HUMAN RIGHTS COMMITTEE

Gomez Casafranca v. Peru

Communication No. 981/2001

22 July 2003

CCPR/C/78/D/981/2001

VIEWS

Submitted by: Teofila Casafranca de Gomez

Alleged victim: Ricardo Ernesto G□mez Casafranca

State party: Peru

Date of communication: 26 October 1999 (initial submission)

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

Meeting on 22 July 2003,

Having concluded its consideration of communication No. 981/2001, submitted to the Human Rights Committee by Mr. Ricardo Ernesto G□mez Casafranca 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:

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

1. The author of the communication, dated 26 October 1999, is Te□fila Casafranca de G□mez, representing her son, Ricardo Ernesto G□mez Casafranca, a Peruvian citizen currently imprisoned after having been sentenced to 25 years' imprisonment for the offence of terrorism. Although the author does

not cite specific provisions of the Covenant, the communication may raise issues under articles 7; 9, paragraphs 1 and 3; 14, paragraphs 1, 2 and 3 (c); and 15 of the International Covenant on Civil and Political Rights, which entered into force for Peru on 28 April 1978. The Optional Protocol entered into force on 2 October 1980. The author is represented by counsel.

The facts as submitted by the author

2.1 The victim was a student at the Faculty of Dentistry of the Inca Garcilaso de la Vega University, and also worked in the family restaurant. On 3 October 1986 he was arrested in a building near to his home, where he had gone to clean up after being stopped at gunpoint by the police. The arrest was made without any arrest warrant, and without the detainee having been arrested in flagrante delicto; he was taken to the offices of DIRCOTE,**(1)** where he was locked in the cells while the police made inquiries.

2.2 According to the author, the victim was subjected to cruel and savage physical, psychological and mental torture. In the records of the second oral hearing, held in 1998, the prisoner states that he was tortured to obtain certain statements. Specifically, he tells of how they bent back his hands and twisted his arms, hoisted him up in the air, put a pistol in his mouth, took him to the beach and attempted to drown him, and later attempted to rape him by inserting a candle in his anus. On 7 September 2001 Mr. G□mez Casafranca reported the torture to which he had been subjected while at DIRCOTE on 3 October 1986 to the National Police Department of Human Rights. On 17 September 2001 the Department issued a finding in which it noted that the victim had been advised by counsel and that he had not submitted a complaint in a timely manner. Mr. Casafranca was charged with homicide, bodily injury and terrorist acts. The author maintains that her son always maintained his innocence and did not even know the other accused persons who, possibly owing to the torture to which they too were subjected, implicated him in the offence.

2.3 According to the author, the police, in an utterly arbitrary act, brought charges against the prisoner in attestation No. 91-D4-DIRCOTE of 22 October 1986, implicating him in acts which he neither committed nor participated in. According to the DIRCOTE police attestation, Ricardo Ernesto G□mez Casafranca, alias "Tom□s", was the military militia commander of a terrorist cell of *Sendero Luminoso*, belonging to the □a□a Chosica central sector. The cell recruited more members, organized "people's schools", carried out dynamite attacks and fire bombings and sought to destroy police units. The attestation states that Ricardo Ernesto G□mez Casafranca is the perpetrator, with others, of a terrorist offence in that on 31 July 1986 he took part in the fire bombing, using home-made devices, of the Papelera Peruana SA company. The author was also accused of other offences, including offences against human life, the person and health, and against company property. The attestation states that a search of the person of Ricardo Ernesto G□mez Casafranca revealed no weapons, explosives or subversive propaganda. A search of his home also proved negative. Nevertheless, analysis revealed that the writing in several subversive political texts deemed as subversive, was that of Ricardo Ernesto G□mez Casafranca. In addition, the detainees Sandro Galdo Arrieta, Francisco Reyna Garc□a, Ignacio Guizado Talaverano and Rosa Luz Tineo Suasnabar accused him of belonging to *Sendero Luminoso*.

2.4 The prisoner was brought before examining magistrate No. 39 of the Lima High Court, who opened

an investigation by issuing an order for his detention on 23 October 1986. The author states that the office of the prosecutor produced no evidence to corroborate the accusations against her son. However, the report of the office of the provincial prosecutor, dated 22 July 1987, states that, as indicated in the police attestation, Mr. G□mez Casafranca, with others, is part of a *Sendero Luminoso* terrorist cell belonging to the □a□a Chosica central sector. The report also refers to the various statements by other defendants, who maintained that they had not confirmed their police statement because it had been obtained under torture. **(2)**

2.5 In the oral proceedings, the judges confined themselves to questioning the alleged victim on the basis of the contentions in the police report, without taking into account events at the pre-trial stage. On 22 December 1988 Lima Seventh Correctional Court acquitted him, declaring him innocent of the charges brought against him.

