



**International covenant
on civil and
political rights**

Distr.
RESTRICTED*

CCPR/C/90/D/1391/2005
22 August 2007

ENGLISH
Original: SPANISH

HUMAN RIGHTS COMMITTEE
Ninetieth session
9-27 July 2007

DECISION

Communication No. 1391/2005

Submitted by: Benito Javier Rodrigo Alonso (not represented by counsel)

Alleged victim: The author

State party: Spain

Date of communication: 29 August 2004 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the State party on 11 May 2005 (not issued in document form)

Date of adoption of decision: 24 July 2007

Subject matter: Failure to conduct a full review of the lower court decision in cassation

* Made public by decision of the Human Rights Committee.

<i>Procedural issues:</i>	Failure to exhaust domestic remedies, insufficient substantiation of the alleged violations
<i>Substantive issues:</i>	Right to have sentence and conviction reviewed by a higher court in accordance with the law
<i>Articles of the Covenant:</i>	14, paragraphs 1, 2 and 5; 15, paragraph 1; and 26
<i>Articles of the Optional Protocol:</i>	2 and 5, paragraph (2) (a) and (b)

[ANNEX]

Annex

**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS**

Ninetieth session

concerning

Communication No. 1391/2005**

Submitted by: Benito Javier Rodrigo Alonso (not represented by counsel)
Alleged victim: The author
State party: Spain
Date of communication: 29 August 2004 (initial submission)

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

Meeting on 24 July 2007,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 29 August 2004, is Benito Javier Rodrigo Alonso, a Spanish national born in 1959. He claims to be the victim of violations by Spain of article 14, paragraphs 1, 2 and 5, article 15, paragraph 1, and article 26 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is not represented by counsel.

Factual background

2.1 On 6 February 1998, at the airport of Frankfurt am Main, Germany, customs officials opened a parcel which had been sent from Bolivia to Javier Rodrigo Alonso, containing 200 grams of cocaine. On the same day, the German authorities sent the parcel to the Spanish authorities. On 17 February the author was arrested by a Spanish official of the customs

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson Lopez, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sánchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

surveillance service as he was preparing to collect the parcel at a post office in Ibiza. The author was taken to the offices of the customs surveillance service, where the parcel was opened in the presence of a judicial official. The author claims that the parcel had been tampered with, since it was open on one of its sides.

2.2 On 1 December 1998, the Provincial High Court of Palma de Mallorca sentenced the author to 10 years' imprisonment and a fine of 30,480,000 pesetas (approximately 183,000 euros). During the trial, the author claimed that the procedure followed when the parcel was opened violated the right to privacy in communications, and that this unlawful act invalidated the evidence obtained as a result. The author also takes the view that the decision of the Provincial High Court introduced an element which was not established during the trial. The judgement stated that a green C-1 sticker was attached to the parcel. However, according to the author, the parcel did not bear such a sticker, and consequently could not be opened by the German authorities.¹

2.3 The author lodged an appeal in cassation against the judgement of the Provincial High Court on the following grounds: (i) an error of fact in the grounds for the judgement in respect of the value of the drugs; (ii) introduction in the judgement of an element which had not been established, namely the existence of the green C-1 sticker; (iii) violation of correspondence, as the parcel was opened in Frankfurt without any intervention or authorization by the courts; (iv) violation of correspondence, as the parcel was opened in Spain without the presence of a judge; and (v) violation of the presumption of innocence. On 10 April 2000, the Supreme Court rejected all the grounds cited by the author except for the first. The Court found that there had been an error of fact in respect of the value of the drugs and accepted the argument, reducing the total amount of the fine imposed by the lower court. According to the author, the Supreme Court confined itself to ruling on the grounds for the appeal, and at no time reviewed the evidence on which the Provincial High Court had based its decision. The author lodged an application in the Supreme Court for judicial review of the facts in March 2004, which was flatly rejected on 9 March 2004.

