



International Covenant on Civil and Political Rights

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Ninety-seventh session

12–30 October 2009

Decision

Communication No. 1471/2006

<i>Submitted by:</i>	Luis Rodríguez Domínguez and José Neira Fernández (represented by counsel, Emilio Ginés Santidrián)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Spain
<i>Date of communication:</i>	6 December 2005 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 9 May 2006 (not issued in document form)
<i>Date of decision:</i>	27 October 2009
<i>Subject matter:</i>	Scope of the remedy of cassation in a criminal case
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; failure to substantiate the claims
<i>Substantive issue:</i>	Right to have the conviction and sentence reviewed by a higher tribunal
<i>Article of the Covenant:</i>	14, paragraph 5
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 (b)

[Annex]

* 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 (ninety-seventh session)

concerning

Communication No. 1471/2006*

Submitted by: Luis Rodríguez Domínguez and José Neira Fernández (represented by counsel, Emilio Ginés Santidrián)

Alleged victim: The authors

State party: Spain

Date of communication: 6 December 2005 (initial submission)

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

Meeting on 27 October 2009,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication, dated 6 December 2005, are Luis Rodríguez Domínguez and José Neira Fernández, Spanish citizens born in 1952 and 1951, respectively. They claim to be victims 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 April 1985. The authors are represented by counsel, Emilio Ginés Santidrián.

1.2 On 11 August 2006, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, agreed to the State party's request that the admissibility of the communication should be considered separately from the merits.

The facts as submitted by the authors

2.1 On 13 April 1998, the Audiencia Nacional (National High Court) sentenced Luis Rodríguez Domínguez, Chief Inspector of the National Police Force in Barcelona, to four years' imprisonment and a fine of 50 million pesetas (300,000 Euros), with a further three months' imprisonment should he fail to pay the fine owing to insolvency, for an attempted offence against public health (drug trafficking) and to a month and a day of detention for

* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

unlawful possession of firearms. José Neira Fernández, a businessman in the hotel and catering industry, was also sentenced for an attempted offence against public health to six years' imprisonment and a fine of 50 million pesetas, without a further term of imprisonment in lieu of the fine. The sentences were handed down in criminal proceedings for drug trafficking in which there were 11 defendants.

2.2 The authors filed a cassation appeal before the Supreme Court in which, among other matters, they contested the assessment of the facts with regard to the charges brought against them by the Audiencia and the violation of the right to presumption of innocence on the grounds that the sentence and conviction were based on insufficient evidence. The appeal was rejected in a judgement of 13 March 2000.

2.3 The authors have provided the Committee with a copy of the cassation judgement. Regarding the assessment of the facts, the Supreme Court referred to the findings of the Audiencia, according to which the authors had engaged in a series of operations in order to obtain cocaine for purposes of trafficking, although it had not been proven that this undertaking had actually been carried through. The Audiencia, referring to the case law of the Supreme Court, understood that these acts were punishable as an attempted offence against public health. The authors claim that, in his brief to the Supreme Court, the prosecutor argued that the alleged facts did not fit the definitions of any of the forms of this offence established in the Criminal Code because no amount of any drug had been used. Regarding this argument, the Supreme Court recalled its case law, according to which "an attempt to acquire possession which takes the form of actions conducive to this end shall be punishable as an attempted offence when possession is not obtained for reasons beyond the person's control".

2.4 Concerning the possible violation of the right to presumption of innocence, Mr. Rodríguez Domínguez told the Supreme Court that this right had been violated because the Audiencia had inferred that he had taken part in the acts on the basis of nothing more than a telephone conversation. The Supreme Court examined the content of the conversation and agreed with the Audiencia's assessment.

2.5 The authors filed an application for *amparo* before the Constitutional Court, and this was also rejected. Mr. Rodríguez stated that his rights to due process, to presumption of innocence and to the principle of legality in criminal proceedings had been violated because the Audiencia Nacional and the Supreme Court had altered the proven facts, as the account of those facts did not reveal any activity that could be characterized as an attempt to commit the offence for which he was ultimately convicted. Moreover, the Supreme Court had not taken into consideration the prosecutor's contention that the facts could not be legally characterized in that way, since they referred to the truncated execution of the offence of drug trafficking. The application for *amparo* filed by Mr. Neira claimed that these judgements violated his rights to the inviolability of the home, the confidentiality of communications, due process and presumption of innocence.

