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HUMAN RIGHTS COMMITTEE
Ninetieth session
9-27 June 2007

**DECISION**

**Communication No. 1386/2005**

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| *Submitted by*: | Tchanko Roussev Gueorguiev (not represented by counsel) |
| *Alleged victim*: | The author |
| *State party*: | Spain |
| *Date of communication*: | 5 April 2004 (initial submission) |
| *Document references*: | Special Rapporteur's rule 97 decision, transmitted to the State party on 21 April 2005 (not issued in document form) |
| *Date of adoption of decision*: | 24 July 2007 |
| *Subject matter*: | Minimum guarantees of due process and lack of proper review of the conviction and sentence on appeal |

* Made public by decision of the Human Rights Committee.

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| *Procedural issues*: | Failure to exhaust domestic remedies, international *lis pendens*; insufficient substantiation of the complaint |
| *Substantive issues*: | Right to minimum guarantees of due process; right to have the conviction and sentence reviewed by a higher tribunal according to law |
| *Article of the Covenant*: | 14, paragraphs 3 (b), 3 (e) and 5 |
| *Articles of the Optional Protocol*: | 2 and 5, paragraphs 2 (a) and 2 (b) |

**[ANNEX]**

**Annex**

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

**Ninetieth session**

**concerning**

**Communication No. 1386/2005**∗

*Submitted by*: Tchanko Roussev Gueorguiev (not represented by counsel)

*Alleged victim*: The author

*State party*: Spain

*Date of communication*: 5 April 2004 (initial submission)

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

*Meeting* on 24 July 2007,

*Adopts* the following:

**Decision on admissibility**

1. The author of the communication, dated 5 April 2004, is Tchanko Roussev Gueorguiev, a Bulgarian citizen born in 1969. The author alleges that he is a victim of violations by Spain of article 14, paragraphs 3 (b) and (e), and article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

**Factual background**

2.1 On 20 June 2000, the Burgos Provincial Court sentenced the author to six years' imprisonment, specific disqualification from exercising the right to passive suffrage, and payment of legal costs, for sexual assault with mitigating circumstances of inebriation, and to three weekends' detention for battery.

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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, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

2.2 In the Provincial Court's ruling, the following were given as relevant established facts:

(i) In the early hours of the morning of 29 August 1999, the author drove V.P., who was working as a waitress in the Pub Varadero in Burgos, after the premises had closed, to the author's home, where he compelled her by force to have sexual relations with him. He used two condoms, one of which broke during the sexual act;

(ii) On the same day, V.P. filed a complaint against the author at the Burgos Police Station and arranged to have herself admitted immediately to hospital for physical and gynaecological forensic tests. According to the report of the physical examination, V.P. presented a number of bruises and inflammation of the nose, lip, neck, clavicle and inner thighs. The gynaecological report found symptoms of vulvitis and traces of semen;

(iii) On the same day, police officers arrived at the author's home and arrested him; they found him asleep in his bedroom, with two condoms bearing traces of semen, one of which appeared to be broken, on the floor.

2.3 The author states that, during his trial before the Burgos Provincial Court, he admitted to having had sexual relations with the alleged victim on the night in question, but that he had done so with her consent, and he denied that he had ever hit or raped her. He argues that he was convicted on the basis of "abstract statements by the prosecution and by the forensic physician". He further claims that the Provincial Court rejected the application submitted by the defence to postpone the trial and to call as a witness the psychiatrist who was treating the victim for bulimia and borderline personality disorder. The defence also requested that the National Institute of Toxicology should issue a report supplementary to the report already issued, transmitting samples of the defendant's blood in order to determine whether the semen found in the condoms was the author's.

2.4 The author further claims that the lawyer who represented him during the oral proceedings ceased to represent him at the beginning of September 2000 and that in January 2001 he received a letter informing him that a lawyer had been appointed to represent him during the appeal in cassation. He alleges that this lawyer never had access to the case documents. He adds that at the end of May 2001 he learned that on 7 December 2000 this lawyer had initiated an appeal in cassation without ever having contacted the author. The grounds for the appeal were the following: (i) error of form, in the refusal to postpone the trial and call the psychiatrist as a witness; (ii) error of law, in the appraisal of the documentary evidence consisting of the psychiatric report; and (iii) violation of the law by infringement of article 24, paragraph 2, of the Spanish Constitution, which recognizes the fundamental right to the use of evidence, in the refusal to conduct a DNA test.

