



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-eighth session
16 October-3 November 2006

VIEWS

Communication No. 1332/2004

Submitted by: Juan García Sánchez and Bienvenida González Clares
(represented by counsel, Mr. José Luis Mazón Costa)

Alleged victims: The authors

State party: Spain

Date of communication: 4 November 2002 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the
State party on 1 December 2004 (not issued in document
form)

Date of adoption of Views: 31 October 2006

Subject matter: Conviction at second instance overturning acquittal by the
lower court, with no possibility of review.

Procedural issues: Exhaustion of domestic remedies

* Made public by decision of the Human Rights Committee.

Substantive issues: Right to appeal against conviction and sentence before a higher court in accordance with the law.

Article of the Covenant: 14, paragraph 5

Article of the Optional Protocol: 2

On 31 October 2006, 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. 1332/2004.

[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-eighth session

concerning

Communication No. 1332/2004*

Submitted by: Juan García Sánchez and Bienvenida González Clares
(represented by counsel, Mr. José Luis Mazón Costa)

Alleged victims: The authors

State party: Spain

Date of communication: 4 November 2002 (initial submission)

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

Meeting on 31 October 2006,

Having concluded its consideration of communication No. 1332/2004, submitted on behalf of Mr. Juan García Sánchez and Ms. Bienvenida González Clares 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 authors of the communication and the State party,

Adopts the following:

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

1. The authors of the communication, dated 4 November 2002, are Juan García Sánchez, born in 1938, and Bienvenida González Clares, born in 1935. They claim to be victims of a breach by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The authors are represented by counsel, Mr. José Luis Mazón Costa.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Factual background

2.1 In February 1996, Juan García Sánchez, a fabric salesman, was ordered to pay damages in excess of 8 million pesetas (€48,080.97) to José González Amoros. Mr. García Sánchez already had outstanding debts of 5 million pesetas (€30,050.61). In December 1996, he decided to abrogate the joint property arrangements between himself and his spouse, Bienvenida González, which covered a single piece of property, the family home. The property was valued at 10 million pesetas (€860,101.21), each of the authors being entitled to half. In early 1997, Bienvenida González acquired her spouse's rights for 5 million pesetas, which Mr. García Sánchez used to pay off various debts, but not the debt he owed Mr. González Amoros.

2.2 Criminal proceedings were brought against the authors for fraudulent bankruptcy, on the grounds that they had concealed assets from their creditors. The Public Prosecutor, in his submissions, requested that the offence be deemed culpable insolvency or concealment of assets. The Criminal Court of Murcia acquitted the authors on 30 November 2000. The judgement was appealed by the prosecution and the Office of the Public Prosecutor. On 5 September 2001, the Provincial High Court of Murcia overturned the judgement handed down at first instance and convicted the authors of culpable insolvency, punishable by one year in prison and a fine. The Provincial High Court ruled that Juan García, in agreement with his spouse, Bienvenida González, had disposed of property so as to reduce his assets to a state of insolvency with intent to defraud Mr. González Amoros of the money due to him.

The complaint

3.1 The authors claim that the State party violated article 14, paragraph 5, of the Covenant, because they were convicted by a court of second instance without the possibility of their convictions or the penalties imposed being reviewed by a higher court. They further contend that the remedy of cassation before the Supreme Court is not applicable against judgements handed down on appeal by the Provincial High Courts, as expressly stipulated in article 847 of the Code of Criminal Procedure.

3.2 The authors acknowledge that they did not submit an application for *amparo* to the Constitutional Court. They consider such application to be ineffective in view of a previous Court ruling that acquittal of a defendant at first instance followed by conviction at second instance without the possibility of appeal does not violate the right to a full review of the conviction to which article 14, paragraph 5, of the Covenant refers. The Constitutional Court justifies the denial of the right to review by a higher court by relying on the presumption that the court of second instance will display greater wisdom, competence and thoroughness than the lower court.

State party's observations on admissibility and on the merits

4.1 The State party, in a note verbale dated 16 February 2005, challenges the admissibility and merits of the communication, maintaining that the authors have not exhausted domestic remedies by failing to apply for *amparo* to the Constitutional Court.

4.2 The State party argues that nowadays an application for *amparo* is a perfectly effective remedy in cases such as the one covered in the communication, especially since the communication is of later date than the decision handed down in *Gómez Vásquez v. Spain*. It maintains that the Constitutional Court, in its judgement of 3 April 2002 (STC 70/02, First Chamber), referred to the Committee's views and did not declare the appeal inadmissible but ruled on the merits. Likewise, the State party refers to the Constitutional Court's ruling of 9 February 2004, No. 10/2004, on an acquittal at first instance superseded by a conviction on appeal, where the Court ruled that the evidence must be produced again at second instance if conviction depends upon evidence with which the judge must be directly and personally acquainted.

4.3 The State party maintains that article 14, paragraph 5, of the Covenant neither requires the prosecution's right of appeal to be restricted nor calls for the establishment of an endless series of appeals. What is crucial is that the issues raised in criminal proceedings can be reviewed, but that does not mean that the higher court cannot consider appeals submitted by the prosecution.

