



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Ninety-third session
7-25 July 2008

VIEWS

Communication No. 1456/2006*

Submitted by: X (on her own behalf and on behalf of her daughter, Y)
(represented by counsel, Mr. José Luís Mazón Costa)

Alleged victim: Y

State party: Spain

Date of communication: 14 February 2006 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the
State party on 28 February 2006 (not issued in document
form)

Date of adoption of Views: 24 July 2008

Subject matter: Acquittal of a father charged with sexual abuse of his
three-year-old daughter and restoration of visiting rights

Procedural issues: Insufficient substantiation of the alleged violations; abuse of
the right to submit communications; failure to exhaust
domestic remedies

* Made public by decision of the Human Rights Committee.

Substantive issues: Alleged denial of justice through arbitrary evaluation of the evidence; a minor's right to private and personal life; a minor's right to protection

Articles of the Covenant: 14, paragraph 1; 17 and 24, paragraph 1

Articles of the Optional Protocol: 2, 3, 5.2 (b)

On 24 July 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. 1456/2006.

[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-third session

concerning

Communication No. 1456/2006*

Submitted by: X (on her own behalf and on behalf of her daughter, Y)
(represented by counsel, Mr. José Luís Mazón Costa)

Alleged victim: Y

State party: Spain

Date of communication: 14 February 2006 (initial submission)

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

Meeting on 24 July 2008,

Having concluded its consideration of communication No. 1456/2006, submitted to the Human Rights Committee on behalf of X 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 Committee members participated in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The texts of two individual opinions, one signed by Committee members Mr. Rajsoomer Lallah, Ms. Christine Chanet and Mr. Prafullachandra Natwarlal Bhagwati, and one signed by Ms. Ruth Wedgwood and Sir Nigel Rodley, are appended to the present decision.

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

1.1 The author of the communication, dated 14 February 2006, is X, a Spanish national acting on her own behalf and on behalf of her daughter, Y, born in 1994. She claims that her daughter is a victim of violations by Spain of article 14, paragraph 1, and of article 24, paragraph 1, read in conjunction with article 17, 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 Luís Mazón Costa.

1.2 On 3 May 2006, the Committee, acting through its Special Rapporteur on new communications, decided to consider the admissibility and merits of the case jointly.

Factual background

2.1 The author, a bank employee resident in Murcia who is legally separated from Z, filed a criminal complaint against the latter on 14 November 1997 for alleged sexual assault on their daughter, who was three years old at the material time. The complaint was based on the child's behaviour and comments after visits to her father, a child psychiatrist's report and a written testimonial from the child's day-care centre.

2.2 By a decision of 14 November 1997, Murcia Investigating Court No. 5 agreed to institute preliminary proceedings on the basis of the author's complaint. By a decision of 18 November 1997, the same Court agreed on a provisional suspension of the visiting arrangements between the father and daughter. As a result of the preliminary proceedings on 19 October 1998, the Court ordered the opening of oral proceedings and transferred the records to the Murcia Provincial Court after the Public Prosecutor's Office characterized the facts as constituting a continuing offence of sexual abuse of minors, pursuant to articles 74, 181.1, 2 and 3, and 192.2 of the Spanish Criminal Code. The private indictment characterized the facts as an attempted sexual assault.

2.3 On 21 May 2002, the Provincial Court acquitted Z of the alleged offences of sexual abuse and assault. The text of the judgement presents the proven facts as follows:

- That, following their legal separation in early 1997, the parties were continuously embroiled in legal disputes over the visiting arrangements for their daughter, with some 20 criminal charges being filed.
- That between late September and October 1997, the teaching staff at the kindergarten where the author's daughter was enrolled noticed a change in the minor's behaviour following visits to her father. She tended to be irritable, was abnormally tired and sleepy, and referred repeatedly to the "little tortoise" game, explaining that it involved her father having a little tortoise beneath his trousers and underpants which she caught and kissed. She had occasionally drawn the tortoise in the form of a penis.

- That in November 1997 the person in charge of the kindergarten decided to bring the foregoing facts to the author's attention. The author raised the matter with her psychiatrist, who referred her to a gynaecologist. The gynaecologist concluded that the child was anatomically normal but that the vaginal entrance seemed to be enlarged. She drew attention to the child's passivity during the examination, which was unusual for a child of that age. The mother subsequently took her daughter to a child psychiatrist, who issued a preliminary report concluding that sexual abuse had taken place, consisting, at a minimum, of exposure of an erect penis that the child had manipulated with masturbatory movements and had kissed in the course of erotic games.

