conduct of the trial at first instance, including the application of the rules that led to the finding of guilt and the imposition of the sentence in the specific case. The object of the review is to verify that the decision at first instance is not manifestly arbitrary and that it does not constitute a denial of justice.

4.3 The State party maintains that the remedy of judicial review is based on the French system and that for historical and philosophical reasons it arose as a review limited to questions of law, and that it maintains this character in various European countries. The State party argues that the European Court of Human Rights has affirmed that States parties retain the right to determine the means for the exercise of the right to review, and may restrict such review to questions of law.

4.4 According to the State party, the Spanish remedy of judicial review is broader than the original French procedure, and complies with the requirements of article 14, paragraph 5, of the Covenant. It points out that the right to review by a second court does not include the right to reappraisal of the evidence, but means that courts of second instance examine the facts, the law and the judicial decision, and, excepting a finding of arbitrariness or denial of justice, uphold it. The State party claims that the conviction and sentence of the author were reviewed by the Supreme Court. It refers to the judgement of the Constitutional Court in the author's case, which stated that: "The applicant … failed even, beyond a mere formal statement of the law, to indicate what specific aspect of the court judgement he was prevented from having reviewed as a result of the legal nature of the application for judicial review, inasmuch as all the grounds cited by him were reviewed, and none was rejected as improper."

4.5 The State party says that the Committee's Views in *Gómez Vásquez* cannot be generalized and applied to other cases, since they are restricted to the specific case in which they were adopted. It also notes the manifest contradiction existing in international protection of the right to two levels of jurisdiction arising from the different interpretation of the European Court of Human Rights and the Human Rights Committee in respect of the same text.

Author's comments on the State party's observations on admissibility and merits

5.1 With regard to admissibility, the author informed the Committee that the European Court of Human Rights had acknowledged receipt of his application in a letter dated 21 September 2001 in which it informed him that his application might be found inadmissible, since neither article 6, paragraph 1, nor article 13 of the European Convention on Human Rights sets a requirement for various levels of jurisdiction and since Spain has not ratified Protocol No. 7 to that Convention. The Court also informed the author that his case would not be registered as a formal application until he determined whether or not he wished to maintain his complaint. The author appended a letter dated 20 December 2002 in which the European Court informed him that a panel of three judges had decided to strike his application off the roll, in accordance with article 37, paragraph 1, of the European Convention on Human Rights.

5.2 With regard to the merits, the author maintains that the placing by the European Court of Human Rights of a restrictive interpretation on the content of the right to a second level of jurisdiction should have no effect on the Committee's jurisprudence regarding the right to review of the conviction and sentence by a higher court.

5.3 The author asserts that the nature of the application for judicial review prevents consideration of the facts. Judicial review is a jurisdictional appeal intended essentially to standardize the interpretation of the law without constituting a second jurisdiction in that it does not permit review of the evidence submitted or assessment of the proof on which the sentencing court based its judgement, but is a review of legal violations of substance or form or of the assessment of the evidence in exceptional circumstances. Appeal cannot be made against the grounds for the judgement and is exceptional and confined strictly to form. The author maintains that the appeal does not permit genuine review of the conviction and sentence.

5.4 The author states that pursuant to the Committee's Views in *Gómez Vásquez*, the Second Chamber of the Supreme Court, convening in plenary session on 13 September 2000, referred to the appropriateness of initiating appeal proceedings before requesting judicial review. The author appended a copy of Act No. 19/2003, which entered into force in Spain at the end of December 2003; as mentioned in the Committee's Views in *Gómez Vásquez*, the Act generalizes a second level of jurisdiction in criminal cases, instituting appeals against judgements by provincial courts and the National High Court. The author indicates that the Act does not cover the military criminal justice system.

Issues and proceedings before the Committee

Considerations as to admissibility

6.1 In accordance with rule 93 of its rules of procedure, before considering any claim contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the State party's assertion that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol read in conjunction with the State party's reservation to this provision of the Optional Protocol,[2] the Committee notes that the author's communication to the Committee is dated 31 July 2001, that the author submitted a complaint alleging a violation of the right to a second level of jurisdiction to the European Court of Human Rights on 27 July 2001, that the European Court did not register the complaint as a formal application, that the author requested withdrawal of the complaint on 12 September 2002, and that the European Court of Human Rights accepted the withdrawal of the complaint on 3 December 2002.

6.3 The Committee notes that the author's complaint is not being considered and has not been considered or reviewed by the European Court of Human Rights, and that it was not registered as a formal complaint but was withdrawn by the author, and that the withdrawal was accepted by the Court without consideration of the merits of the issues raised by the author. The Committee concludes that the present communication is not inadmissible under article 5, paragraph 2 (a), of the Optional Protocol and the State party's reservation thereto.

6.4 The Committee considers that the complaint raises issues relating to article 14, paragraph 5, of the Covenant; it decides that it is admissible and proceeds to a consideration of the merits.

Consideration of the merits

7. The Committee notes that the main issue in the penal case against the author was the assessment of his capacity to perform military duty, and that means an assessment of facts. The Committee further notes the comments made by the State party concerning the nature of the remedy of judicial review, in particular that the court of second instance is limited to an examination as to whether the findings of the trial court amount to arbitrariness or denial of justice. As the Committee has determined in previous cases,[3] such limited review by a higher tribunal does not meet the requirements of article 14, paragraph 5. Therefore, the Committee concludes that the author is a victim of a violation of article 14, paragraph 5, of the Covenant.

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

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be reviewed in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. Considering that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[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.]

Notes

[1] Communication No. 701/1996, *Gómez Vásquez v. Spain*, decision of 20 July 2000.

[2] The official text of the reservation reads as follows: "The Spanish Government accedes to the Optional Protocol to the International Covenant on Civil and Political Rights, interpreting article 5, paragraph 2, of the Protocol to mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement."

[3] Communication No. 701/1996, *Gómez Vásquez v. Spain*, decision of 20 July 2000; communication No. 986/2001, *Semey v. Spain*, decision of 30 July 2003; communication No. 1007/2001, *Sineiro Fernández v. Spain*, decision of 7 August 2003; communication No. 1101/2002, *Alba Cabriada v. Spain*, decision of 1 November 2004.
