UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/88/D/1181/2003
16 January 2007

ENGLISH
Original: SPANISH

HUMAN RIGHTS COMMITTEE
Eighty-eighth session
16 October-3 November 2006

VIEWS

Communication No. 1181/2003

Submitted by:	Francisco Amador Amador and Ramón Amador Amador (represented by counsel, Emilio Ginés Santidrián)
Alleged victim:	The authors
State party:	Spain
Date of communication:	20 September 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 2 June 2003 (not issued in document form)
Date of adoption of Views:	31 October 2006
Subject matter:	Scope of review in cassation of criminal sentences

* Made public by decision of the Human Rights Committee.

GE.07-40125 (E) 130207 190207

Procedural issues:	-
Substantive issues:	Right to have a sentence and conviction reviewed by a higher court
Article of the Covenant:	14, paragraph 5
Article of the Optional Protocol:	-

On 31 October 2006, the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1181/2003. The text of the Views is appended to the present document.

[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

Eighty-eighth session

concerning

Communication No. 1181/2003*

Submitted by:	Francisco Amador Amador and Ramón Amador Amador (represented by counsel, Emilio Ginés Santidrián)
Alleged victim:	The authors
State party:	Spain
Date of communication:	20 September 2002 (initial submission)

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

Meeting on 31 October 2006,

Having concluded its consideration of communication No. 1181/2003, submitted to the Human Rights Committee on behalf of Mr. Francisco Amador Amador and Mr. Ramón Amador Amador 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 authors of the communication and the State party,

Adopts the following:

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

1. The authors of the communication, which is dated 20 September 2002, are Francisco Amador Amador and Ramón Amador Amador, Spanish nationals who claim to be the

* 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. Alfredo Castillero Hoyos, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

victims of a violation by Spain of article 14, paragraph 5, of the International Covenant on Civil and Political Rights. The authors are represented by Mr. Emilio Ginés Santidrián. The Optional Protocol entered into force in Spain on 25 April 1985.

Factual background

2.1 In a judgement dated 12 December 2000, the Almería Provincial Court found the authors guilty of an offence against public health (drug trafficking), with the aggravating circumstance of recidivism, and sentenced them both to 10 years' imprisonment and a fine of 20 million pesetas (about €120,200), with an additional penalty of disqualification from public service or office for the duration of the sentence.

2.2 The authors submitted an appeal in cassation to the Supreme Court, alleging: (a) a violation of the right to be presumed innocent, on the grounds of the inadequacy of the evidence presented in the trial court; (b) a violation of the right to due process, on the grounds that the search of the house where the drugs were found had been overseen by an official of the investigating court and not the court registrar; and (c) a violation of the right to be presumed innocent, on the grounds of the refusal to admit expert evidence submitted by the defence.

2.3 The Supreme Court considered these grounds for cassation in a judgement dated 2 January 2002. It found that the use of a court official rather than the court registrar in the above-mentioned search procedure was not unlawful, since the possibility of replacing the registrar with a competent official was provided for by law. It also rejected the authors' claim that their right to be presumed innocent had been violated as a result of the inadequacy of the evidence presented. It pointed out that the trial court had based the authors' conviction on an incriminating statement made by another person implicated in the case, on the authors' presence in the house where the cocaine was being kept, and on the fact that they emerged from that house with other defendants when the police arrived. The Supreme Court concluded that the evidence for the prosecution had been lawfully obtained, presented in oral proceedings in accordance with due process, and objectively evaluated by the trial court; the latter had, moreover, explained the reasons underlying its conclusion, and had thus respected the defendants' right to be presumed innocent. However, the Court did partially accept the third allegation that the refusal to hear expert evidence on the exact quantity of trafficked cocaine had constituted a violation of the authors' right to be presumed innocent. The Court found that, given the lack of clarity on the exact quantity of trafficked drugs as a result of discrepancies in the pretrial proceedings, evidence submitted by the authors should have been examined in order to determine the quantity involved. The Supreme Court therefore allowed part of the appeal and reduced the sentence to seven years' imprisonment; it also withdrew the fine, but upheld the remaining elements of the contested sentence.

2.4 The authors submitted an application for *amparo* to the Constitutional Court, claiming a violation of the right to be presumed innocent, on the grounds that the house search had been invalid and that there was no evidence that the trafficked substance was a narcotic. The application was rejected on 1 July 2002 as manifestly devoid of substance with regard to the Constitution. The Constitutional Court held that, as a warrant had been granted, the manner in which the search had been conducted was within the bounds of legality. Concerning the second

ground for the application, the Court deemed that the seizure of the substance, the expert evidence and witnesses' testimony were sufficient to constitute incriminating evidence regarding the nature of the substance.