4.4 The State party indicates that although in the case under consideration the High Court's sentence is based solely on documentary evidence, the Constitutional Court has not had an opportunity to rule on the case, owing to the failure to apply for *amparo*. Likewise, it reiterates that in Spain the prosecution and the defence are equally entitled to appeal. Were the higher court not able to take account of an appeal by the prosecution, as it did in the case at hand, that would run counter to this principle that the parties have an equal right to lodge an appeal.

Authors' comments on the State party's observations

5.1 The authors challenge the State party's arguments in a letter dated 15 September 2005. They say the Constitutional Court has maintained since 1985 that first conviction at second instance does not breach article 14, paragraph 5, of the Covenant. They refer to the Constitutional Court's decision of 28 June 1999, reiterating that the Court's case law on this point was not established by that decision but dates back to 1985.

5.2 The authors contend that the ruling of 9 February 2004 to which the State party alludes is not concerned with acknowledgement of the right to a review of court decisions, but rather a separate issue, the right to a public trial at second instance, which is a different subject from that of the present communication.

5.3 The authors submit that the futility of *amparo* as a remedy in cases relating to review at second instance has been repeatedly discussed by the Committee in its Views, including those on the *Gomariz Valera* case of 22 July 2005, in which it found the Government of Spain at fault in an identical case.

5.4 In addition, the authors submit that the Constitutional Court explicitly rejects the Committee's jurisprudence, which requires a full legal and factual review of the conviction.

Issues and proceedings before the Committee

Considerations on 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 has not been submitted to any other procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 On the exhaustion of domestic remedies, the Committee takes note of the State party's claims that domestic remedies have not been exhausted because the alleged violation now before the Committee was not argued before the Constitutional Court, which is said to have amended its case law in decisions dating from 2002 and 2004. The Committee observes that at the time of the authors' conviction on 5 September 2001, the Court had clear case law on the issue.¹ The Committee also observes that the Court's case law as presented to it is concerned with the need to present again at second instance any evidence with which, by its very nature, the judge must, according to the Court's understanding, be directly and personally acquainted, in particular oral testimony and expert opinions. In the case under consideration, the conviction was based entirely on documentary evidence.² The Committee recalls its jurisprudence to the effect that only remedies with a reasonable chance of success need to be exhausted and reiterates that, when the case law of the highest domestic court has settled the point, ruling out any chance of a successful appeal to the domestic courts, the authors are not required under the Optional Protocol to exhaust domestic remedies.³ In the case under examination, the Committee considers that the remedy of *amparo* had no prospect of success with regard to the alleged violation of article 14, paragraph 5, of the Covenant. The Committee therefore considers that domestic remedies have been exhausted and that the communication is admissible in relation to the above-mentioned provision.

Consideration of the merits

7.1 With regard to the merits of the communication, the Committee takes note of the State party's argument that conviction on appeal is compatible with the Covenant. It notes that the authors were found guilty by the Provincial High Court of Murcia after being acquitted by the Criminal Court of Murcia without the possibility of a full review of the conviction.

7.2 Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that the expression "according to law" is not intended to leave the very existence of a right of review to the discretion of the States parties.⁴ On the contrary, what must be understood by "according to law" is the modalities by which the review by a higher tribunal is to be carried out. Article 14, paragraph 5, not only guarantees that the judgement will be placed before a higher court, as happened in the authors' case, but also that the

conviction will undergo a second review, which was not the case for the authors. Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant's right to review of his or her conviction and sentence by a higher court.⁵ The Committee accordingly concludes that there has been a violation of article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication.

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. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the authors with an effective remedy that allows for a review of their convictions by a higher court. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. 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 applicable remedy should it be proven that a violation has occurred. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

[Done 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.]

Notes

¹ See the decision of 28 June 1999, in which the Constitutional Court held that: "In principle, in the light of our doctrine (...), conviction in a higher court does not in itself involve a violation; nevertheless, there is no constitutional need to make provision for further review of the conviction, which could be endless, particularly considering the function, from the standpoint of the Constitution, of *amparo* with respect to the protection of the fundamental rights in question." STC 120/1999.

² STC 10/2004 of 9 February 2004 and STC 167/2002 of 18 September 2002.

³ See, for example, communication No. 511/1992, *Länsman et al. v. Finland*, Views adopted on 14 October 1993, para. 6.3; communication No. 1095/2002, *Gomariz v. Spain*, Views adopted

on 22 July 2005, para. 6.4; communication No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5; and communication No. 1293/2004, *Maximino de Dios Prieto*, decision, 25 July 2006, para. 6.3.

⁴ See, for example, communication No. 64/1979, *Salgar de Montejo v. Colombia*, Views adopted on 24 March 1982, para. 10; communication No. 1073/2002, *Terrón v. Spain*, Views adopted on 5 November 2004, para. 7.4; communication No. 1211/2003, *Luis Oliveró Capellades v. Spain*, Views of 11 July 2006.

⁵ Communication No. 1095/2002, *Gomaríz v. Spain*, Views adopted on 22 July 2005, para. 7.1.
