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HUMAN RIGHTS COMMITTEE
Eighty-fifth session
17 October-3 November 2005

DECISION

Communication No. 1059/2002

Submitted by:	Héctor Luciano Carvallo Villar (represented by counsel, Luis Sierra y Xauet)
Alleged victim:	The author
State party:	Spain
Date of communication:	12 February 2001 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 March 2002 (not issued in document form)
Date of decision:	28 October 2005
Subject matter:	Conviction of the author on insufficient evidence

* Made public by decision of the Human Rights Committee.

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Procedural issues:	Exhaustion of domestic remedies, failure to substantiate claims
Substantive issues:	Presumption of innocence, accused's right to the assistance of counsel of his choice
Articles of the Covenant:	2, paragraphs 3 (a) and (b); 14, paragraphs 1, 2, 3 (d) and 5
Articles of the Optional Protocol:	2; 5, paragraph 2 (b)

ANNEX

Annex

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

Eighty-fifth session

concerning

Communication No. 1059/2002*

Submitted by:	Héctor Luciano Carvallo Villar (represented by counsel, Luis Sierra y Xauet)
Alleged victim:	The author
State party:	Spain
Date of communication:	12 February 2001 (initial submission)

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

Meeting on 28 October 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication, which is dated 12 February 2001, is Héctor Luciano Carvallo Villar, a Chilean national, who alleges violation by Spain of articles 2, paragraphs 3 (a) and (b); and 14, paragraphs 1, 2, 3 (d) and 5, of the Covenant. The author is represented by counsel, Luis Sierra y Xauet.

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Factual background

2.1 On 25 June 1997, the author was sentenced by the Barcelona Provincial Court to eight years' imprisonment and a fine for offences against public health (drugs trafficking). The author applied for judicial review before the Supreme Court, which rejected the application in a ruling of 14 July 1999.

2.2 While the review application was being prepared, the author asked to be assisted by counsel of his choice. His counsel sought the consent of the court-appointed counsel, who received a sum of money from the author as a fee. The court-appointed counsel did not consider the fee adequate, however, and would not consent to the change. Consequently, the court did not accept the author's proposed new counsel, who was unable to act in his defence. The application was thus filed by counsel not of the author's choice.

2.3 The Supreme Court's judgement was communicated to the court-appointed *procurador* (court representative), Fontanilles Fornielles, on 2 September 1999, but the author was not informed. By the time the counsel he had appointed heard about the judgement and informed the author, the deadline for submitting an application for *amparo* - 20 days from the date of notifying the *procurador* - had passed. The author's appointed attorney nonetheless submitted an application for *amparo* on 31 January 2000, but it was found inadmissible *ratione temporis* by the Constitutional Court on 5 May 2000.

2.4 The author states that he was convicted on the basis of voice identifications by the Provincial Court from monitored telephone calls. He alleges that the phone-tap evidence was handled without adequate safeguards as required in article 14, paragraphs 1 and 2, of the Covenant, on the following grounds:

(a) The examining magistrate did not listen to all the tapes but was given selected recordings chosen by the police. Under the Criminal Procedure Act, telephone communications must be considered in the presence of the judge, the secretary - who should prepare a record - and the accused. Moreover, any transcription of items of interest or extracts of monitored telephone conversations must be done by the examining magistrate. Yet in this case the Court was provided with transcribed extracts of calls which had been selected by the police and merely noted by the secretary;

(b) The judge examined this evidence in the absence of the accused;

(c) The phone-tap warrant failed to provide the requisite grounds for the measure, although according to the judgement, it contained the basic information required such as the offence and the period of monitoring. This constituted a violation of the right to privacy of correspondence under the Constitution, for the fact that it referred to the offence alone and failed to provide any evidence to substantiate the measure or to mention that it was a criminal matter or to explain in what way it concerned the person under investigation, effectively made it an arbitrary measure;

(d) The evidence was not presented in accordance with the rules of documentary evidence since it was not reproduced at the trial, and it was not established that the calls had been made by the accused. Neither the author nor his co-defendant admitted that the author's voice

was one of those to be heard on the tapes. Moreover, the expert voice analysis of the tapes failed to establish the degree of similarity between the author's voice and the voice on the tapes. The fact that the Court found the voices similar was only one element among others in the body of evidence, and could not have carried enough weight to convict the author and overturn the presumption of innocence.

2.5 The author states that this matter has not been submitted to any other procedure of international investigation or settlement.

The complaint

3.1 The author alleges a violation of his right to an effective remedy under article 2, paragraphs 3 (a) and (b), of the Covenant, on the grounds that the Supreme Court judgement of 14 July 1999 was not conveyed to him in time to submit an application for *amparo*.