The complaint

3.1 The authors claim a violation of article 14, paragraph 5, of the Covenant, arguing that the Spanish judicial system provides no effective right of appeal in cases involving serious offences, since provincial court judgements are subject to an appeal in cassation before the Supreme Court on very limited legal grounds only. Such appeals allow no reappraisal of the evidence, as all factual determinations by the lower court are final. In any complaint to the Supreme Court regarding an error of fact in the weighing of the evidence, the Supreme Court refers back to the lower court's appraisal of that evidence, which demonstrates the inadequacy of the Spanish legal process. The Supreme Court does not have the status of an appeal court and is consequently barred from re-examining the evidence; as it has no direct access to the evidence, it cannot determine what conclusions should be drawn therefrom.

3.2 When an appeal is lodged with the Supreme Court against an error of fact in the appraisal of the evidence, the Supreme Court refers back to the trial court's appraisal of the evidence, whereas an appeal court would be required to invoke the safeguards contained in the Covenant; this reveals the inadequacy of the Spanish legal process and, thus, a violation of the authors' rights.

3.3 The authors refer to the Committee's established jurisprudence to the effect that article 14, paragraph 5, of the Covenant requires a full appraisal of the evidence and the conduct of the trial. They argue that the real thrust of article 14, paragraph 5, is the principle of a full second hearing for the convicted person, not as a means of rectifying errors made during the first hearing, but as a realization of the right of the accused to be sentenced on the basis of a double finding - first by the trial judge and then by a collegiate appeal court.

3.4 The authors cite a decision by the Criminal Division of the Supreme Court, dated 25 July 2002, which states that, on the basis of Human Rights Committee decisions, the Supreme Court has extended the concept of points of law affording grounds for an appeal in cassation beyond the traditional limits. At the same time, its case law has reduced the points of fact excluded by the remedy, so that it now excludes only those that would require resubmission of the evidence in order to permit its re-evaluation.

State party's observations on admissibility

4.1 In its observations of 4 August 2003, the State party maintains that the communication should be declared inadmissible on the grounds that domestic remedies have not been exhausted or, failing that, on the grounds that it is totally without merit. The authors confine their complaint to the proposition that an appeal in cassation does not meet the requirements of article 14, paragraph 5, of the Covenant. Yet the ruling handed down following just such an appeal found partly for the authors and corrected, in their favour, facts that had been declared proven in the lower court's judgement. It appears from the Constitutional Court ruling that the authors at no time claimed a violation of the right to a review of the conviction and sentence handed down by the lower court, or of article 14, paragraph 5, of the Covenant.

4.2 Furthermore, it is clear from the Supreme Court's ruling that it conducted a thorough re-examination of the facts and evidence in the course of the appeal in cassation, and that the resulting reassessment of the facts deemed to have been proven was in the authors' favour. Under the circumstances, it is paradoxical to claim that a re-examination of the facts is limited under an appeal in cassation, when the ruling resulting from such an appeal shows that the facts were very thoroughly re-examined. The State party therefore concludes that the Committee should dismiss the communication as without merit.

Authors' comments

5.1 In their comments of 22 January 2004, the authors contend that the remedy of *amparo* in Spain is restricted in terms of the grounds on which an application may be based. These do not include the right to a second hearing, because such a right is not provided for in Spanish legislation on criminal cases falling under the jurisdiction of the provincial courts or the High Court. It is thus not possible to invoke article 14, paragraph 5, of the Covenant as the basis for either an appeal in cassation or an application for *amparo*. However, as in other cases that have come before the Committee, the Supreme Court judges who heard the appeal in cassation submitted by the authors have themselves noted that Spain's cassation procedure suffers from a number of shortcomings. The State party has on several occasions given the Committee assurances that it would carry out the necessary legislative reforms to introduce a second hearing in all criminal proceedings and reform the procedure for appeals in cassation to the Supreme Court in criminal cases. To date no such legislative reform has been carried out.

