



# International Covenant on Civil and Political Rights

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## Human Rights Council

102nd session

11–29 July 2011

### Decision

#### Communication No. 1617/2007

<i>Submitted by:</i>	L.G.M. (represented by counsel Fernando Pamo de la Hoz)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	2 May 2006 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 15 November 2005 (not issued in document form)
<i>Date of adoption of Decision:</i>	26 July 2011
<i>Subject matter:</i>	Scope of review on appeal in criminal proceedings
<i>Procedural issues:</i>	Exhaustion of domestic remedies; degree of substantiation of the complaint; abuse of rights
<i>Substantive issues:</i>	The right to have a conviction and sentence reviewed by a higher tribunal
<i>Article of the Optional Protocol:</i>	2
<i>Article of the Covenant:</i>	14, paragraph 5

[Annex]

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\* Made public by decision of the Human Rights Committee.

## Annex

### **Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (102nd session)**

concerning

#### **Communication No. 1617/2007\*\***

*Submitted by:* L.G.M. (represented by counsel Fernando Pamo de la Hoz)

*Alleged victim:* The author

*State party:* Spain

*Date of communication:* 2 May 2006 (initial submission)

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

*Meeting on 26 July 2011,*

*Adopts the following:*

#### **Decision on admissibility**

1. The author of the communication is Mr. L.G.M., an Iranian citizen, born in 1965, who claims to be the victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 January 1985. The author is represented by counsel Fernando Pamo de la Hoz.

#### **Factual background**

2.1 On 23 January 2004 the author was sentenced by the National High Court to 20 years and 7 months' imprisonment and a fine of 41 million euros for offences against public health, money laundering and forgery of an official document. According to the judgement handed down by the National High Court, the author belonged to and headed a drug-trafficking organization.

2.2 The case was heard by the National High Court between 27 October and 5 December 2003. At those hearings the author requested the annulment of various proceedings. In particular, he alleged procedural infringements, a breach of the right to an effective remedy and violation of the right to a defence. These annulment pleas were entered at different stages of the proceedings and were all dismissed. On 30 January 2004,

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

the National High Court took a decision on the author's request for clarification of his sentence.

2.3 On 14 April 2004, the author lodged an appeal in cassation before the Supreme Court. In a ruling on 10 February 2006, the Court decided to uphold the decision of the National High Court. The author alleges before the Committee that he was unable to obtain a proper review of the National High Court's judgement on the ground that, by law, cassation proceedings do not allow the evidence leading to a conviction to be re-examined. He maintains that the limitations of cassation proceedings prevented him from either questioning the credibility of the testimony of witnesses and experts or re-examining contradictory documentary evidence.<sup>1</sup>

2.4 During his appeal in cassation, the author alleged that the judgement of the National High Court was null and void *ipso jure* and contained omissions, errors and flaws. The ruling of the Supreme Court, which the author attaches, replies to the 14 grounds for cassation put forward. These are some extracts of the ruling:

(a) The author alleges that the National High Court had dismissed an item of documentary evidence (the transcription of a document in Persian) on the ground that it was time-barred. Nevertheless, the same evidence was subsequently taken into consideration in the judgement handed down by the National High Court. To this allegation the Supreme Court replied that its examination of the records of the proceedings had led it to conclude that the National High Court had not declared the evidence as such to be invalid but had instead invalidated only the conclusions procedure, which had begun before the transcription of the document in question had been made available to the parties;

(b) The author alleged a violation of the right to an effective remedy and a legal defence. To this allegation the Supreme Court replied that the author had failed to substantiate this aspect of his appeal and that not all procedural infringements prevent the exercise of the right to a proper defence. It also pointed out that the author did not lodge an appeal or a challenge when he had the opportunity to do so;

(c) The author alleged a violation of the right of defence with respect to his spouse on the grounds that she did not receive any legal assistance during the investigation to which she was subject. In this regard the Supreme Court argued that, under Spanish law, cassation proceedings are intended only to ensure the defence and exercise of the rights of the person concerned, not those of another person. The author's own right of defence was respected, since he was always assisted by a lawyer, as shown in the records of the proceedings of the case;

(d) The author alleged that Turkish documentation had been added to the file by the Public Prosecution Service. The Supreme Court noted, however, that the documentation in question had been entered under a request for judicial assistance prior to closure of the preliminary proceedings;<sup>2</sup>

(e) The author argued that one of the co-defendants was not summoned personally and therefore did not appear at the trial, which deprived the author of a means of defence. The Supreme Court commented that the author had not shown for what reason the presence of the co-defendant would have been necessary or essential. The Court pointed out

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<sup>1</sup> The author's communication is couched in very general terms and does not specify which testimony or documentary evidence he is referring to. The author merely attaches copies of the judgements handed down by the domestic courts. Nor does he highlight the elements of those judgements which might be relevant in relation to article 14, paragraph 5, of the Covenant.

