



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Fifth-seventh session
10-28 July 2006

VIEWS

Communication No. 1211/2003

Submitted by: Mr. Luis Oliveró Capellades (represented by two counsels,
Mr. José Luis Mazón Costa and Mr. Javier Ramos Chillón)

Alleged victim: The author

State party: Spain

Date of communication: 18 April 2002 (initial communication)

Document references: Special Rapporteur's rule 97 decision, transmitted to the State
party on 28 October 2003 (not issued in document form)

Date of adoption of Views: 11 July 2006

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Conviction in first instance by the highest court in the land with no possibility of appeal; conviction on a count not included in the indictment
<i>Procedural issues:</i>	Insufficiently substantiated claim, abuse of the right to submit communications
<i>Substantive issues:</i>	Right to have conviction and sentence referred to a higher court in accordance with the law; right to a fair trial
<i>Articles of the Covenant:</i>	14, paragraphs 1 and 5
<i>Article of the Optional Protocol:</i>	3

On 11 July 2006, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1211/2003. The text of the Views is appended to the present document.

[ANNEX]

Annex

**VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5,
PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

Eighty-seventh session

concerning

Communication No. 1211/2003*

Submitted by: Mr. Luis Oliveró Capellades (represented by two counsels,
Mr. José Luis Mazón Costa and Mr. Javier Ramos Chillón)

Alleged victim: The author

State party: Spain

Date of communication: 18 April 2002 (initial communication)

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

Meeting on 11 July 2006,

Having concluded its consideration of communication No. 1211/2003, submitted to the Human Rights Committee on behalf of Mr. Luis Oliveró Capellades 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 members of the Committee participated in the examination of the present communication: Mr. Abdelfattor Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castellero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

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

1.1 The author of the communication, dated 18 April 2002, is Luis Oliveró Capellades, a Spaniard born in 1935. He claims to be the victim of a violation by Spain of article 14, paragraphs 1 and 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by Mr. José Luis Mazón Costa and Mr. Javier Ramos Chillón.

Factual background

2.1 Proceedings were brought against the author in June 1991 when, in response to press reports of irregularities in funding for the Spanish Socialist Workers' Party, charges were laid against a number of individuals. Since a member of the Senate and a member of the Congress of Deputies were involved, the investigation and trial of the case were assigned, in accordance with the Spanish Constitution, to the Supreme Court, the highest court in the land with jurisdiction over criminal cases. This affected the author, who maintains that he was thus deprived of the opportunity to appeal against his conviction. The author was the manager of Filesa, one of the trading companies implicated in the affair.

2.2 On 19 July 1997, the author states, the Supreme Court decided to omit from the indictment the charge of unlawful association, which was thus excluded from the trial. But, the author indicates, he was found guilty of this offence.

2.3 On 28 October 1997, the Supreme Court sentenced the author to six years in prison for forgery, two years for unlawful association and two years for an offence against the Public Treasury. The documents supplied by the author show that he lodged an application for *amparo* with the Constitutional Court on 20 November 1997, claiming breaches of several rights. It appears from the documents supplied that the Constitutional Court took three separate decisions, on different dates, on the author's application. On 22 December 1997 it ruled the author's claims which form the basis of his complaint to the Human Rights Committee inadmissible; on 25 January 1998 it ruled inadmissible all the author's other claims that his constitutional rights had been violated save the claim relating to the lawfulness of his conviction for forgery, which it decided to examine on the merits. It rejected this latter claim on 4 June 2001.

2.4 The author was amnestied under a general pardon decreed in December 2000, having served part of his sentence.

The complaint

3.1 The author claims a violation of article 14, paragraph 5, since he was tried and convicted in sole instance by the Supreme Court and had no opportunity to appeal against his conviction. He says that, unlike other States parties which entered reservations to article 14, paragraph 5, Spain entered no reservation about trial in first instance by the highest court in the land. He considers that acknowledging this right would have a minimal impact on the State party, for it would suffice to assign some Supreme Court justices to review the judgements handed down by

the Court's Criminal Division. There is, he says, a procedure for appealing to a bench of Supreme Court justices against judgements handed down by the Administrative Litigation Division of the Court. He finds no justification whatsoever for there being no review of the judgement in the event of a conviction in first instance by the Supreme Court.

3.2 The author claims a violation of article 14, paragraph 1, since he was sentenced to two years in prison for unlawful association, a charge which had been expressly omitted from the indictment by the Supreme Court. Even if, as the Constitutional Court accepted, the omission was a mistake, the author says that the mistake was not of his making. He considers that this anomaly in the trial violates the right to a fair and impartial hearing and the principle of equality of arms.