2.5 On 16 July 2001, the Supreme Court rejected the appeal and upheld the decision of the Burgos Provincial Court. On the matter of calling the psychiatrist as a witness, the Supreme Court held that such evidence was unnecessary because V.P.'s illness and treatment were already a matter of record, since during the oral proceedings the defence had conducted a thorough cross-examination of the forensic physicians who had examined the complainant. The Supreme

Court also found that the Provincial Court had made a correct appraisal of the psychiatric report. Lastly, the DNA test had been rejected principally because the defendant had already admitted to having had sexual relations with the victim on the night in question.

2.6 The author states that he applied to the Constitutional Court for *amparo*. He maintains that on 25 September 2001 the Burgos Provincial Court notified his legal representative of the decision that his sentence was enforceable. He says he was notified of this decision by ordinary mail and informed that he had 20 days in which to submit an application for *amparo*, but did not know how or where to apply. He notes that on 14 October 2001, having no attorney to advise him, he asked the Burgos Provincial Court to appoint an attorney and a legal representative to apply on his behalf. Once these were appointed, an application was filed with the Constitutional Court on 4 March 2002 alleging a violation of the right to a second hearing and of the right to a defence as a result of the Provincial Court's refusal to allow the psychiatrist to be called as a witness or a DNA test to be carried out. This application was rejected on 14 March 2002 *ratione temporis*, having been submitted after the deadline reckoned from the date of notification of the Supreme Court decision. The author notes that the application would have been unsuccessful in any case, since the Constitutional Court does not accept applications for *amparo* for violations of the right to a second hearing established in article 14, paragraph 5, of the Covenant.

2.7 On 18 July 2002, the author submitted an application to the European Court of Human Rights, which was declared inadmissible on 13 November 2003 for non-exhaustion of domestic remedies, since the application for *amparo* had been submitted to the Constitutional Court after the deadline. The author argues that his complaint was not considered by the European Court, since the Court rejected it on formal grounds and did not consider the substance of the complaint. He adds that, in any case, the European Court does not have jurisdiction in Spain with respect to the right to a second hearing, since Spain has not ratified Protocol No. 7 to the European Convention on Human Rights.

**The complaint**

3.1 The author alleges a violation of article 14, paragraph 3 (b), of the Covenant as a result of the rejection of his request for a DNA test. He takes the view that this refusal infringed his right to have adequate facilities for the preparation of his defence. He argues that this evidence was necessary in order to demonstrate that the semen found on V.P.'s clothing and body was not his. He points out that a certain period of time would have elapsed between the time the victim claimed in her initial statement to have closed the premises and the time she arrived at the author's home, which means she could have been assaulted by someone else on the way. He stresses that the trial court's refusal to admit the DNA evidence was arbitrary and unreasonable.

3.2 The author argues that the refusal to suspend the oral proceedings and to call as a witness the psychiatrist who had treated V.P. violated his right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, as provided for in article 14, paragraph 3 (e), of the Covenant. The author claims that this evidence was proposed in time and in due form and was pertinent in determining whether the illnesses from which V.P. was suffering (bulimia and borderline personality disorder) led her on some occasions to fabulate only about her eating habits, or whether that tendency could extend to other areas of her life. He

adds that there is no record that the forensic physicians who testified in the oral proceedings were specialists in psychiatry, and that it has thus not been determined that they were able to give information with full technical knowledge of V.P.'s diagnosis and that "there could have been doubts as to the forensic physician's impartiality". The author further argues that the alleged victim's word was the only incriminating evidence against him.

3.3 Lastly, the author alleges that the Spanish Criminal Procedure Act prevents effective appeal against the conviction and sentence to a higher court that reviews the evidence and the judgement at first instance, thereby violating article 14, paragraph 5, of the Covenant.[1] He maintains that the Supreme Court confined itself to upholding the decision of the sentencing court and at no point reviewed the evidence used to justify the conviction and sentence.

**State party's observations on admissibility**

4.1 On 20 June 2005, the State party submitted its observations on the admissibility of the communication. The State party claims that the communication is inadmissible because domestic remedies have not been exhausted. It points out that the author himself recognizes that he has failed to exhaust domestic remedies because he submitted his application for *amparo* late, and that his purported justification for this - alleged omissions by lawyers or legal representatives - is in no way the State party's responsibility. It adds that the alleged futility of the remedy of *amparo* can equally be dismissed inasmuch as it is expressly established in article 5, paragraph 2 (b), of the Optional Protocol that the only exception to the exhaustion rule occurs when the application of the remedies is unreasonably prolonged. It argues that the effectiveness of an appeal cannot be equated with acceptance of the appellant's claims. It points out that an unduly broad interpretation of the Protocol would make it possible to dispense with domestic remedies to the extent that relevant case law had been established by the domestic courts, which would clearly be contrary to the letter and spirit of article 5, paragraph 2 (b).