<sup>2</sup> According to the Supreme Court, that documentation appeared in volume 30 of the preliminary proceedings rather than in volume 38, as alleged by the author.

that the whereabouts of the person in question were unknown and that the trial of the other defendants was conducted in compliance with domestic legislation and with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, i.e. with the right to be tried without undue delay and within a reasonable time. The Supreme Court argued that it was necessary to proceed with the trial because some of the defendants had been held in pretrial detention for almost as long as was legally permitted, and it was impossible to tell how long it would take before those not present could be brought to trial;

(f) The author alleged that he had been denied the right to due process and to use all available evidence, on the ground that one of the co-defendants was tried only a few days after the author's own trial<sup>3</sup> was concluded. Sentence was passed on the author after the separate trial of this co-defendant, who confirmed all the arguments put forward by the prosecutor in his indictment and introduced new incriminatory elements. According to the author, this considerably influenced the views of the judges when passing judgement on him. With regard to this allegation, the Supreme Court concluded that the author's arguments were pure speculation, especially since the factual record of the judgement handed down to the co-defendant contained no reference whatsoever to the author. The Court argued, moreover, that the author did not voice an objection at the appropriate stage of the proceedings. The co-defendant was at the disposal of the parties at the author's trial but did not wish to make a statement;

(g) The author alleged a violation of his right to a fair trial. He argued that the reporting judge had shown, through certain questions that he had asked during the trial, that he was biased against the argument adduced by the author. The Supreme Court considered that if the author had thought that any questions had been intended to discredit a concrete piece of evidence which he considered to be vital, then he should have voiced the appropriate complaint. That day's record, however, contains no mention of any such challenge;

(h) The author maintained that the requirements for establishing the constitutionality of the telephone taps had not been met. The Supreme Court commented that the taps had been authorized and monitored by the courts in compliance with the principles of proportionality, legality and motivation. The manner in which the information obtained from those telephone taps was incorporated into the proceedings may have affected their evidential value, but not the basic right which had allegedly been violated. With regard to the author's complaint that the translations of the recordings of telephone calls were faulty, the Court concluded that the existence of different translations did not imply an irregularity, but rather reflected an exceedingly zealous judicial precaution. The corrections made by the Turkish interpreter did not influence the proceedings or the author's defence in any vital way. Furthermore, the interpreters' presence in the courtroom made it possible to be apprised of the exact content of the calls and to verify the accuracy of the transcriptions. The author did not, on the other hand, draw attention to any passage which might have weighed against his case on account of an incorrect or confused translation.

2.5 On 4 April 2006, the author lodged an appeal of *amparo* with the Constitutional Court.<sup>4</sup> He maintains, however, that *amparo* proceedings are not effective in cases such as his, as already established by the Committee in *Gómez Vázquez v. Spain*.<sup>5</sup>

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<sup>3</sup> The co-defendant was tried on 13 January 2004.

<sup>4</sup> This appeal was pending when the author submitted the communication to the Committee.

<sup>5</sup> Communication No. 701/1996, *Gómez Vázquez v. Spain*, Views adopted on 11 August 2000.

### The complaint

3. The author claims a violation by the State party of article 14, paragraph 5, of the Covenant, on the ground that full account was not taken of the evidence and the questions of fact produced in first instance.

### State party's observations on admissibility and merits

4.1 The State party, in its notes verbales dated 10 January and 14 May 2008, maintains that the author failed to exhaust all domestic remedies, since the *amparo* proceedings had not yet run their course.

4.2 It considers that, following the Committee's decision in the *Gómez Vázquez* case, the Constitutional Court incorporated the Committee's legal tenet that the appeal in cassation in criminal proceedings should be of sufficient scope to meet the requirements of article 14, paragraph 5, of the Covenant. This requirement has been consistently observed in subsequent rulings of the Constitutional Court.

4.3 Nevertheless, the State party points out that, while the appeal in cassation lodged by the author before the Supreme Court put forward 14 grounds for appeal, none of these refers to a flaw in the application of evidence or a violation of the presumption of innocence. The Supreme Court considered all the grounds of appeal very carefully. The State party therefore requests that the Committee declare the communication inadmissible on the grounds that domestic remedies were not exhausted and that the communication constitutes an abuse of the provisions of the Covenant.

### Author's comments on the State party's observations

5. On 6 February 2008 the author informed the Committee that his *amparo* appeal had been dismissed on 17 July 2006. The author argued that this dismissal demonstrates the lack of due process in the appeal procedure.

### 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 it is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes the State party's observations regarding the non-exhaustion of domestic remedies and that the author subsequently submitted a copy of the Constitutional Court's decision in the *amparo* proceedings. The Committee recalls that it has consistently held that only those remedies that have a reasonable prospect of success need be exhausted<sup>6</sup> and that it is not necessary to have exhausted the remedy of *amparo* in cases concerning the review of judgements brought against Spain under article 14, paragraph 5, of the Covenant.<sup>7</sup> The Committee therefore considers that domestic remedies have been exhausted.

<sup>6</sup> See, for example, communication No. 1095/2002, *Gomariz v. Spain*, Views adopted on 22 July 2005, paragraph 6.4; communication No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, paragraph 6.5; and communication No. 1293/2004, *Dios Prieto v. Spain*, decision of 17 June 2002, paragraph 6.3.

<sup>7</sup> Communication No. 701/1996, *Cesario Gómez Vázquez v. Spain*, Views adopted on 11 August 2000.

6.4 The Committee notes the State party's argument that the communication should be declared inadmissible on the ground of abusive use of the provisions of the Covenant, but it does not agree with that argument.

6.5 With regard to the author's complaint that the review of his case was not conducted in accordance with article 14, paragraph 5, of the Covenant, the Committee takes note of the State party's argument that the Supreme Court examined all the grounds for appeal in cassation very carefully. The Committee considers that the author has formulated his complaint in general terms, without specifying the exact matters which he considers were not reviewed by the Supreme Court. Moreover, it appears from the ruling of the Supreme Court that the latter examined all the grounds for cassation put forward by the author, many of which refer to the assessment of some pieces of evidence made by the lower court. In the light of the explanations given by the author regarding the cassation ruling, the Committee considers that the complaint relating to article 14, paragraph 5, has not been sufficiently substantiated for purposes of admissibility and concludes that it is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

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

[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.]

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