Observations by the State party on admissibility and the merits, and comments by the author

4.1 In a note dated 7 January 2004, the State party points out that the author failed to furnish the Committee with the Supreme Court's judgement of 22 December 1997, which finally settled the issues which the author is raising with the Committee by rejecting an application from the author in which he made the same claims as he is now laying before the Committee. According to that judgement, the fact that a case is tried by the Supreme Court, the highest court in the land, substitutes for guaranteed access to an appellate court and excuses the lack of access to a higher-level court. The substitution stems from the need to preserve the independence of the judiciary when persons subject to privilege or immunity are put on trial; in any event, judgements of the Supreme Court can be appealed before the Constitutional Court, which then acts as an appellate court. As regards the alleged omission of the count of unlawful association on which the author was later convicted, the Constitutional Court pointed out that the author had not been left without a defence in the matter since the charge had been included in the original version of the indictment, in the decision to take the case to trial and in the final conclusions on the charges, and had been discussed.

4.2 The State party maintains that the author has abused the right to submit communications, and that the present communication is manifestly unfounded. The author lodged his complaint excessively late, in 2002, almost five years after the Supreme Court, in December 1997, settled the issues now before the Committee, and failed to supply important documents such as the said Supreme Court judgement. In the circumstances, and given that the author has benefited from a pardon, the State party holds that consideration of the communication on its merits by the Committee would amount to a clear "loss of legal certainty" and an "invitation" to reopen a criminal case which had been definitively closed, in which there had been nothing arbitrary, and in which all safeguards had been respected.

4.3 In a note dated 4 May 2004, the State party repeats its claims about admissibility and maintains, on the merits of the complaint relating to article 14, paragraph 5, that: (i) the case involving the author had been tried by the Supreme Court because that was required by article 123 of the Spanish Constitution, which gives the Supreme Court jurisdiction over trials of

members of Parliament and the Senate; (ii) the assignment of jurisdiction to the Supreme Court was an extra safeguard for members of Parliament and the Senate from which the author had benefited because he had been charged jointly with two members of Parliament; (iii) the safeguard of being tried by the highest court in the land substituted for the safeguard of appeal proceedings and excused the lack of access to a higher-level court; (iv) the judgement of the Supreme Court could be reviewed by the Constitutional Court, which in such cases would act as an appellate court; (v) the jurisdiction of the Supreme Court was based on the need to preserve the independence of Spain's judicial institutions; and (vi) the trials of accused persons who did not enjoy parliamentary privilege or immunity could not be separated from the trials of those who did.

4.4 The State party goes on to say that: (i) in the case of petty criminal offences, review by a higher court is counterproductive since it makes the proceedings longer and more expensive; (ii) appeal is not limitless - there is a logical limit inasmuch as there cannot be an appeal of an appeal: if an individual acquitted in first instance is convicted on appeal, that conviction cannot be reviewed in turn; (iii) the reason for appeal is to avoid legal errors; but if a person is tried by the highest court in the land, there cannot be an appeal because there is no higher court to appeal to; (iv) trial in first instance by the highest court is justified and occasioned by the objective fact that an individual holds a public position which puts him or her in an unequal situation, and that person must, therefore, be treated unequally in order to secure equality before the law; (v) jurisdiction of this type exists in several States parties; (vi) the Covenant should be interpreted in a manner consistent with regional human rights agreements, and trial by the highest court should not be found to be in breach of the Covenant; and (vii) in Spain, aspects of conviction by the highest court which affect fundamental rights can be reviewed by the Constitutional Court through the *amparo* procedure.

4.5 Regarding the alleged violation of article 14, paragraph 1, the State party repeats, citing the ruling of the Constitutional Court, that the author was not left without a defence since the charge of unlawful association was mentioned in the original version of the indictment, was included in the decision to take the case to trial, was part of the final conclusions on the charges and was the subject of lively argument in the oral proceedings. It also cites the judgement of the Supreme Court to indicate that the author spoke openly about the activities which were deemed to constitute unlawful association.

5.1 In a letter dated 3 August 2004, the author asserts that he is not abusing the right to submit communications. The Optional Protocol sets no deadline for submitting complaints. The author states that the last judgement by the domestic courts was that handed down by the Constitutional Court on 28 January 1998, that he received it only in June 2001, and that he submitted his communication in April 2002. He adds that, although he received the decision on his complaint about the right to appeal and the count of unlawful association in December 1997, that was immaterial since, if his application to the Constitutional Court for *amparo* had been successful, he would have had redress for his complaints. Besides, the author says, the State party was partly responsible for citizens being unaware that they could apply to the Committee, since it was reluctant to publicize the Committee's decisions.