2.4 The discussion in the oral proceedings focused on the evidence adduced in support of the charges, namely: (a) the report and video prepared by the psychologist and social worker of the Family Court technical team; (b) the report of the child psychologist who visited the minor; (c) the testimony of the kindergarten teachers; and (d) the report of the gynaecologist who visited the minor. The Court, having examined each of these items, concluded that the evidence they contained failed "to provide solid grounds for the conclusion that abuse actually occurred. The child's age and the contextual background, involving a confrontational marriage break-up, made it extremely difficult to establish what had occurred. It would therefore have been advisable to base the case on a rigorous and meticulous code of procedure conducted by specialists, with judicial intervention *ab initio*, so as to obtain a statement by the child based on adequate safeguards, and carefully recorded by audio-visual media to facilitate its reproduction whenever necessary and, in particular, for the trial (...). As such action had not been taken, any evidence that might have existed had been effectively lost. Furthermore, the father had consistently denied the facts, sticking to an account that was consistent, unchanging and basically watertight".¹

2.5 The judgement of acquittal handed down by the Murcia Provincial Court invalidated the decision by Murcia Investigating Court No. 5 of 18 November 1997 to suspend the visiting arrangements as a preventive measure. The Provincial Court held that "although it could take steps, acting on article 158 of the Civil Code and, in general, on Act 1/96 Organizing the Legal Protection of Minors, to restore and normalize relations between the father and daughter - which have been seriously damaged, to the child's detriment - in the Court's view, such measures should be ordered, at the earliest opportunity, by the Family Court dealing with the parents' marriage break-up, which is better equipped (psychosocial team) than this Court to devise whatever arrangements its experts consider to be most fitting, the basic aim being to serve the best interests of the child, and on the understanding that the goal is not merely the resumption of contact and visits but the restoration and strengthening of the bond between father and child so necessary for the daughter's personal and emotional stability, paying particular attention to those who might wish to obstruct that process".²

¹ Judgement No. 32/2002 of the Murcia Provincial Court rendered on 21 May 2002, seventh legal ground.

² Judgement No. 32/2002, *op. cit.*, seventh legal ground, *in fine*.

2.6 The author filed an appeal with the Supreme Court for annulment (*casación*) of the judgement of acquittal handed down by the Provincial Court, citing an alleged violation of the right to effective legal protection and the right not to be deprived of a defence, recognized in article 24, paragraphs 1 and 2, of the Spanish Constitution by virtue of the fact that the Provincial Court had no direct statement from the victim. The author further alleged that the Court had erred in its evaluation of the evidence provided by experts and witnesses. Lastly, she challenged the failure to apply articles 181.1 and 192 of the Criminal Code, arguing that the proven facts were subsumed in the offences characterized in those articles.

2.7 On 23 June 2003 the Supreme Court dismissed the grounds for annulment, ruling that the Provincial Court's reasoning in support of its judgement of dismissal had been sound. It had explicitly addressed the evidence in its possession, particularly the problem raised by the lack of direct viewing of the alleged victim's statement, and had concluded that there was insufficient evidence of the charges against the accused to undermine his right to be presumed innocent. The Court also found that "the documentary and witness evidence presented in the oral proceedings lacked probative value, so that the Provincial Court's finding that there was sufficient doubt concerning the facts to preclude the necessary conviction was justified". Lastly, the Court considered that the description of the facts in the Provincial Court's judgement did not warrant the subsumption of those facts under the alleged offences inasmuch as the Court was unable to conclude from the body of evidence that such abuse had actually occurred.

2.8 On 26 April 2004 the author filed an application for *amparo* (enforcement of constitutional rights) with the Constitutional Court, invoking three grounds: (a) lack of defence due to the invalidation of the prosecution's main item of evidence, the video-recording of the minor's statement before the Family Court's technical team, and the fact that it was impossible to obtain a direct statement from the child during the proceedings; (b) the manifest arbitrariness of the judgements at first and second instance in terms of their evaluation of the evidence; and (c) violation of the minor's right to privacy by the judgement of acquittal through its order for immediate contact between the minor and her father.