2.6 The Office of the Attorney-General applied for annulment of the judgement, which was declared void on 11 April 1997 by the faceless Supreme Court. The Court held that the facts had not been properly determined or the evidence properly verified.

2.7 On 11 September 1997 the police arrested Mr. Ricardo Ernesto G□mez Casafranca at his home for an appearance at further oral proceedings based on the same charges; this time, on 30 January 1998, he was sentenced to 25 years' imprisonment by the Special Criminal Counter-Terrorism Division. The sentence was confirmed by the Supreme Court on 18 September 1998.

The complaint

3.1 The author claims violation of the right of her son to protection of the person and to physical, psychological and mental integrity and of his right not to be subjected to torture while being held. She also claims that the victim's right to liberty and security of person has been violated.

3.2 The author further claims that the State party, in pursuing its counter-insurgency policy, has violated judicial guarantees of due process and protection of the courts. She also maintains that there has been a violation of the right to judicial protection, that is, the right to a hearing with due guarantees and presumption of innocence. Moreover, she contends that the sentence handed down against her son was based solely on the transcription of the police report, there being no mention of legal grounds or of individual criminal liability.

3.3 Lastly, the author claims violation of the principle of legality, equality of the victim before the law, and retroactivity.

The State party's observations on admissibility and the merits

4.1 In its communication dated 20 December 2001 the State party acknowledges that all the requirements for admissibility have been met and that the victim has exhausted all domestic remedies and that the matter has not been submitted to any other international body.

4.2 On the merits, the State party indicates that Mr. G□mez Casafranca was arrested under the law on the investigation of terrorist offences and in the context of the 1979 Constitution then in force. Legislative Decree No. 46, adopted on 10 March 1981, that is before the alleged victim was arrested, provided, in its article 9, that the police could place in preventive detention for a period not exceeding 15 days those allegedly involved in such offences as perpetrators or participants, subject to providing immediate notification in writing to the Public Prosecutor's Office and within 24 hours to the examining magistrate. Accordingly the police acted in accordance with the law.

4.3 The State party maintains that the communication does not contest the compatibility of Legislative Decree No. 46 with the International Covenant on Civil and Political Rights, or its validity before national courts. The State party asserts that Peruvian judges could have found the decree incompatible with the Constitution had they considered that it was not applicable to the author's son. Neither was the victim the subject of any application for habeas corpus or amparo, either at the time of pre-trial detention or during the trial for terrorism. Accordingly, his detention was in accordance with article 9, paragraph 1, of the Covenant.

4.4 Regarding the author's claims that her son was subjected to cruel torture, the State party maintains that the file relating to the pardon **(3)** contains a copy of medical certificates corroborating the absence of any physical ill-treatment of the victim.

4.5 The State party also asserts that the communication simply refers to torture without specifying the date or the methods of torture to which the victim was allegedly subjected. Accordingly there is no proof of a violation of article 7 of the Covenant.

4.6 The State party asserts that the norms of due process provided for in article 14 of the Covenant have been observed. According to the State party, the author's claims that there was a violation of due process and protection of the courts, of the right to judicial protection and to a hearing with due guarantees, of the principle of the presumption of innocence, and of grounds based on the facts and applicable legislation, have not been substantiated.

4.7 The State party maintains that the victim was judged on conditions of equality by the Peruvian courts. He was heard in public hearings on two occasions, when he appeared before a tribunal composed of professional judges specializing in criminal law, where he had an opportunity to be heard, and where he was able to exercise his right to defend himself, both in person and by counsel of his choosing. According to the State party, the courts that judged him had already been constituted prior to his appearance, in accordance with the legislation then in force: the Code of Criminal Procedure, approved in Act No. 9024 of 23 November 1939; and Decree Law No. 25475, as amended by Act No. 26248 **(4)** and Act No. 26671, **(5)** and that the latter abolished the so-called "faceless courts". That is, he was not judged in a closed hearing by a "faceless" court, but on two occasions was examined at public hearings by judges comprising a competent (previously established by law), independent (selected on the basis of the institutional guarantees provided for in the Constitution and by law) and impartial tribunal.