3.2 He also claims a violation of article 14, paragraphs 1 and 2, for the absence of guarantees in considering the evidence upon which his conviction was based: the phone tap was not adequately supervised by the court or authorized by a duly substantiated warrant and the evidence was not reproduced in accordance with the rules of documentary evidence. He was thus deprived of a defence and denied the right to presumption of innocence.

3.3 The author alleges a violation of the right to be assisted by counsel of his choice under article 14, paragraph 3 (d), of the Covenant: the Court should have accepted the author's designated counsel without seeking the consent of the court-appointed counsel, a requirement that is not to be found anywhere in domestic or international law. The matter of consent between lawyers should not amount to a denial of the right to counsel of one's choice.

3.4 The author also alleges a violation of article 14, paragraph 5, of the Covenant, on the grounds that the Supreme Court failed to review or scrutinize the evidence considered by the trial court or to assess whether it was lawful or sufficient.

State party's submissions on admissibility, and author's comments

4. In its submission of 6 May 2002, the State party contests the admissibility of the communication on the grounds that the author has not exhausted domestic remedies. In the lower court the author was represented by a court-appointed *procurador*, Mr. Fontanilla Fornielles, who gave his consent for another *procurador*, Ms. Echevarría, to deal with the application for judicial review. The latter subsequently declined to act as *procurador* for the author and asked the Court to appoint a *procurador*. The Court again appointed Mr. Fontanilla Fornielles, to whom the Supreme Court judgement was communicated on 2 September 1999. By the time the application for *amparo* was submitted on 31 January 2000, the 20-day deadline for applications to the Constitutional Court was long past and the application was therefore rejected as time-barred.

5.1 The author responded to the State party's submissions on 5 July 2002. He states that the Supreme Court judgement was communicated to the court-appointed counsel on 2 September 1999. When the author's appointed attorney learnt that judgement had been handed down, he went to the Barcelona Provincial Court on 19 January 2000, where he was

given a copy. That should be the date from which the deadline for the application for *amparo* should be calculated, since that was the date when the defence counsel appointed by the author was notified of the judgement. Consequently, the application for *amparo* submitted on 31 January 2000 was in time and should have been admitted.

5.2 The author also draws attention to the special nature of the *amparo* application and argues that, in order to exhaust domestic remedies, such remedies must have some prospect of success.

6. In further comments dated 13 September 2002, the State party points out that, in the Spanish system, judgements are communicated to the *procurador*, who handles procedural matters on the party's behalf, and not to counsel, who is responsible for the technical side of the party's defence. Provision of a copy of the judgement should not be confused with formal notification thereof.

State party's submissions on the merits, and author's comments

7.1 In its submission of 4 September 2002, the State party maintains that there has been no violation of the Covenant. In respect of the allegations of a violation of article 14, paragraphs 1 and 2, and with reference to the author's contestation of the phone-tap warrant, it states that the Provincial Court judgement in fact includes the legal basis for the action: there are details of the prima facie evidence, the telephone number, the person under investigation and the period authorized, as well as the requirement for original tapes, a reference to legal principles and a description of the offence under investigation. The Supreme Court found the phone tap to be in accordance with the law. The State party also refers to those points in the lower court judgements which showed the reasoning that convinced the Court that the person speaking in the taped conversations was the author, and concludes that the oral hearings were conducted in full accordance with the principle of adversarial procedure.

7.2 As to the allegations concerning article 14, paragraph 3 (d), the State party points out that the author was assisted in the review proceedings by a court-appointed counsel at his own express request, on the grounds of lack of financial means. He later changed his mind and, making clear that he had the means, asked to appoint counsel of his choice. However, since he now had the means to do so, he was required to pay a fee to the court-appointed counsel for the work that had been done. The author did not wish to pay a fee and he does not appear to have discussed the matter with the Bar Association. In the course of the domestic proceedings, the author did not seek the consent of the court-appointed counsel (Bar Statute, art. 33) or discuss his obligation to pay the court-appointed counsel's fees or the amount thereof. Consequently, the author cannot hold the Spanish authorities responsible for his changes of mind and his own acts or omissions.

7.3 As to the allegations of a violation of article 14, paragraph 5, the State party points out that this provision does not give the right to a second hearing with a full rerun of the trial, but the right to a review by a higher court of the conduct of the trial at first instance and verification of the proper application of the rules in arriving at the conviction and the sentence imposed in any given case. The review procedure may be governed by domestic law, which shall establish its scope and limitations.

