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

DECISION

Communication No. 1293/2004

Submitted by:	Maximino de Dios Prieto (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	17 June 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 June 2004 (not issued in document form)
Date of decision:	25 July 2006
Subject matter:	Conviction of the author on insufficient evidence

* Made public by decision of the Human Rights Committee.

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Procedural issues:	Failure to substantiate claims
Substantive issues:	Failure of the court of second instance to reconsider the facts
Articles of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	2

[ANNEX]

Annex

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

Eighty-seventh session

concerning

Communication No. 1293/2004*

Submitted by:	Maximino de Dios Prieto (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	17 June 2002 (initial submission)

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

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, which is dated 17 June 2002, is Maximino de Dios Prieto, who claims to be a victim of a violation by Spain of article 14, paragraphs 1 and 5, of the Covenant. He is represented by counsel, Mr. José Luis Mazón Costa. The Optional Protocol entered into force for the State party on 25 April 1985.

Factual background

2.1 In December 1999, the author was arrested by members of the Civil Guard for the alleged offence of trafficking in drugs (hashish). Five months later, he was accused of having committed the offence of bribery, namely for having offered 10 million pesetas to one of the Civil Guards who took part in his arrest.

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* 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. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

2.2 In its ruling of 23 February 2001, the Oviedo Provincial High Court sentenced the author to four years' and six months' imprisonment and a fine of 400 million pesetas for the offence of drug trafficking, and to three years' imprisonment and a fine of 10 million pesetas for the offence of bribery. During the trial, the author denied his involvement in either offence. The author points out that there is no verbatim record of the trial, since the Criminal Procedures Act allows only a summary of the proceedings, and the summary reflects, at most, one seventh of the content of the statements made.

2.3 The author submitted an appeal to the Supreme Court (*recurso en casación*); this remedy does not allow the reconsideration of the primary evidence for the prosecution that was decisive in the author's conviction. In order to substantiate his claims, he cites a paragraph of the Court's ruling in which the Court states: "With regard to the violation of the right to the presumption of innocence, such a complaint is equivalent to the claim of having been convicted in the absence of evidence and obliges this court of cassation to examine the evidentiary hearing, while it does not have the competence to examine the 'ruling on the evaluation of the evidence', which falls within the purview of the sentencing court by virtue of its direct involvement in the case."

2.4 Lastly, with regard to the complaints concerning the absence of a court of appeal for criminal cases, the author points out that the remedy of *amparo* is useless since, according to the established case-law of the Constitutional Court, the absence of such a court is not in violation of article 14, paragraph 5, of the Covenant.

The complaint

3.1 The author claims a violation of article 14, paragraph 5, of the Covenant and refers to the Committee's Views concerning communication 701/1996 (*Gómez Vázquez v. Spain*), in which such a violation was disclosed. According to the author, this provision implies the right to a comprehensive review of the conviction in all its aspects.

3.2 The author also points out that the records of the trial do not reflect everything that took place during the trial, and that it is inherent to a fair trial with the right to a second hearing to have a verbatim record that reflects everything that occurred during the oral proceedings. This allegedly resulted in a violation of article 14, paragraphs 1 and 5, of the Covenant.

The State party's observations on admissibility and the merits

4.1 In its note verbale dated 2 August 2004, the State party enumerated the reasons adduced by the author in his appeal: violation of the fundamental right to the judge predetermined by law; violation of the right to the presumption of innocence and *in dubio pro reo*, also with regard to the offence of bribery; improper application of the Criminal Code in the calculation of the sentences and the application of the aggravating circumstance of recidivism; violation of the Criminal Code with respect to the imposition of fines; error in the documentation regarding conduct constituting bribery. All these reasons were dismissed because no violation of any basic rights or procedural norms or errors in the application of provisions of the Criminal Code were found.

4.2 The alleged violations that were referred to the Committee were never brought before the domestic courts, which therefore indicates that domestic remedies have not been exhausted. The author had repeated access to the courts, obtained well-founded decisions in which the domestic courts replied fully to his allegations, and he submits a communication to the Committee concerning the alleged violation of basic rights different from those alleged in domestic courts and without exhausting domestic remedies. The communication is therefore unsubstantiated, since the author is trying to make use of the mechanism of the Covenant in clear abuse of its purpose. The State party requests the Committee to declare the communication inadmissible because it is incompatible with the provisions of the Covenant, in accordance with article 3 of the Optional Protocol, and because the author failed to exhaust domestic remedies.