2.4 The author indicates that he has exhausted domestic remedies. In his opinion, it was pointless to make an *amparo* application to the Constitutional Court claiming a violation of his right to a second hearing owing to the Court's established practice in denying such remedies. He adds that the remedy would be equally ineffective in respect of the violation of his right to the presumption of innocence, since the Court cannot modify facts established during the trial and evidence cannot be evaluated by a higher court.

2.5 On 14 February 2001, the author lodged a complaint with the European Court of Human Rights, which on 31 May 2002 declared the communication inadmissible on the grounds

¹ In accordance with article 117.1 of the Universal Postal Union Convention Regulations, of 14 December 1989, ratified by Spain on 1 June 1992, "packages to be checked at customs shall bear a green sticker following the C-1 model or a round sticker of the same model".

that domestic remedies had not been exhausted, because of failure to pursue the remedy of *amparo* in the Constitutional Court. The author claims that the European Court has no jurisdiction in respect of Spain where the right of appeal is concerned because Spain has not ratified Protocol No. 7 to the European Convention, which recognizes the right of appeal.

The complaint

3.1 The author alleges a violation of article 14, paragraph 5, of the Covenant. He claims that he was unable to secure a full review of the court ruling by a higher court because the remedy of cassation is limited and relates only to matters of law or issues of procedure and does not allow evidence to be challenged, since the Supreme Court cannot re-evaluate the evidence.² The author claims that, in this case, the Provincial High Court introduced an element which was not established during the trial: that the parcel bore a green C-1 sticker. The appeal ruling dismissed this argument, holding that it had not been raised during the trial, thus breaching the principle of equality.³ According to the author, this ground for the appeal was supported by documentary evidence including a photocopy of the wrapping without any type of sticker, the record of the opening of the parcel, which made no mention of the green sticker, and the record of the receipt of the parcel, which described the external characteristics of the parcel without referring to stickers of any kind.

3.2 The author also alleges a violation of article 14, paragraphs 1 and 2, on the grounds that: (i) the parcel was reopened in Spain without the presence of a judge; (ii) the evidence obtained unlawfully could not be used against him; (iii) the claim that the parcel bore a green C-1 sticker was arbitrarily introduced into the court judgement as a fact, making it impossible for him to challenge it during the trial. He states that the Provincial High Court of Mallorca evaluated the evidence in a completely arbitrary manner.

² The author cites the Committee's decisions in communications Nos. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000, and 986/2001, *Joseph Semey v. Spain*, Views of 30 July 2003.

³ The Supreme Court also took the view that: "there is also proof in a document signed by two officials of the customs surveillance service that the parcel sent to the defendant bore a green C-1 sticker, and although they were not summoned to the oral hearing, since there was no discussion on this point, account must be taken of the document, which was even requested as documentary evidence for the petitioner's defence". Supreme Court, criminal division, ruling No. 686/2000 of 10 April 2000, p. 9. However, in the appeal to the Supreme Court, the author claims that the indictment, as well as the committal order, contains no reference to the parcel bearing such a sticker. The record of the proceedings states: "It also bore a green C-1 customs declaration sticker used for letters or similar objects the weight and dimensions of which are less than those previously stated and which originate in countries or territories outside the European Union."

State party's observations on admissibility

4.1 By means of a note verbale dated 30 January 2006, the State party submitted its observations on the admissibility of the communication. It contends that the communication is inadmissible on grounds of non-exhaustion of domestic remedies, as the remedy of *amparo* was not sought. It also holds that the communication is inadmissible because it constitutes an abuse of the right to submit communications, because it is clearly without merit and because it has already been submitted under another procedure of international settlement, the European Court of Human Rights.