5.2 The author maintains that the State party has not respected the right to full review of conviction and sentence as established by the Covenant. He emphasizes that Spain entered no reservation to article 14, paragraph 5, on ratifying the Covenant. The State party's reference to Protocol No. 7 to the European Convention is of no relevance since that Protocol - which Spain has not ratified - is immaterial to the Committee's jurisdiction. He repudiates the State party's assertion that there can be no court higher than the highest court, because Spanish domestic legislation allows for that possibility in the case of judgements handed down by the Administrative Litigation Division of the Supreme Court. As regards the complaint relating to article 14, paragraph 1, the author insists that the Supreme Court decided, on 19 July 1997, not to try him on the charge of unlawful association, and maintains that the Constitutional Court, in its ruling, is careful to deny that that decision by the Supreme Court has any legal validity.

Issues and proceedings before the Committee

Consideration of admissibility

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 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 also observes that the State party has put forward nothing to suggest that there are still remedies to exhaust under domestic law, and therefore finds no impediment to its consideration of the communication under article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes the State party's argument that the complaint represents an abuse of the right to submit communications owing to the excessive delay in the submission of the complaint and the fact that the issues before the Committee have been settled, with explanatory reasoning, by the domestic courts. As regards the supposedly excessive delay in submitting the complaint, the Committee points out that the Optional Protocol sets no deadline for submitting communications, that the amount of time that elapsed before submission does not in itself constitute an abuse of the right to submit and that, in exceptional circumstances, the Committee can ask for a reasonable explanation of the delay.¹ In the present case, the Committee observes that the issues the author has brought before it were finally resolved by the Constitutional Court in December 1997 and that a second group of claims by the author which, if accepted, might have annulled his conviction, were rejected by the Constitutional Court in January 1998. The author maintains that he gained access to the 1998 ruling only in June 2001, when the Constitutional Court rejected, on the merits, a claim by the author unrelated to his complaint before the Committee. In the light of the circumstances of the case, the Committee considers that the communication cannot be described as an abuse of the right to submit.

6.4 On the complaint relating to article 14, paragraph 1, of the Covenant, the Committee notes the author's comment that the charge of unlawful association was omitted from the

indictment and the State party's observations to the effect that the trial did indeed cover that charge. It observes that whether the charge was included in the indictment is a matter of fact which in principle the domestic courts must determine unless their determination is manifestly arbitrary or constitutes a denial of justice. The documents supplied by the author show that criminal procedure in Spain allows indictments to be brought by individuals in addition to the indictment by the Attorney-General and that, while the Supreme Court ruling of 19 July 1997 to which the author alludes does omit various charges from one of the individual indictments, including the charge against the author of unlawful association, it did not omit the charge against him of unlawful association presented in the indictment by the Attorney-General and another of the individual indictments. The Committee considers that the author has not adequately substantiated for purposes of admissibility his complaint relating to article 14, paragraph 1, of the Covenant, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the remainder of the communication raises issues under article 14, paragraph 5, of the Covenant, declares it admissible and proceeds to consider the communication on its merits.

Consideration on the merits

7. On the complaint relating to article 14, paragraph 5, the Committee observes that the author was tried by the highest court in the land because among the others accused in the case were a member of the Senate and a member of the Congress of Deputies, and under Spanish law trials of cases involving two members of Parliament are to be conducted by the Supreme Court. It takes note of the State party's arguments that conviction by the highest court is compatible with the Covenant and that this is a common situation in many States parties to the Covenant. However, article 14, paragraph 5, of the Covenant provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law. The Committee considers that the phrase "according to the law" was not intended to mean that the very existence of the right to review should be left to the discretion of the States parties. Although the legislation of the State party provides that under some circumstances a person, by reason of his office, is to be judged by a higher tribunal than would ordinarily be the case, that circumstance cannot of itself detract from the right of an accused to have his conviction and sentence reviewed by a higher tribunal. The Committee therefore concludes that the facts as set forth in the communication represent a violation of article 14, paragraph 5, of the Covenant.²

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 before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party should afford the author an effective remedy and take the necessary steps to ensure that similar violations are not repeated in the future.

10. Bearing in mind that, by becoming 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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

¹ See communication Nos. 787/1997, Gobin v. Mauritius, decision dated 16 July 2001, para. 6.3, and 1434/2005, Fillacier v. France, Views dated 28 April 2006, para. 4.3.

² See, in this regard, communication No. 1073/2002, Terrón v. Spain, Views dated 5 November 2004, para. 7.4.