4.8 The State party maintains that, although the Criminal Chamber of the Supreme Court which annulled the judgement that had acquitted Mr. Casafranca on 11 April 1997 was a "faceless" Chamber, the judgment had enough reasoning.

4.9 The principle of the presumption of innocence set forth in article 14, paragraph 2, of the Covenant, was respected during the judicial investigation and in the trial. The evidence and other testimony produced in a fair trial led the judges to conclude that the presumption of innocence was unfounded. The Supreme Court concurred in confirming the judgement.

4.10 The State party maintains that the judicial decisions were based on the facts and the law. Although this is not a right expressly set forth in the Covenant, it is in accordance with the concept of due process.

4.11 Regarding the claims that there were violations of the principles of legality, equality before the law and retroactivity, the State party maintains that the courts investigated and punished the alleged victim for the offence of terrorism and applied the special criminal rules relating to investigation and punishment. That is, regarding the procedural norms applied in the 1998 trial, they applied Legislative Decree No. 46 of 10 March 1981, Act No. 24651 of 6 March 1987 and Decree Law No. 25475 of 5 May 1992.

4.12 With regard to the acquittal of 22 December 1988, the State party maintains that the Seventh Correctional Court applied, as substantive criminal legislation, Legislative Decree No. 46, then applicable to the offences attributed to the victim, consisting in the homicide of police officer Rom□n Rojas Saavedra on 22 June 1986, the attempted arson at the Papelera Peruana SA factory on 31 July 1986, the blowing up of high-tension pylons on 27 July 1986, the homicide of police corporal Aurelio da Cruz del □guila on 11 August 1986, the homicide of police officer Rolando Mar□n Paucar on 2 September 1986 and the planning of the homicide of Enrique Thomas Ojeda, an Aprista Peruano party candidate in Chaclacayo.

4.13 Legislative Decree No. 46 was repealed by article 6 of Act No. 24651 of 6 March 1987. This Act was applied in the conviction of 30 January 1998. The Criminal Division for terrorism offences of the Lima High Court thus applied a legal provision (Act No. 24651) that post-dated the events it considered unlawful. Its decision was endorsed by the Supreme Court on 18 September 1998. However, Legislative Decree No. 46 and Act No. 24651 applied similar penalties to offences constituting terrorism. Accordingly, the author has not demonstrated how this could be incompatible with article 15 of the Covenant.

4.14 Lastly, the State party notes that the acts for which the Peruvian courts sentenced the victim were offences under the applicable national legislation, and that the provision in force at the time can be applied so that the acts are properly classified. The situation could be rectified through a further decision by the courts, rather than by the executive.

4.15 In conclusion, the State party reiterates that it has no observations to make on admissibility, that due process was respected, and that neither the right of the victim to liberty nor to security of person was

violated.

The author's comments relating to admissibility and the merits

5.1 The author alleges in her comments that all the assertions by the State party are false, having the sole object of concealing the violation of articles 9 and 14 of the Covenant. According to the author, the State party has not responded to her specific allegations regarding the victim, who has been sentenced to a term of imprisonment after having been tried by a "faceless" court and convicted without evidence or any attribution of material individual liability by applying laws that were not in force when the acts occurred, as in the judgement of 30 January 1998.

5.2 The author claims that the victim was arrested without there being a warrant and without being caught in flagrante delicto. With regard to the period of detention, the law provided for a maximum of 15 days' detention at the police station. Yet the victim was held for 22 days and the judgement made no reference to this. Further, the State party has not provided any information on the torture to which the victim was subjected.

5.3 The author maintains that the judgement is a continuation of the methods applied by the "faceless" courts. The right to due process, the presumption of innocence and burden of proof as well as the principle of legality were violated. Further, the author alleges that the judgement was a literal reproduction of the police attestation in contravention of the principle of legality and equality before the law. She further maintains that the victim was sentenced under a law that was not in force at the time the acts were committed, namely June to December 1986, whereas the sentence was pronounced under Act No. 24651 of 6 March 1987.

5.4 The author states that this judgement violated the principles of liberty and security of person, the principle of equality before the law and retroactivity, the right to due process and effective protection of the courts.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol. It has further ascertained that the victim has exhausted domestic remedies for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.

