

HUMAN RIGHTS COMMITTEE

Piscioneri v. Spain

Communication No. 956/2000

7 August 2003

CCPR/C/78/D/956/2000

ADMISSIBILITY

Submitted by: Mr. Rocco Piscioneri (represented by Mr. Luis Bertelli)

Alleged victim: The author

State party: Spain

Date of communication: 11 May 2000

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

Meeting on: 7 August 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Rocco Piscioneri, an Italian citizen who is currently being held in the prison of Jaén in Spain. In his communication of 5 April 2000, supplemented on 5 January 2001, he claims to have been the victim of violations by Spain of paragraph 1, paragraph 3 (b) and paragraph 5 of article 14, and paragraph 1 of article 15 of the International Covenant on Civil and Political Rights. He is represented by counsel. The Optional Protocol entered into force for Spain on 25 January 1985.

The facts as submitted by the author

2.1 On 7 November 1997, Italy requested the extradition of the author, on the grounds that on 30 September 1997 an arrest warrant had been issued against the author for a drug-trafficking offence

following the seizure of 200 kilograms of cocaine in Feletto Canavese, Italy, and 1,385 kilograms of hashish in Barcelona, Spain. Nevertheless, this arrest warrant was annulled on 7 November 1997 by the Civil and Criminal Court of Turin on the ground that a procedural requirement had been infringed.(1) The author was then in Spain.

2.2 On 17 November 1997 the Civil and Criminal Court of Turin, Italy, issued a new arrest warrant in respect of the same events, which, according to the author, had not first been investigated by an Italian court, but had been the subject of preliminary investigation No. 979/97 by Spanish examining court No. 10.

2.3 Since, at all relevant times, the author was on Spanish territory, the Italian authorities requested his extradition again on the basis of the second arrest warrant and, by an order dated 18 May 1998, the National High Court granted extradition in respect of trafficking in cocaine but refused extradition in respect of trafficking in hashish, contending that an investigation had already begun in Spain into the latter offence. Under the order, the transfer of the author to Italy would be suspended until he had served any sentence which might be imposed on him by examining court No. 10 in Barcelona, which was seized of the matter.

2.4 According to the author, the day before the preliminary hearing in the extradition proceedings, (2) he was asked only whether he was aware that a further charge had been laid against him, and consequently he did not have enough time to prepare his defence.

2.5 In opposing the extradition order, the author submitted an application for reconsideration, which was dismissed by the Criminal Division of the National High Court on 23 July 1998. Three of the judges who declared his extradition to be lawful also served in the nine-member Criminal Division of the National High Court which ruled on his application for reconsideration.

2.6 The author challenged the ruling rejecting his application for reconsideration by lodging a writ of amparo with the Constitutional Court, which was dismissed on 4 December 1998.

2.7 On 11 January 1999, the Provincial High Court in Barcelona sentenced the author to a prison term of six years and six months and a fine of 1 billion pesetas for trafficking in hashish. The author applied to the Supreme Court for judicial review of this sentence (*casación*), and on 9 October 2000, when the Court had not yet ruled on the application, requested the court to suspend the proceedings. (3) On 11 October 2000, the Second Division of the Supreme Court dismissed the author's request.

2.8 After the Supreme Court refused to suspend the application for judicial review, the author instituted amparo proceedings. The Spanish Constitutional Court dismissed the application for amparo on 11 December 2000, and on 8 June 2001 the Supreme Court gave its ruling on the application for judicial review, which it dismissed..

The complaint

3.1 The author lodged his complaint in two documents nine months apart. In his initial

communication, dated 5 April 2000, concerning the extradition procedure, the author claims violations of article 14, paragraph 1, and article 13, contending that, if he were extradited to Italy, his case would not be heard in a competent and impartial tribunal, which would try him for trafficking in cocaine. That it was Spain that should hear his case as the country which began the investigation of the acts, and that the charges brought against him in both Italy and Spain were based on the same acts. That the principle of universal jurisdiction should also be invoked, since drug-trafficking is regarded as contrary to the interests of all States.

3.2 The author also claims a violation of article 14, paragraph 1 of the Covenant, contending that Spain had not rejected the extradition request, and that he was denied the right to be charged with a continuing offence, for which the punishment is less severe than for two offences tried separately. The author also alleges that he was denied the right to a fair trial, since the provisions of the Extradition Act, which stipulates that the extradition request must be accompanied by "the judgement or detention order or similar decision", were ignored, and Italy sent only a preventive arrest warrant. He adds that, in breach of the Act, extradition was initiated on the application of the requested country, namely Spain.

3.3 The author claims to have been the victim of a violation of article 14, paragraph 1 of the Covenant, arguing that the same judges who declared his extradition to be lawful formed part of the division of the National High Court which ruled on the application for reconsideration; this could have had the consequence that they exerted a certain influence on their colleagues.