4.2 The State party argues that the communication is also inadmissible because the case has been submitted to another international court, the European Court of Human Rights, which declared the author's claim inadmissible on 13 November 2003. It cites the Committee's doctrine with respect to article 5, paragraph 2 (a), of the Optional Protocol, whereby the declaration made by Spain upon ratification of the Optional Protocol is interpreted as a reservation extending the scope of article 5, paragraph 2 (a), to apply also to communications the consideration of which has been completed under another international procedure.[2]

4.3 The State party alleges an abuse of the right of submission of communications, given that the author is attempting to use the Covenant to revisit a case three years after the enforceable domestic ruling was handed down.

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[1] In support of this claim, the author cites the Views of the Committee in the cases of *Cesario Gómez Vásquez v. Spain* (communication No. 701/1996) and *Sineiro v. Spain* (communication No. 1007/2001).

[2] The State party cites the Committee's decision in the case of *Arturo Navarra Ferragut v. Spain* (communication No. 1074/2002), adopted on 31 March 2004, para. 6.2.

4.4 It further claims that the communication is clearly without merit, since it is merely a discussion of facts deemed established by domestic courts, whose decisions cannot be branded as arbitrary.

4.5 Lastly, the State party points out that the Supreme Court considered all the matters of fact raised by the complainant.

**Author's comments**

5.1 In his comments dated 8 September 2006, the author stresses that the remedy of *amparo* was not available, since he was not notified of the Supreme Court's final decision, and was therefore unable to challenge that ruling in *amparo*. He further points out that the Supreme Court's decision did not state which remedy was applicable, giving the impression that the decision was not subject to appeal. He states that even if he had submitted his application for *amparo* in time and in due form, it would never have been successful with respect to his complaint regarding the right to a second hearing. He points out that the Committee has stated on previous occasions that failure to exhaust domestic remedies does not preclude the Committee from examining complaints against Spain in relation to article 14 of the Covenant.[3] He adds that article 5, paragraph 2 (b), of the Optional Protocol does not require exhaustion of domestic remedies where the application of the remedies is unreasonably prolonged.

5.2 The author claims that the State party's contention that "omissions by lawyers or representatives of the complainant [are] in no way the State party's responsibility" would be valid only if the author had chosen and appointed his lawyer and legal representative himself. He points out that, in his case, the lawyer and legal representative who submitted the appeal were court-appointed, and it was therefore the State party's obligation to act in a way that ensured that the complainant could effectively exercise his right to a defence and representation free of charge.

5.3 The author repeats his points that he tried to address an appeal to the European Court of Human Rights but that that body declared the application inadmissible for failure to exhaust the remedy of *amparo* in Spain, and did not examine the case; and that, in any case, the European Court does not have jurisdiction in Spain with respect to the right to a second hearing because Spain has not ratified Protocol No. 7, which recognizes that right.

**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.

6.2 The Committee takes note of the State party's allegations that the same case has been examined under another procedure of international agreement or settlement, the European Court

[3] The author cites the Committee's Views in the cases of *Cesario Gómez Vásquez v. Spain* (communication No. 701/1996) and *Semey v. Spain* (communication No. 986/2001).

of Human Rights, which means that Spain's reservation with respect to article 5, paragraph 2 (a), of the Optional Protocol is applicable. However, the Committee notes that in this case the Court did not actually examine the complaint submitted by the author, its decision being based solely on a strictly formal matter - failure to exhaust domestic remedies - without any examination of the substance of the complaint. Consequently, the Committee takes the view that the case does not raise any issues under article 5, paragraph 2 (a), of the Optional Protocol, as amended by the reservation formulated by the State party.[4]