4.2 According to the State party, domestic remedies have not been exhausted because the Constitutional Court did not have the opportunity to rule on an *amparo* application in the specific case of the author in respect of the extent of the review conducted in cassation. The State party cites the 3 April 2002 ruling of the Constitutional Court (STC 70/02, First Chamber), in which the Court held that:

“... there is a functional similarity between the remedy of cassation and the right to review of conviction and sentence set forth in article 14.5 of the [Covenant], provided that the scope for review in cassation is interpreted broadly and the right under the Covenant is interpreted not as the right to a second hearing with full retrial, but as the right to verification by the higher court of the correctness of the proceedings in the lower court ... It is not correct to state that our system of cassation is confined to analysis of issues of law and issues of form and does not allow the review of evidence ... Currently, by virtue of article 852 [of the Criminal Procedure Act], the remedy of cassation can be sought in any case on the grounds of violation of a constitutional principle. And under article 24.2 [of the Constitution] (fair trial and presumption of innocence), the Supreme Court may verify both the lawfulness of the evidence on which the judgement is based and its adequacy in overriding the presumption of innocence and the reasonableness of the inferences drawn. Consequently, [the petitioner] has an option which allows full review, in the sense of an opportunity to address not only issues of law but also the matters of fact on which the declaration of guilt is based, through checks of the application of procedural rules and the evaluation of the evidence”.

4.3 The State party also cites the Views of the Committee in the *Parra Corral*⁴ and *Carvallo Villar*⁵ cases, where the Committee took the view that the review of the judgement by means of the remedies of cassation and *amparo* was adequate for the purposes of article 14,

⁴ See communication No. 1356/2005, *Parra Corral v. Spain*, decision of 29 March 2005, paragraphs 4.2 and 4.3.

⁵ See communication No. 1059/2002, *Carvallo Villar v. Spain*, decision of 28 October 2005, paragraph 9.5.

paragraph 5, of the Covenant. It also refers to the Views in the *Bertelli Gálvez*⁶ and *Cuartero Casado*⁷ cases, where the Committee also considered the remedy of cassation to be adequate to fulfil the requirements of the Covenant.

4.4 According to the State party, the author concedes that domestic remedies have not been exhausted, seeking to justify his non-use of the remedy of *amparo* on that ground of its alleged ineffectiveness. However, following the decision in the *Gómez Vázquez* case, the remedy of *amparo* is perfectly effective, which has been demonstrated by the fact that, in cases where such remedies were previously denied, the Constitutional Court now rules on the merits. If the scope of this specific case is analysed in practical terms, it is clear that an adequate review has been conducted, not only of issues of law, but also of matters of fact. The remedies must exist and be available, but they cannot be considered to be ineffective solely because they have failed to satisfy the author's claims. The State party adds that excessively broad interpretation of the Protocol would give rise to the possibility of dispensing with domestic remedies in cases where established practice of the domestic courts exists, which would seem clearly contrary to the letter and spirit of article 5, paragraph 2 (b).

4.5 Likewise, the State party holds that the communication clearly lacks merit in view of the fact that the Supreme Court ruling broadly settles the issues raised in the appeal, in particular those related to the prosecution evidence which nullifies the presumption of innocence. It is clear from the Supreme Court's decision that the Court carried out a full review of the conviction and sentence. The remedy of cassation related almost exclusively to facts and evidence, to the extent that the argument relating to the value of the drugs was accepted and the sentence modified.

4.6 Lastly, the State party points out that "the same matter" has been brought before the European Court of Human Rights, which declared the complaint inadmissible on the grounds that domestic remedies had not been exhausted. The State party cites the Committee's Views in the *Ferragut Pallach v. Spain* case,⁸ where the Committee took the view that the Spanish text also related to situations where such examination had been concluded, and that Spain had had the clear intention to uphold the meaning of the Spanish text of the Optional Protocol, concluding that its declaration was equivalent to a reservation, extending article 5, paragraph 2 (a), of the Protocol to cover communications the consideration of which had been completed under another international procedure. Consequently, the State party calls on the Committee to declare the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.7 The State party also calls for the communication to be declared inadmissible on the grounds that domestic remedies have not been exhausted, in accordance with articles 2 and 5, paragraph 2 (b), of the Protocol, and that it constitutes an abuse of the purpose of the Protocol in accordance with articles 2, 3 and 5, paragraph 2.

⁶ See communication No. 1389/2005, *Bertelli Gálvez v. Spain*, decision of 25 July 2005.

⁷ See communication No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005.