The complaint

3. The authors claim that they were deprived of their right under article 14, paragraph 5, of the Covenant to have their conviction and sentence reviewed by a higher court. They state that the prosecutor of the Supreme Court asked for an acquittal owing to the lack of sufficient evidence for the conviction. If Spanish criminal procedure had provided for a review by a higher court with all the relevant guarantees, including a re-examination of all the evidence, facts and points of law, then, when the prosecutor asked for an acquittal, the authors would not have been sentenced and convicted, because there would have been no charges brought in the proceedings before the higher court. The court of cassation does not re-examine the evidence because, by law, it must always refer to the assessment of the evidence made by the court of first instance, in this case the Audiencia Nacional.

State party's observations on admissibility and the merits

4.1 In a note verbale of 10 July 2006, the State party indicates that the communication should be declared inadmissible. It affirms that, when formulating the cassation appeal before the Supreme Court, the authors did not raise any issues regarding the alleged limitation of the judicial review they were requesting. This point was not raised in the application for *amparo* either, even though the Constitutional Court has repeatedly insisted that the cassation appeal has to be given sufficient scope to comply with the requirements of article 14, paragraph 5, of the Covenant. Consequently, the authors have not exhausted domestic remedies in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

4.2 According to the State party, the authors do not indicate what specific pieces of evidence should have been re-examined but were not. Their complaint bears no substantive relationship to article 14, paragraph 5, of the Covenant. Rather, it appears to involve an attempt to introduce a new element in the Supreme Court. However, there is no new element, and the Supreme Court confirmed the judgement delivered by the Audiencia Nacional without making any factual changes. In addition, the Court ruled on all the questions raised by the authors. The State party therefore argues that, in accordance with article 3 of the Optional Protocol, the communication should be declared inadmissible on the grounds that the authors are availing themselves of the Covenant in a way that is clearly an abuse of its purpose.

Authors' comments

5. On 12 February 2009, the authors reiterated that, if the Spanish legal system had guaranteed the right to have a conviction and sentence reviewed by a higher court, they would have been acquitted by the appellate court since, according to the prosecutor of the Supreme Court, there was clearly insufficient evidence for the Audiencia Nacional to convict them. Under the Spanish system, it is the prosecutor who must pursue the charges and, in the absence of charges, the court cannot hand down a conviction.

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with article 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes the State party's argument that domestic remedies were not exhausted because the alleged violation of the Covenant submitted to the Committee was never brought before the domestic courts. However, the Committee recalls its established jurisprudence, which indicates that it is necessary to exhaust only 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 authors claim that they were deprived of their right under article 14, paragraph 5, of the Covenant to have their conviction and sentence reviewed by a higher court because Spain's remedy of cassation is not an appeal procedure and does not permit re-

¹ See, for example, communications No. 1095/2002, *Gomariz v. Spain*, decision of 22 July 2005, para. 6.4; No. 1101/2002, *Alba Cabriada v. Spain*, decision of 1 November 2004, para. 6.5; and 1293/2004, *de Dios Prieto v. Spain*, decision of 17 June 2002, para. 6.3.

examination of the evidence on which the sentence was based. However, the Committee observes that a reading of the Supreme Court's decision clearly indicates that the Court examined all the grounds on which the authors filed their appeal, including those relating to the characterization of the facts as an attempted offence against public health and the telephone conversation that, according to the Audiencia, proved Mr. Rodríguez Domínguez's participation in these events. The Supreme Court concluded, in keeping with its case law, that the Audiencia Nacional's assessment of those elements had been correct. Consequently, 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.²

7. Consequently, the Committee decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the authors 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.]

² See communications No. 1490/2006, *Pindado Martínez v. Spain*, decision of 30 October 2008, para. 6.5, and No. 1489/2006, *Rodríguez v. Spain*, decision of 30 October 2008, para. 6.4.