7.4 The Supreme Court reviewed the case to establish whether any prosecution evidence existed and concluded that it did. It also verified that the prosecution evidence had been lawfully obtained and concluded on reasoned grounds that such was the case. It also reviewed the case to ensure that the guilty verdict and conviction had not been the result of arbitrary, irrational or absurd considerations and concluded on reasoned grounds that the Court's consideration had been logical and rational. In respect of the phone-tap tapes, the review judgement states:

> "The sentencing Court, in concluding that it was [the author's voice], reasons as follows: when he makes the call, he identifies himself using that name; he is so addressed by the co-defendants; his is the name under which the telephone he is using is registered; and the Court itself, notwithstanding the inconclusive nature of the voice-identification test suggested by the accused himself, recognizes Luciano's voice as that of the accused it has seen and heard in the oral hearings. Thus the Court had before it not only evidence of the reality of the cocaine dealing but also a whole body of circumstantial evidence arising out of the statements of a co-defendant, as well as direct evidence. The Court applied logical reasoning in order to arrive at an understanding of how the various elements, taken together, demonstrate the appellant's involvement in the matter. These are the points relating to the right to presumption of innocence that this review Court may examine and verify."

7.5 As to the phone-tap warrant, the Supreme Court states:

> "The monitoring of co-defendant Antonia Soler Soler's telephone was ordered on the basis of a detailed police report describing the frequent contacts between that subscriber and the man living with her, and individuals who had been arrested for possession of drugs; the warrant dated 27 October 1993 contains a general argument based on the applicable legislation and a specific argument relating to the subscriber, giving details of the number and its location and providing a time frame for reporting the results. No more than 10 days later, the police provided the court with a seven-page report on the results of the phone tap, detailing each day's calls, and on 12 November they uncovered the attempt to set up a cocaine deal which gave rise to this case and in relation to which the Court was able to hear during the trial the original tapes of the conversations, which led to the conviction referred to in the earlier judgement. Thus the telephone-monitoring procedure cannot be said to have failed to meet any of the conditions imposed to prevent violation of this constitutional right."

7.6 At no time during proceedings in the domestic courts did the author or his appointed counsel express any doubts concerning the scope or proper conduct of the judicial review, or bring any complaint against the Supreme Court for violation of the right to a second hearing.

8.1 In his comments of 24 November 2002, the author restates his claims concerning the judicial review. In his view, this remedy is one which precludes any defence, since it does not allow the submission of new evidence that might arise later or any weighing of the evidence. He also points out that the State party makes no reference in its reply to his complaint to the Committee of interference in private communications, and he therefore takes it the State party admits that violation of the Covenant.

8.2 The author repeats his earlier arguments. He points out in particular that the Supreme Court did not accept his change of counsel, thereby denying him the right to counsel of his choice. It also meant the *procurador* he had appointed had to decline to represent him. Her withdrawal was thus not voluntary but forced upon her by the Supreme Court.

8.3 In the Spanish system, a convicted person must be notified of the judgement. In this case, the author was arrested and went to prison because he had not been notified of a judgement. When the Supreme Court judgement reached the Provincial Court, the author's appointed counsel had not ceased to represent him, as it was he who had defended the author in the Provincial Court.

Issues and proceedings before the Committee

9.1 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.

9.2 The author alleges a violation of the Covenant on the grounds that the Supreme Court judgement was not communicated to him in time to submit an application for *amparo*. The State party maintains that the judgement was sent to the *procurador* who had handled the case. In the Committee's view, the State cannot be held responsible for the *procurador's* failure to notify the author of the judgement in time for him to submit the relevant appeals. The Committee therefore finds that this part of the communication is not duly substantiated and is therefore inadmissible under article 2 of the Optional Protocol.

9.3 As to the claims that the author was denied representation by counsel of his choice in the judicial review procedure, and that the Supreme Court judgement was not sent to him directly, the Committee notes that the author made no appeal to the Spanish authorities on these grounds, and therefore finds that this part of the communication should be declared inadmissible for non-exhaustion of domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

9.4 With regard to the claims of an absence of guarantees in respect of the evidence upon which the conviction was based, the Committee finds that, in view of the failure to submit an application for *amparo*, through no fault of the State, these allegations should also be declared inadmissible for non-exhaustion of domestic remedies.

9.5 With regard to the alleged violation of article 14, paragraph 5, it is clear from the judgement of the Supreme Court that the Court looked very closely at the Provincial Court's assessment of the evidence. In this regard, the Supreme Court considered that the evidence against the author was sufficient to set aside the presumption of innocence.[1] The claim regarding article 14, paragraph 5, is therefore, insufficiently substantiated for purposes of admissibility. The Committee concludes that this claim is inadmissible under article 2 of the Optional Protocol.

[1] Cf. communication No. 1399/2005, *Cuartero v. Spain*, decision dated 7 July 2005, para. 4.4.

10. The Human Rights Committee therefore decides:

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

(b) That the decision be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English 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.]