2.9 By a judgement of 17 January 2005, the Constitutional Court dismissed the application for *amparo*. With regard to the alleged violation of the minor's right to privacy, the Court held that since the argument had not been raised at the cassation stage it was inadmissible on account of the subsidiary nature of the *amparo* application. With regard to the complaint of lack of defence due to the invalidation of the prosecution's main item of evidence, the Constitutional Court held that the Provincial Court had found the evidence to be valid and had even described it as "a key piece of evidence", so that the finding of invalidity did not refer to the evidence as such, which had been admitted and presented to the court, but rather to its purported aim, namely to serve as prosecution evidence of the guilt of the accused, since it failed to meet the evidentiary standard required to guarantee the credibility of the minor's testimony. Lastly, with regard to the ground of lack of defence due to the arbitrariness of the evaluation of evidence by the Provincial Court, the Constitutional Court held that the *amparo* procedure was not the proper avenue for effecting a review of the evaluation of the evidentiary material by the trial court unless the latter had acted in a manner that was arbitrary or unreasonable. According to the Constitutional Court, the Provisional Court had carefully evaluated each item of expert or witness evidence presented during the oral proceedings and had disqualified each item on grounds that could not on any account be characterized as unreasonable or arbitrary.

The complaint

3.1 The author claims that there was a denial of justice constituting a violation of article 14, paragraph 1, because the trial courts invalidated an item of evidence, the video-recording by the Family Court's technical team, the nature of which was such that it could not have been submitted in any other form owing to the very young age of the witness and the delay in bringing the case to trial, which meant that the child no longer remembered the facts. She submits that the judgements handed down by the Provincial Court and the Supreme Court were inconsistent, since they maintained that the facts of the case could not be considered credible unless they were related by the minor herself during the proceedings, while acknowledging at the same time that it was impossible to reproduce the statement owing to the child's age and the time that had elapsed before the case came to trial. According to the author, the preconstituted evidence consisting of a video-recorded statement by the child that had been viewed during the proceedings was the only possible means of reproducing the minor's statements and should therefore have been recognized as a key item of evidence. Yet the trial courts had invalidated the evidence, leaving the plaintiff defenceless.

3.2 The author also claims that there was a denial of justice as a result of the manifest arbitrariness of the judgements in terms of their evaluation of the evidence. She contends that the courts resorted in their reasoning to *probatio diabolica*, rendering proof impossible, since only a statement to the court by the minor was deemed to constitute sufficient evidence for the prosecution, although such evidence could not possibly be adduced.

3.3 Lastly, she maintains that the order by the Provincial Court to restore contact between the minor and her father as a matter of urgency, reversing the suspension of the visiting arrangements, violates article 24, paragraph 1, of the Covenant, read in conjunction with article 17. She submits that this order leaves the child unprotected, in violation of article 24, paragraph 1. Moreover, in the author's view, it constitutes arbitrary interference with the minor's privacy inasmuch as she is compelled to live with a father who, according to the substantial evidentiary material described in the account of the facts set forth in the judgement, sexually abused the child. She points out that jurisdiction to prescribe measures of protection for the minor lies with the Family Court, which is not bound by the acquittal, although that ruling undoubtedly brings unlawful pressure to bear on the Family Court, since the Murcia Provincial Court is the authority of higher instance.

Observations by the State party on admissibility

4.1 In its observations of 27 April 2006, the State party maintains that the communication is inadmissible as manifestly unfounded and as an abuse of the right of submission of communications as well as on the ground of failure to exhaust domestic remedies.

4.2 The State party notes that the author's complaint concerns an issue of evaluation of evidence, although the evidence was thoroughly analysed by the court that rendered the judgement. The court in question, referring to the evidence consisting of a video-recording of the minor's statements made by the Family Court's technical team, held that "her statement lacks evidentiary value because it failed to present the facts as a freely recalled memory, since she was persistently asked leading questions, with positive and negative reinforcement, including suggested answers to which the minor conveniently assented in an attempt to please the adults

and have done with a subject in which she had no interest whatsoever. Moreover, the various repetitions of the interview were bound to prove fatal since they entailed the risk that the child would no longer be able to distinguish between what actually happened and the information from others that she had internalized and incorporated in her account". The State party points out that every item of evidence presented during the proceedings was thoroughly and separately evaluated by the Provincial Court, including the statements by the plaintiff and the defendant, before the judgement of acquittal was rendered. It notes that the Committee's role, as it has acknowledged on numerous occasions, is not to substitute its evaluation of evidence for that of national courts unless their evaluation is manifestly arbitrary or ill-founded. The State party submits that it is clear from a reading of the judgement of acquittal handed down by the Provincial Court that it is based on a thorough analysis that can on no account be branded as arbitrary.