3.4 The author claims to have been the victim of a violation of article 14, paragraph 3 (b) of the Covenant, contending that he was not given time to prepare his defence or properly to present to the competent court the grounds on which he opposed the new extradition request.

3.5 Also with regard to the extradition proceedings, the author claims a violation of article 15, paragraph 1 of the Covenant, arguing that the acts with which he was charged did not constitute an offence when they took place. In his view, by annulling the first arrest warrant, the Turin Civil and Criminal Court considered that the offence for which extradition was being sought did not exist, and the second extradition request was based on the same events, with the irregularity that had caused the first request to be void unrectified. In that regard, the author contends that the Spanish court had noted that any infringements of fundamental rights that originated with the foreign authorities in the original criminal proceedings could be attributable to the Spanish courts which were aware of them yet authorized his transfer. He states that despite the first arrest warrant which was annulled, the Italian court opened further criminal proceedings relating to the same events, without bearing in mind that the case had already been heard, and that Spain did not take this into account.

3.6 In another document, dated 5 January 2001, the author claims further violations relating to the proceedings in Spain. He states that article 14, paragraph 5 of the Covenant was violated because, in its ruling on the application for judicial review, the Supreme Court rejected the submission of preliminary investigation 979/79, which confirmed that a Spanish judge was already investigating the event for which his extradition was being sought. The author alleges another violation of the same article, contending that it was impossible for him to benefit from an effective remedy of

judicial review of the facts in respect of the judgement handed down by the Spanish court and the sentence he received for trafficking in hashish. The author maintains that, by refusing to suspend his application for judicial review, the Constitutional Court was violating that same rule on the grounds that, since application for judicial review is not an effective remedy in Spain, his right to a second hearing would thereby be violated.

3.7 With regard to the extradition procedure, the author states that, since his application for amparo had been refused, no second hearing was available to him and the evidence in his favour was therefore not re-evaluated and that that constituted a violation of article 14, paragraph 5 of the Covenant.

Observations by the State party on the admissibility of the communication

4.1 In its observations dated 18 January 2001, the State party pointed out that the Barcelona Provincial Court had expressly declared that Mr. Rocco Piscioneri is a leader of a criminal organization involved in trafficking drugs and narcotics, and reminded the Committee of the serious nature of this type of activity, as highlighted in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was referred to in the extradition proceedings.

4.2 The State party disputes the admissibility of the communication *ratione materiae*, on the grounds that the criminal trial and the extradition proceedings are separate matters. It holds that, where the trafficking in cocaine is concerned, the author cannot be tried in Spain because no criminal charges have been brought against him in any Spanish court. It notes that, under the Constitutional Court's decision, the purpose of extradition carried out at the request of another State is not to punish certain behaviour, but only to make criminal proceedings possible in the other State.

4.3 In relation to the violation of article 15, paragraph 1 of the Covenant alleged by the author, the State party points out that in its order of 18 May 1998 the National High Court confined itself to declaring that the extradition of the author to Italy on some charges was lawful, while refusing it on others; and that the court had not convicted or sentenced Mr. Rocco Piscioneri. The author's claim that the arrest warrant issued by the Turin Civil and Criminal Court, which underpinned the extradition ruling, was void, should, in the view of the State party, be challenged at the appropriate time before the Italian courts, since the Spanish National High Court does not have the authority to hear the case by applying the procedural legislation of another sovereign State, such as Italy, so that the author's assertions on this matter were similarly incompatible with the Covenant *ratione materiae*.

4.4 In relation to the claimed violation of article 14, paragraph 3 (b) of the Covenant, the State party states that this matter was not complained of either in the application for reconsideration or in the *amparo* application, so that, as the complaint had not been lodged at the domestic level, in accordance with article 5, paragraph 2 (b) of the Optional Protocol, it should be declared inadmissible.

4.5 In relation to the author's claim that article 14, paragraph 1 of the Covenant was violated

because the judges who declared his extradition lawful were the same as those who ruled on his application for reconsideration, the State party argues similarly that the author did not raise this allegation at the domestic level; and that his *amparo* application contains no mention of this violation.

4.6 The State party adds that the case of Mr. Rocco Piscioneri cannot be regarded as a violation of article 13 of the Covenant since it held extradition proceedings in which a decision was adopted in accordance with the law, and in which the complainant made as many submissions as he deemed appropriate and sought all possible remedies.

4.7 In relation to the alleged violation of article 14, paragraph 5 of the Covenant, the State party holds that the complaint is inadmissible, on the grounds that, first, the judicial review proceedings had not been completed when the complainant made an *amparo* application to the Constitutional Court, and that only by considering the totality of the proceedings and the final ruling would it be possible to gauge whether the guarantees for the defence had actually been impaired in the complainant's case. The State party adds that the Committee should examine specific violations of current relevance rather than reviewing legislation in the abstract.

