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HUMAN RIGHTS COMMITTEE
Ninety-fourth session
13-31 October 2008

DECISION

Communication No. 1490/2006

Submitted by:	José Ramón Pindado Martínez (represented by counsel, Manuel Cobo del Rosal)
Alleged victim:	The author
State party:	Spain
Date of communication:	6 April 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 7 August 2006 (not issued in document form)
Date of adoption of decision:	30 October 2008
Subject matter:	Alleged violations of the rights to presumption of innocence; to be tried by an impartial tribunal; and to have the sentence and conviction reviewed by a higher tribunal
Procedural issues:	The case has been submitted to another procedure of international investigation or settlement; insufficient substantiation

* Made public by decision of the Human Rights Committee.

Substantive issues:	Torture and cruel, inhuman or degrading treatment or punishment; right to be tried by a competent, independent, impartial tribunal; presumption of innocence; right to have the sentence and conviction reviewed by a higher tribunal
Articles of the Covenant:	7; 14, paragraphs 1, 2 and 5
Articles of the Optional Protocol:	2; 5, paragraph 2 (a)

[ANNEX]

Annex

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

Ninety-fourth session

concerning

Communication No. 1490/2006*

Submitted by:	José Ramón Pindado Martínez (represented by counsel, Manuel Cobo del Rosal)
Alleged victim:	The author
State party:	Spain
Date of communication:	6 April 2006 (initial submission)

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

Meeting on 30 October 2008,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 6 April 2006, is José Ramón Pindado Martínez, a Spanish national born in 1955. The author claims to be a victim of a violation by Spain of article 7 and article 14, paragraphs 1, 2 and 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Manuel Cobo del Rosal.

1.2 On 31 October 2006, the Rapporteur on New Communications and Interim Measures decided that the admissibility of the communication should be considered separately from the merits.

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* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè-Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Facts of the case

2.1 On 23 November 1990, the author was appointed head of the Spanish Civil Guard's Central Drugs Squad (UCIFA). In 1991, as a result of a criminal complaint made by a member of the Civil Guard, Central Investigating Court No. 5, under judge Baltasar Garzón, opened an investigation against the author and others for alleged crimes against public health (drugs trafficking) and smuggling that occurred in the course of operations involving "controlled delivery" of drugs.

2.2 On 16 November 1992, the author requested judge Garzón's withdrawal under article 219, paragraphs 9, 10 and 11, of the Judiciary Act.[1] The author claimed to have been under the immediate supervision of and legally subordinate to the judge at the time the alleged offences occurred. The challenge was dismissed by Central Investigating Court No. 1 on 21 November 1992.

2.3 The trial took place between March and July 1997 before the Criminal Division of the National Court (Audiencia Nacional). During this stage most of the defendants changed the statements they had made during the investigation stage. The author claims that this was because the statements made during the investigation had been extracted under duress.

2.4 On 3 October 1997, the Criminal Division of the National Court handed down a conviction sentencing the author to eight years' imprisonment, a fine and disqualification for a continuing offence against public health. He was further sentenced to one year in prison and a fine for a continuing offence of misrepresentation of facts in a public instrument.

2.5 The author filed an appeal in cassation with the Criminal Division of the Supreme Court. In that appeal the author cited nine grounds for cassation, including the right to be tried by an impartial judge, the right to presumption of innocence, the right to trial with due process guarantees and the right to effective judicial remedy, with reference to the probative value accorded to statements obtained under duress. On 11 January 1999, the Supreme Court, after separately considering each of the nine grounds for the appeal, partially upheld the National Court judgement, acquitting the author of the offence of misrepresentation of facts in a public instrument.[2] As to the possibility of a fresh evaluation of the evidence, the Court ruled that

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[1] Article 219: Grounds for withdrawal or, where appropriate, challenge. ... 9. Close friendship with or overt hostility towards one of the parties; 10. Direct or indirect interest in the dispute or case; 11. Involvement in the investigation of the criminal matter or in the settlement of the dispute or case in another instance ... .

[2] The National Court had found the author guilty of misrepresentation inasmuch as he had diverged from the truth in the statements he had prepared for the investigating judge and in several reports to the prosecutor's office on the outcome of the operations. The Supreme Court found that there was no malicious intent to deceive ... although he might have been attempting to cover his tracks, which is not punishable since, as a general rule, no one may be compelled to testify against themselves.

evaluation of the evidence was the sole and exclusive prerogative of the court of first instance.[3] It nevertheless reviewed the evidence and concluded that sufficient evidence existed and that it was legal. With regard to pressure on some of the witnesses, the Court said that it did not have enough information or evidence to determine whether any such pressure had been exerted and said that coercion of that kind should be reported at the proper time.