4.3 With regard to article 17 of the Covenant, the State party asserts that it was a perfectly logical step for the Provincial Court to stipulate that the judgement of acquittal should be communicated to the Family Court with a view to terminating the measures concerning the visiting arrangements adopted pending the judicial proceedings. It points out that the terms used by the Provincial Court were distorted by the author, the Court having stated: "A certified true copy of this decision shall be communicated to the Family Court (...) for its cognizance and so that it may adopt appropriate decisions, promptly and as a matter of urgency (article 158 of the Civil Code), aimed at normalizing relations between the father and daughter, taking such precautions as it deems fit." The State party maintains that, according to aforementioned article 158, "measures to protect minors can be adopted in any civil or criminal proceedings or in non-contentious jurisdiction proceedings", notwithstanding which the court that rendered the judgement merely communicated its decision to the Family Court so that the latter could make an appropriate ruling.

4.4 The State party points out that, in any case, such measures as the Family Court might have adopted pursuant to the acquittal of which it was informed are not at issue here, since relevant domestic remedies pertaining to the alleged violation of articles 17 and 24 of the Covenant have not been exhausted.

Observations by the State party on the merits

5. In its observations of 10 July 2006, the State party submits its observations on the merits, reiterating the arguments set out in its observations of 27 April 2006.

Comments by the author

6.1 In her comments of 16 October 2006, the author claims that the Provincial Court's order to communicate the judgement of acquittal to the Family Court with a view to the urgent resumption of relations between the father and daughter had left her in a state of deep distress. She points out that article 158 of the Civil Code does not require the Family Court to adopt such a measure but that paragraph 4 of the article requires it to take appropriate steps, on its own initiative, to remove the child from danger or harm. The author adds that, although the Family Court did not act on the request contained in the Provincial Court's judgement, she spent years in a state of anxiety, fearing that at any time the father could demand to exercise his right to visit the minor.

6.2 She insists that the existence of sexual abuse can be inferred from the account of the proven facts set out in the judgement, facts that allegedly were not taken into account by the Provisional Court when it handed down its judgement of acquittal, leaving the minor unprotected.

6.3 She asserts that the invalidation of the evidence consisting of the video-recording of the minor's statement is arbitrary and sanctions impunity for pederasty.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any allegations contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, in accordance with article 5, paragraph 2 (a), of the Optional Protocol.

7.3 The Committee takes note of the State party's allegation that domestic remedies have not been exhausted in the case of the complaint based on articles 17 and 24 inasmuch as the issue of the invalidity of the measures taken by the Family Court regarding the possible restoration of visiting arrangements was not raised before a domestic court. The Committee notes, however, that the author exhausted all available domestic remedies, including an application for *amparo* before the Constitutional Court, on grounds of violation of the minor's right to privacy.

7.4 As to the claim that the communication is inadmissible under article 17, the Committee notes that the complaint is based on the Provincial Court's decision, upheld in cassation by the Supreme Court, denying the validity of the evidence submitted by the author. It is this alleged arbitrariness on the part of the Provincial Court and the Supreme Court, which could constitute a violation of article 14, paragraph 1, that forms the basis of the author's claim of a violation of articles 17 and 24. In the Committee's view, the complaint under these articles has been sufficiently substantiated for the purposes of admissibility.

7.5 With regard to the State party's argument regarding abuse of the right to submit communications, the Committee notes that the State party has failed to substantiate its claim and that, furthermore, there are no grounds to consider that such abuse occurred in the light of the circumstances of the case.

Consideration of the merits

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

8.2 The Committee takes note of the author's allegations to the effect that a denial of justice occurred in the form of alleged arbitrariness in the domestic courts' evaluation of the evidence adduced by the prosecution and, specifically, the invalidation of an item of evidence, the video-recording of the minor's statement, which by its very nature could not have been submitted in any other form because of the minor's young age and the delay in bringing the legal proceedings. It also takes note of the State party's allegations that all the evidence, including the video-recording of the minor, was thoroughly analysed by the trial court, which dismissed it on well-reasoned grounds.