5.2 The authors argue that the principle of the presumption of innocence remained fully applicable following the trial in the lower court, which failed to consider evidence such as quantitative or qualitative analyses of the impounded substance. This was one of the reasons why the Supreme Court was obliged, in its wisdom, to quash part of the sentence. Since it could not hold the trial again, the authors had to be satisfied with a reduction of their sentence. The logical procedure would have been for the authors to be given a second trial in which the evidence of their innocence was examined.

Committee's decision on admissibility

6.1 On 4 July 2005, during its eighty-fourth session, the Committee considered the admissibility of the communication.

6.2 With respect to the State party's contention that domestic remedies had not been exhausted because the authors had not invoked a violation of their right to a review of the conviction and sentence during the *amparo* proceedings, the Committee observed, on the basis of the case before it and its previous decisions, that *amparo* was not an adequate mechanism for dealing with allegations regarding the right to a second hearing under the Spanish criminal justice system. It therefore concluded that domestic remedies had been exhausted.

6.3 The Committee concluded that the authors' complaint raised significant issues with respect to article 14, paragraph 5, of the Covenant and that those issues should be considered on the merits.

State party's observations on the merits

7.1 In its observations of 25 January 2006, the State party recalls that the Committee, in its decisions on earlier communications relating to article 14, paragraph 5, of the Covenant, considered the compatibility of each individual case with the Covenant without conducting a theoretical review of the Spanish legal system. It cites the Committee's decisions in communications Nos. 1356/2005 (*Parra Corral v. Spain*), 1059/2002 (*Carvallo Villar v. Spain*), 1389/2005 (*Bertelli Gálvez v. Spain*) and 1399/2005 (*Cuartero Casado v. Spain*), in which the Committee determined that the remedy of cassation in criminal cases met the requirements of the Covenant, and declared those communications inadmissible. It also cites a judgement of the Constitutional Court of 3 April 2002 (STC 70/02) in which the Court declares that there is a "functional similarity between the remedy of cassation and the right to the review of a conviction and sentence, as set out in article 14, paragraph 5, of the Covenant, provided that the concept of review by the court of cassation is interpreted broadly … It is incorrect to state that our system of cassation is restricted to an analysis of legal and formal issues and that it does not allow for a review of the evidence … Currently, under article 852 [of the Criminal Procedure Act], the remedy of cassation may be invoked for any violation of a constitutional precept. And, under article 24, paragraph 2 [of the Constitution] (trial with due process and presumption of innocence), the Supreme Court may review the legitimacy of the evidence on which the judgement is based and determine whether it is sufficient to outweigh the presumption of innocence and the reasonableness of the conclusions drawn. Therefore, [the applicant] does have a mechanism for a full review, in the sense that it is possible to reconsider not only the points of law but also the facts on which the finding of guilt is based, by reviewing the application of procedural rules and the evaluation of the evidence".

7.2 The State party notes that, in the case under consideration, the decision in cassation demonstrates that the sentence handed down by the trial court was very thoroughly reviewed, in that elements related to the presumption of innocence - namely, the evidence for the prosecution and an error in the appraisal of the evidence - were considered. Both these elements are suitable starting points for a review of the facts. In this case, moreover, the outcome of the review of the facts deemed to have been proven in the lower court was in the authors' favour, and it is therefore paradoxical, in the view of the State party, that they should be arguing that no review of the sentence and verdict was possible.

Authors' comments

8.1 On 3 March 2006, the authors submitted their observations on the merits. They point out that since the Committee issued its Views stating that the right to a second hearing was violated in the Spanish cassation procedure, more than 10 top legal authors have published studies supporting the Committee's position.

8.2 They add that a report on Spain by the Commissioner for Human Rights of the Council of Europe emphasized the Spanish Government's failure to comply with the Committee's Views on the right to a second hearing in the Spanish cassation procedure and invited the State party to comply with the Committee's demands in this area.

Issues and proceedings before the Committee

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

9.2 The Committee takes due note of the State party's contention that, in this case, the cassation proceedings included a full review of the facts and the evidence. Indeed, the Supreme Court thoroughly and objectively reviewed each of the grounds for the appeal, which were primarily based on an appraisal of the evidence examined by the trial court, and it was rightly on the basis of this reappraisal that the Court concluded that the refusal to hear expert testimony that would have established the precise quantity of trafficked cocaine was a violation of the authors' right to be presumed innocent. This was why the Court allowed part of the appeal in cassation and reduced the sentence imposed by the trial court. In the light of the circumstances of the case, the Committee concludes that there has been a genuine review of the conviction and sentence handed down by the trial court.

10. 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.

[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.]