6.3 The Committee also notes that the State party has not refuted the applicability of article 5, paragraphs 2 (a) and (b), of the Optional Protocol to the case, thereby accepting its admissibility. Accordingly, and bearing in mind the author's claims, the Committee declares the communication

admissible and proceeds to consideration of the merits of the case on the basis of the information provided by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

Consideration of the merits

7.1 With regard to the author's claims that her son was subjected to ill-treatment while being held at the police station, the Committee notes that, while the author does not provide further information in this regard, the attached copies of the records of the oral proceedings of 30 January 1998 reveal how the victim described in detail before the judge the acts of torture to which he had been subjected. Taking into account the fact that the State party has not provided any additional information in this regard, or initiated an official investigation of the events described, the Committee finds that there was a violation of article 7 of the Covenant.

7.2 With respect to the allegations of a violation of the right of the victim to liberty and security of person and that her son was arrested without a warrant, the Committee regrets that the State party has failed to provide an explicit response to this claim, merely asserting in general terms that Mr. G□mez Casafranca was arrested in accordance with Peruvian law. The Committee notes the author's claim that her son was held for 22 days at the police station, whereas the law provides for a period of 15 days. The Committee considers that since the State party has not contested these claims due weight must be attached to them. Accordingly the Committee finds that there was a violation of article 9, paragraphs 1 and 3, of the Covenant.

7.3 Regarding the author's claims under article 14, the Committee takes note of the fact that Mr. G□mez Casafranca was, after first acquitted in 1988, ordered for retrial by a "faceless" Chamber of the Supreme Court. This alone raises issues under article 14, paragraphs 1 and 2. Taking into account that Mr. G□mez Casafranca was convicted after retrial in 1998, the Committee takes the view that whatever measures were taken by the Special Criminal Counter-Terrorism Chamber to guarantee Mr. G□mez Casafranca's presumption of innocence, the delay of some 12 years after the original events and 10 years after the first trial resulted in a violation of the author's right, under article 14, paragraph 3(c), to be tried without undue delay. In the circumstances of the case, the Committee concludes that there was a violation of article 14 of the right to a fair trial taken as a whole.

7.4 With regard to the author's claims that there was a violation of the principles of non-retroactivity and equality before the law as a result of the application of Act No. 24651 of 6 March 1987, subsequent to the events in the case, the Committee notes that the State party acknowledges that this occurred. While it is true, as asserted by the State party, that acts of terrorism at the time of the events were already offences under Legislative Decree No. 46 of March 1981, it is equally true that Act No. 24651 of 1987 amended the penalties, by imposing higher minimum sentences and thereby making the situation of guilty parties worse. **(6)** Although Mr. G□mez Casafranca was sentenced to the minimum term of 25 years under the new law, this was more than double compared to the minimum term under the previous law, and the Court gave no explanation as to what would have been the sentence under the old law if still applicable. Accordingly, the Committee finds that there was a violation of article 15 of the Covenant.

8. 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 as found by the Committee constitute violations of articles 7; 9, paragraphs 1 and 3; 14 and 15 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to release Mr. G□mez Casafranca and pay him appropriate compensation. The State party is also under an obligation to ensure that similar violations do not occur in future.

10. Bearing in mind 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 or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 90 days, information on the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the original text being the English version. To be published subsequently in Arabic, Chinese and Russian too, as part of the annual report of the Committee to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Alfredo Castillero Hoyos, Mr. Maurice Gl□l□ Ahanhanzo, Mr. Walter K□lin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hip□lito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Notes

1. Department of Counter-Terrorism.

2. Sandro Galdo Arrieta, Francisco Reyna Garc□a, Ignacio Guizado Talaverano and Rosa Luz Tineo Suasnabar.

3. Act No. 26655 was passed to give pardons to individuals convicted of terrorism, and it is administered by the National Council of Human Rights of Peru. There is no information about any decision taken in relation to Mr. G□mez Casafranca.

4. Act No. 26248 of 25 November 1993, which re-established the habeas corpus in cases of terrorism and treason.

5. Act No. 26671 of 12 October 1996, which established that "faceless" judges will no longer function

from 15 October 1997.

6. Legislative Decree No. 46 of March 1981 sets the minimum penalty at 12 years' imprisonment and sets no maximum penalty. Act No. 24651 of 1987 sets the minimum penalty at 25 years' imprisonment and the maximum at life imprisonment, but only for leaders of terrorist organizations.