8.3 The Committee refers to its well-established jurisprudence, according to which it is generally for domestic courts to evaluate facts and evidence, unless it can be ascertained that such evaluation was manifestly arbitrary or amounted to a denial of justice.³ The Committee notes that the Provincial Court thoroughly analysed each and every item of evidence adduced by the prosecution, separately and coherently. The Provincial Court's evaluation of the evidence was again thoroughly reviewed by the Supreme Court, which concluded that it had been well-reasoned and adequate. Specifically, with regard to the evidence that the author deemed to be vital, namely the video-recording of the minor by the Family Court's technical team, the Committee notes that that evidence was thoroughly analysed by the Provincial Court, which concluded that it was inadequate on account of the circumstances in which it was taken and the minor's young age. The Committee considers that it is not in a position to rule on the soundness of the arguments advanced by the Provincial Court to dismiss the probative value of the evidence, in the light of the Court's detailed reasoning and line of argument. Therefore, the Committee considers that there is insufficient basis for the conclusion that the domestic courts acted arbitrarily in evaluating the evidence.

8.4 Having failed to find a violation of article 14, paragraph 1, the Committee considers that the author's complaints under articles 17 and 24 have no basis in law. The acquittal, by two courts, of the author's husband does not constitute sufficient grounds for finding a violation of the rights contained in articles 17 and 24.

9. In the light of the foregoing, 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 1, 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.]

³ See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995, para. 6.2.

ANNEX

**Individual opinion of Committee members Mr. Rajsoomer Lallah,
Ms. Christine Chanet and Mr. Prafullachandra Natwarlal Bhagwati**

Insofar as the author's complaint in relation to article 14, paragraph 1 of the Covenant is concerned, it is in our view inadmissible on the following grounds:

- The Covenant does not provide a right to see another person prosecuted. (See *de Groot v. The Netherlands*, Communication No. 578/1994 which follows the established jurisprudence of the Committee)
- In prosecutions, article 14.1, as indeed the other paragraphs of Article 14, has for object the protection of the due process rights of the person accused and not those of the prosecutor
- The author admittedly had rights as a parent to ensure the protection of her child and the Family Court was best equipped to determine any relevant issues in this regard, as explained by the Supreme Court

(Signed): Mr. Rajsoomer Lallah

(Signed): Ms. Christine Chanet

(Signed): Mr. Prafullachandra Natwarlal Bhagwati

[Done 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.]

**Individual opinion of Committee members Ms. Ruth Wedgwood
and Sir Nigel Rodley (concurring)**

In its general practice, the Committee has deferred to the reasoned decisions of national courts as to the evaluation of evidence presented at trial. In the matter currently before the Committee, a very young child was allegedly the victim of serious sexual abuse by one of her parents. A videotaped statement by the child was excluded by the Spanish criminal courts, because it consisted of leading questions and suggested answers, repetitively put to the child, and the child was no longer able to testify to the events in open court because of loss of memory. The Committee defers to this decision, and I concur in the Committee's Views.

But I would add a cautionary note, in regard to the limits of our decision. Children have a moral and legal right to protection against physical and sexual abuse. This right to protection is grounded under articles 7, 9, 17, and 23 of the Covenant. The evidentiary standards applicable to decisions on custody and visitation rights may be quite different from a criminal prosecution.

In the instant case, after the acquittal of the accused parent on criminal charges, the Provincial Court delivered a strong suggestion, if not a mandate, to the family court, that visiting rights with the accused parent should be restored, though the particular arrangements were to be determined by the family court. The family court declined to follow the views of the Provincial Court.

In this directive, the Provincial Court apparently overlooked the fact that the evidentiary standards applicable to a decision on visiting rights are appropriately quite different from the nearly perfect proof required for a criminal case. Thus, the applicant in this case, acting on behalf of the daughter, had a basis to complain that the right to protection enjoyed by every child should not be overlooked, even in the face of a criminal acquittal.

(Signed): Ms. Ruth Wedgwood

(Signed): Sir Nigel Rodley

[Done 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.]