⁸ See communication No. 1074/2002, *Ferragut Pallach v. Spain*, decision of 31 March 2004, paragraph 6.2.

Author's comments

5.1 In his comments dated 15 May 2006, the author repeats that the judgement handed down by the Provincial High Court of Palma de Mallorca could only be appealed by means of the remedy of cassation before the Supreme Court, which confined itself to ruling on the grounds for the appeal. At no time did the Supreme Court review the evidence on which the Provincial High Court had based its conviction.

5.2 Article 847 of the Criminal Procedure Act stipulates that judgements handed down by courts in oral proceedings can be appealed in cassation only on the ground of error of law or error of form. The special nature of this remedy makes it impossible to challenge the evidence used by the trial court and restricts the review to the procedural or legal aspects of the judgement. Thus, all lower court decisions relating to elements which are set out in the judgement as established are final, and it is not possible for the court of cassation to evaluate the evidence anew.

5.3 The author explains that, in the light of the Committee's jurisprudence, he lodged an application in the Supreme Court for judicial review of the facts, citing new evidence which demonstrated the error of the trial court. The Court decided that the author was seeking a review of the entire process of hearing the evidence, and simply shelved the application.

5.4 According to the author, the Provincial High Court of Palma de Mallorca denied him justice by evaluating the facts in a manifestly arbitrary manner, and the Supreme Court in cassation confined itself to upholding the conviction while correcting the value assigned to the drugs also in an arbitrary manner. He claims that the Supreme Court, in cassation, carries out a limited examination of whether the conclusions reached by the lower court are arbitrary or amount to a denial of justice, which is not in keeping with article 14, paragraph 4 (sic), of the Covenant.

5.5 Concerning the State party's claim that domestic remedies have not been exhausted, the author explains that, even if he had lodged an application for *amparo*, it would have failed, and that the Constitutional Court cannot modify facts established by the trial court. He also contends that the Constitutional Court dismisses *amparo* applications for review of sentence. Lastly, he points out that data published in the Spanish press show that in 2003 the Constitutional Court denied 97 per cent of *amparo* applications made to it. He concludes that the application had no prospect of success, and refers to the Committee's jurisprudence in the *Gómez Vázquez* and *Joseph Semey* cases.⁹

5.6 Concerning the State party's claim that the communication has already been examined by the European Court, the author points out that the European Court declared his communication inadmissible on the grounds of non-exhaustion of domestic remedies because he had not lodged an *amparo* application with the Constitutional Court. He repeats that the matter was therefore not considered by the European Court, which did not examine any issue of substance. In accordance

⁹ See communications Nos. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000 and 986/2001, *Joseph Semey v. Spain*, Views of 30 July 2003.

with the Committee's jurisprudence, in order for this admissibility requirement to be applied, the matter should have been examined by another procedure of international settlement. Moreover, he holds that the European Court lacks jurisdiction in respect of Spain where the right of appeal is concerned because Spain has not ratified Protocol No. 7, article 2 of which recognizes the right of appeal in criminal matters.

5.7 Lastly, the author claims violation of the rights set out in article 15, paragraph 1, and article 26 of the Covenant on the grounds that, following the Supreme Court's decision which raised the threshold of "significant quantities" of drugs to 750 grams of cocaine, the competent courts apply this decision and impose sentences of three to six years for public health offences when the amount of cocaine seized is under 750 grams. The author claims that he is serving a 10-year sentence for an amount of roughly 400 grams of cocaine despite having applied for a reduction in his sentence through the normal legal channels. He concludes that the State party has breached the principles of equality and non-discrimination.

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 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee takes note of the claims based on article 14, paragraphs 1 and 2, concerning the reopening of the parcel in Spain in an allegedly unlawful manner and the arbitrary introduction into the lower court's judgement of a reference to the existence of a green C-1 sticker. The Committee takes the view that these allegations relate essentially to the evaluation of the facts and the evidence carried out by the Spanish courts. It reiterates its settled jurisprudence that it is generally for the courts of the States parties to evaluate facts and evidence, except where such evaluation was clearly arbitrary or amounted to a denial of justice.¹⁰ The Committee takes the view that the author has failed to demonstrate, for the purposes of admissibility, that the conduct of the courts of the State party in the author's case was arbitrary or amounted to a denial of justice, so that this part of the communication must also be declared inadmissible under article 2 of the Optional Protocol.