4.3 On 31 May 2005, the State party reiterated the arguments contained in the preceding paragraphs and also submitted its observations on the merits of the communication.

4.4 The State party refers to the ruling of the Supreme Court and, more specifically, to the paragraph of the ruling cited by the author. It points out that the author deliberately ignores the paragraphs that follow the cited paragraph, and which refer to the evidential activity of the Provincial High Court with respect to the offence of bribery. The Supreme Court carried out a comprehensive review of the evidence for the conviction, for which reason the appealed conviction and penalty were submitted, with full guarantees, to a higher court.

4.5 With regard to the author's allegations that there was no verbatim record of the trial, in no case does article 14 of the Covenant require that court proceedings be recorded verbatim, provided that the record of the proceedings contains everything required for the defence of the person being tried. Moreover, at no time did the author claim before the Supreme Court or the Constitutional Court that his right to a fair trial had been violated because there had been no verbatim record of the proceedings of the Provincial High Court. For this reason, and independently of the fact that the complaint has no merit, the complaint should be declared inadmissible under article 3 of the Optional Protocol.

The author's comments

5. In his comments of 29 July 2005, the author points out that the Constitutional Court systematically rejects, without consideration on the merits, any complaint concerning the lack of a second hearing based on the Committee's jurisprudence. Moreover, the author maintains that he did not have access to a genuine review of his conviction for either of the two offences - trafficking in hashish and bribery - for which he was sentenced and in which he denied any involvement. The sentence handed down by the Oviedo Provincial High Court is based on an examination of the primary evidence for the prosecution - evidence which the author rejects. The Supreme Court ruling establishes limits on criminal appeals in cassation: evidence cannot be reconsidered in such appeals. The legal framework of such an appeal did not allow the author to request a re-examination of the evidence that resulted in his conviction; this legal limitation is contrary to article 14, paragraph 5, of the Covenant. There is also no real right to a second hearing when there is no verbatim record that reflects in detail all the statements made by witnesses, experts and intervening parties.

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 the communication is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

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

6.3 The Committee has noted the State party's argument that domestic remedies were not exhausted, since the alleged violations that were referred to the Committee were never brought before the domestic courts. However, the Committee recalls its established jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success.[1] An application for *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considers that domestic remedies have been exhausted.

6.4 The author alleges a violation of article 14, paragraph 5, of the Covenant, owing to the fact that the primary evidence for the prosecution that was decisive in his conviction was not reviewed by a higher court, since under Spanish law an application to the Supreme Court is not an appeal procedure and does not permit such a review. The Committee notes that the author does not explain the reasons why he believes that the court of first instance did not make a correct evaluation of the evidence, nor does he indicate to which of the offences the evidence that he considers disputable applies. On the other hand, the Supreme Court ruling indicates that the Court considered at length the evaluation by the court of first instance of the evidence relating to the offence of bribery, and concluded that that court's evaluation had been correct. In the view of the Committee, the complaint relating to article 14, paragraph 5, has not been sufficiently substantiated for the purposes of admissibility, and the Committee concludes that it is inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's claims in relation to article 14, paragraph 1, based on the lack of a verbatim record of the trial, the Committee notes that the author has not explained why he considers that the record of the trial held in the Provincial High Court did not correctly reflect what took place during the proceedings and why it infringes his rights. Moreover, the author did not file any kind of remedy in connection with that complaint. Consequently, the Committee is of the view that this part of the communication must also be considered inadmissible owing to the author's failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

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[1] See, for example, communications Nos. 511/1992, *Lansman et al. v. Finland*, Views adopted on 14 October 1993, para. 6.3; 1095/2002, *Gomaritz v. Spain*, Views adopted on 26 August 2005, para. 6.4; or 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 3 November 2004, para. 6.5.

7. The Human Rights Committee therefore decides:

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

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

[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.]