6.3 The Committee further notes the State party's claims that domestic remedies have not been exhausted since the application for *amparo* was not submitted before the deadline established by law. It takes note also of the author's allegations with respect to supposed irregularities in the appointment of his attorney and legal representative and in the notification of the Supreme Court's decision, which he cites as the reasons that he was unable to meet the deadline established by law to challenge the decision through the remedy of *amparo*. Likewise, the author claims that this remedy would, in any case, have been unsuccessful, given the Constitutional Court's systematic dismissal of applications for *amparo* that are based on the right to a second criminal hearing. The Committee refers to its case law, in which it has repeatedly held that the exhaustion rule applies only to remedies that have a reasonable chance of success.[5] The remedy of *amparo* had no chance of success with respect to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore takes the view that domestic remedies have been exhausted with respect to this part of the communication. As to the complaints based on article 14, paragraphs 3 (b) and 3 (e), of the Covenant, the Committee notes that the State party has not challenged the alleged irregularities mentioned by the author with respect to the appointment of his legal representatives and the failure to notify him of the ruling in cassation, which the author claims justified the late submission of his application for *amparo*. The State party has confined itself to stating that these matters do not fall within its remit. The Committee takes the view that the State has an obligation to ensure that any person accused of a crime can exercise the right to a defence and the right of appeal, and regrets that the State party offered no reasonable explanation for the procedural irregularities described. Consequently, the Committee takes the view that domestic remedies have also been exhausted with respect to this part of the communication.

6.4 The Committee takes note of the State party's argument that the communication should be dismissed on the grounds of abuse of the right of submission of communications, given that three years have elapsed since the final appeal decision was issued. In view of the circumstances

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[4] See communication No. 1389/2005, *Bertelli Gálvez v. Spain*, decision of 25 July 2005, para. 4.3.

[5] See, for example, communications No. 701/1996, *Cesario Gómez Vásquez v. Spain*, Views adopted on 20 July 2000, para. 10.1; No. 986/2001, *Joseph Semey v. Spain*, Views adopted on 30 July 2003, para. 8.2; No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5; No. 1293/2004, *Maximino de Dios Prieto v. Spain*, decision of 25 July 2006, para. 6.3; and No. 1305/2004, *Villamón Ventura v. Spain*, decision of 31 October 2006, para. 6.3.

of the case - in particular, the procedural irregularities claimed by the author - as well as the prior practice of the Committee with respect to deadlines for the submission of communications, the Committee is not convinced that the mere fact that three years have elapsed since the final decision was handed down is sufficient to constitute abuse of the right of submission of communications.[6]

6.5 As to the author's complaints with respect to article 14, paragraphs 3 (b) and 3 (e), of the Covenant that the trial court refused to admit evidence which, in his view, was fundamental to establishing the author's guilt, the Committee observes that these complaints refer to the appraisal of the evidence adduced at trial, a matter which, as it has consistently held, in principle falls to the national courts, unless this evaluation was clearly arbitrary or constituted a denial of justice.[7] In the present case, the Committee takes the view that the author has failed to demonstrate, for the purposes of admissibility, that the conduct of the State party's courts was arbitrary or constituted a denial of justice, and consequently declares the author's allegations to be inadmissible under article 2 of the Optional Protocol.

6.6 As to the complaint based on article 14, paragraph 5, of the Covenant, the Committee notes that, in the present case, the Supreme Court examined at length each of the grounds for appeal, all of which related to the appraisal of the facts and evidence by the Burgos Provincial Court, and that it reasonably dismissed the three grounds. The Committee therefore takes the view that this part of the communication has not been sufficiently substantiated for the purposes of admissibility and declares it to be inadmissible under article 2 of the Optional Protocol.

7. The 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 author and to the State party.

[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.]

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[6] See, for example, communications No. 1086/2002, *Weiss v. Austria*, Views adopted on 3 April 2003, and No. 744/1997, *Linderholm v. Croatia*, decision of 23 July 1999.

[7] See, inter alia, communications No. 867/1999, *Smartt v. Republic of Guyana*, Views adopted on 6 July 2004, para. 5.3; No. 917/2000, *Arutyunyan v. Uzbekistan*, Views adopted on 29 March 2004, para. 5.7; No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004, para. 6.3; No. 1006/2001, *Martínez Muñoz v. Spain*, Views adopted on 30 October 2003, para. 6.5; No. 1084/2002, *Bochaton v. France*, decision of 1 April 2004, para. 6.4; No. 1120/2002, *Arboleda v. Colombia*, Views adopted on 25 July 2006, para. 7.3; No. 1138/2002, *Arenz v. Germany*, decision of 24 March 2004, para. 8.6; No. 1167/2003, *Ramil Rayos v. Philippines*, Views adopted on 27 July 2004, para. 6.7; and No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, para. 4.3.