6.3 Likewise, concerning the author's claim in relation to article 15, paragraph 1, and article 26, that he is serving a sentence which is more severe than that applied currently by the courts in respect of the amount of drugs seized, the Committee notes that the author has not provided any information on any remedies he may have sought in the domestic courts. Consequently, the Committee finds that this part of the communication is also inadmissible on the ground of non-exhaustion of domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

¹⁰ See, for example, communications Nos. 541/1993, *Errol Simms v. Jamaica*, decision of 3 April 1995, paragraph 6.2, 842/1998, *Serguey Romanov v. Ukraine*, decision of 30 October 2003, paragraph 6.4; 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, paragraph 4.3.

6.4 Concerning the State party's claim that the communication is inadmissible because the same matter has been brought before the European Court of Human Rights, the Committee notes that the Court did not *examine* the case within the meaning of article 5, paragraph 2 (a), of the Optional Protocol, since its decision was based solely on procedural grounds and did not involve any consideration of the merits of the case.¹¹ Therefore, the Committee deems that no issue arises with regard to article 5, paragraph 2 (a), of the Optional Protocol as modified by the State party's reservation to this provision.

6.5 The Committee takes note of the State party's claims that domestic remedies have not been exhausted since the alleged violations referred to the Committee were never brought before the Constitutional Court, and that, since the Committee's Views in the *Gómez Vázquez* case, the remedy of *amparo* is perfectly effective. The Committee observes that the Supreme Court's ruling in the author's case predated the Committee's Views in the *Gómez Vázquez* case. The Committee also invokes its established jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success.¹² The application for *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore deems domestic remedies to have been exhausted.

6.6 The Committee takes note of the author's claims under article 14, paragraph 5, that the Supreme Court failed to conduct a full review of the conviction handed down by the Provincial High Court, confining itself to ruling on the grounds of the appeal in cassation without reviewing the evidence on which the Provincial High Court based its conviction and, in particular, dismissing the argument relating to the introduction of a non-established element in the Provincial High Court's judgement, namely the existence of the green C-1 sticker, on the grounds that the issue had been raised for the first time in cassation. However, the Committee notes that the Supreme Court conducted a review of the decision handed down by the Provincial High Court in which it focused essentially on issues of fact and evidence. It notes that, as the State party indicates, the Court even accepted the argument based on the error of fact in the valuation of the drugs, correcting the valuation and substantially reducing the fine imposed at first instance. Concerning the argument relating to the existence of a green C-1 sticker, the Committee notes that the Court ruled that that issue had not been raised within the prescribed period and that in any event sufficient documentary proof existed in the form of the document signed by two officials of the customs surveillance service confirming the existence of the sticker. The Committee concludes that it follows from the Supreme Court ruling that the Court

¹¹ See communication No. 1389/2005, *Bertelli Gálvez v. Spain*, Views of 25 July 2005, paragraph 4.3.

¹² See, for example, communications Nos. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000, paragraph 10.1; 986/2001, *Joseph Semey v. Spain*, Views of 30 July 2003, paragraph 8.2; 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, paragraph 6.5; 1293/2004, *Maximino de Dios Prieto v. Spain*, decision of 25 July 2006, paragraph 6.3 and 1305/2004, *Villamón Ventura v. Spain*, decision of 31 October 2006, paragraph 6.3.

carefully considered the author's arguments, examining in detail the facts and evidence presented in his application and conducting a full review of the judgement handed down by the Provincial High Court. In the light of the above, the Committee deems that the author's complaint under article 14, paragraph 5, has not been sufficiently substantiated for the purposes of admissibility, and concludes that it is inadmissible under article 2 of the Optional Protocol.

7. The Committee consequently decides:

(a) That the communication is inadmissible in accordance with article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and the State party.

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