4.8 In relation to the author's claim that he was not allowed to present an item of documentary evidence - a copy of the preliminary investigation 979/97 - the State party emphasizes that the complaint is premature, since the Constitutional Court did not refuse the application, but, in view of the stage reached in the proceedings - with only the hearing and the judgement remaining - pointed out that it would be necessary to wait for the hearing itself, at which time it would be possible to lodge such applications as the author deemed appropriate; that meanwhile, no real and actual violation of the author's rights has taken place, and that, as the Constitutional Court stated, the author's complaint deals with a merely hypothetical, potential or possible violation.

Comments by the author on the observations by the State concerning the admissibility of the communication

5. In his comments dated 8 June 2001 and 16 August 2001, the author replies to the observations by the State party on admissibility and states that, in accordance with the Committee's case law in the Gómez Vásquez case, it is not necessary to wait for proceedings under way to be resolved if all the indications are that the outcome will be identical to that of the previous cases heard by the same courts, and that in this specific case, Mr. Piscioneri complained to the Spanish Supreme Court that his application for judicial review would not constitute an effective remedy, and that the reason why he had lodged a writ of *amparo* with the Constitutional Court was that his request for the suspension of the proceedings had been refused.

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 communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that the author's allegations in relation to article 14, paragraph 1 refer principally to the criminal proceedings to which he might be liable on charges of trafficking in cocaine; thus he contends that he should be tried in Spain, since he would then benefit from the procedure for continuing offences. The Committee points out that such criminal proceedings are for the moment of a hypothetical or potential nature, and consequently cannot form part of the claimed violations of the articles of the Covenant. The Committee therefore considers that the author's complaint is not within the scope of paragraph 1 of article 14 of the Covenant, and thus declares this part of the communication inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.4 In relation to the extradition proceedings conducted in Spain, the author claims that he was denied the right to a fair trial since the extradition proceedings were instituted at the request of the requested State, i.e., Spain, and since the extradition request was accompanied only by a preventive arrest warrant. In this regard, the Committee notes that the author's complaint has no relation to the right protected in article 14 of the Covenant, and thus it is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.5 In relation to the author's claims that article 14, paragraph 1 of the Covenant was violated, because the judges who considered his extradition at first instance formed part of the court which ruled on the application for reconsideration, and in relation to the violation of article 14, paragraph 3 (b), in that he did not have enough time to prepare his defence, the State party points out that these complaints were not raised during the appeals initiated by the author. On the basis of the material available to it, the Committee notes that the author did not complain about the violations at the domestic level, and that, while complainants are not obliged to cite specific provisions of the Covenants which they claim to have been violated, they must mention in substantive terms, in domestic courts, the grounds which they later present to the Committee. Since he failed to lodge these complaints even in domestic courts, this part of the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

6.6 In his complaint relating to article 15, paragraph 1 of the Covenant, the author seeks to base his claims on the fact that the first arrest warrant against him issued by the Italian court was annulled, while the second, on the basis of which extradition was granted, referred to the same events without the original irregularity having been rectified. In this regard, the Committee considers that the author's complaint has no relation with the right guaranteed in paragraph 1 of article 15 of the Covenant. Consequently, this part of the complaint must be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.7 In relation to the author's complaint concerning article 14, paragraph 5, although in his document dated 8 June 2001 the author states that his application for reconsideration of the judgement (*casación*) against him for trafficking in hashish was dismissed, the Committee notes that both in the supplement to his initial communication and in his comments on the observations

by the State party, he confines himself to claiming that the violation of the article in question consisted of a refusal by the Constitutional Court to interrupt the judicial review proceedings (*casación*) he had initiated. The mere suspension of an on-going proceeding cannot be considered, in the Committee's opinion, to be within the scope of the right protected in paragraph 5 of article 14 of the Covenant, which only refers to the right to a revision by a higher tribunal. Consequently, this part of the complaint must be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7. Consequently, the Committee decides:

(a) That the communication is inadmissible under articles 3 and 5, paragraph 2 (b), of the Optional Protocol;

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

[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.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhango, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.*

Notes

1. The arrest warrant did not comply with article 309.10 of the Italian Code of Penal Procedure, as the public prosecutor had not authorized phone-tapping.

2. The author refers to the hearing provided for in article 12 of the Spanish Extradition Act: "The Court shall invite the person to indicate whether he or she consents to the extradition or intends to contest it, and to provide reasons therefor".

3. The author contends that he did so because he had learned of the Committee's decision in the *Gómez Vásquez* case.