2.6 The author applied for *amparo* in respect of the Supreme Court ruling, citing the same facts and circumstances as at cassation. The application was rejected by the Constitutional Court on 27 March 2000. On the right to presumption of innocence, the Constitutional Court stated that both judgements, at first instance and in cassation, explained what evidence the court considered incriminatory and sufficient to support a guilty verdict and a criminal conviction. The Constitutional Court further stated that it was not a third judicial instance and could not and should not reassess the evidence or alter the proven facts.

2.7 On 14 July 2000, the author applied to the European Court of Human Rights; the application was declared inadmissible by the Court on 5 March 2002.[4] On the alleged violation of the right to presumption of innocence, the Court stated that, according to its case law, absent arbitrariness, it is for the domestic courts to interpret facts and domestic law. It went on to state that the information available in the file showed no violation of any of the rights invoked. As to the violation of the right to an impartial tribunal, the European Court considered that the relationship of cooperation or subordination referred to by the author was of no importance since the subordination related to different events and operations, albeit of a similar nature. It further held that the existence of a professional relationship between the author and the investigating judge did not in itself mean that the judge was "tainted" and therefore unfit to handle the investigation of a case based on different facts; it stressed that the alleged lack of impartiality referred to the investigating judge and not the trial judges. Both complaints were accordingly declared inadmissible as manifestly unfounded under article 35, paragraphs 3 and 4, of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.8 As to the complaint concerning the lack of a second hearing in criminal matters as required by article 14, paragraph 5, of the Covenant, the European Court stated that it was not competent to examine alleged violations of rights under the Covenant. It also pointed out that a second hearing in criminal matters was not guaranteed by the European Convention and recalled that Spain was not a party to Protocol No. 7 to the Convention. Accordingly, that part of the claim was declared inadmissible under article 35, paragraph 3, of the European Convention.

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[3] "*No adulteration of the remedy of cassation can be permitted such as to transform it into a second or third hearing and ... it is important to bear in mind that immediate apprehension of the evidence is only possible in the lower courts, principally through oral proceedings ... Consequently, the sole task of the court of cassation is to consider whether or not there existed direct or circumstantial incriminating evidence with sufficient probative value, and whether such evidence may be in any way unlawful.*"

[4] European Court of Human Rights, Fourth Section, application No. 61341/00, decision on admissibility, 5 March 2002.

Complaint

3.1 The author claims to be the victim of a violation by Spain of article 7 and article 14, paragraphs 1, 2 and 5, of the Covenant. Concerning article 7, the author says that during the investigation phase steps were taken to attempt to get him to change his statement, including presenting him in handcuffs to the media, sending him to a civil rather than a military prison, and keeping him incommunicado for an extended period for no reason. The author argues that these measures constitute treatment contrary to the provisions of article 7 of the Covenant.

3.2 The author alleges a violation of article 14, paragraph 1, on grounds of lack of subjective and objective impartiality on the part of the investigating judge, who apparently authorized the operations for which the author was subsequently convicted. With regard to article 14, paragraph 2, he claims to have been convicted in the absence of sufficient evidence to set aside the principle of presumption of innocence.

3.3 Lastly, with regard to article 14, paragraph 5, the author argues that the remedy of cassation does not constitute a second hearing but is an extraordinary remedy that can only be invoked on specific grounds defined by law. In his view the lack of any right to a full review of the conviction and sentence is a violation of article 14, paragraph 5, of the Covenant. In this regard he cites the Committee's Views in *Gómez Vázquez*.[5]

State party's observations on admissibility and merits

4.1 On 9 October 2006, the State party submitted its observations on the admissibility of the communication. The State party recalls that the subject matter of this communication has already been examined by the European Court of Human Rights, which found no violation of the rights and freedoms asserted by the author, and that that constitutes grounds for inadmissibility under article 5, paragraph 2 (a), of the Optional Protocol. Here the State party refers to the Committee's decision in *Ferragut Pallach*,[6] which was declared inadmissible under that article, as modified by the State party's reservation.

4.2 As to the investigating judge's alleged lack of impartiality, the State party argues that, since it falls to the central investigating court to investigate drug trafficking offences committed by organized groups, it would be strange if the author, as former commander of UCIFA, did not have a professional relationship with all of those courts. The State party repeats the argument advanced by the Supreme Court and accepted by the European Court that the central investigating courts would be unable to do their job if they were to recuse themselves every time

[5] Communication No. 701/1996, *Gómez Vázquez v. Spain*, Views of 20 July 2000.

[6] Communication No. 1074/2002, *Ferragut Pallach v. Spain*, decision on admissibility, 31 March 2004, para. 6.2.

a member of the security forces was involved. Regarding subjective impartiality, the fact that the author worked with the investigating judge in the performance of his duties need not mean that their working relationship affected other matters of a similar nature. As to article 219, paragraph 11, of the Judiciary Act, the author is not cited in the pretrial proceedings as the judge's subordinate. As to objective impartiality, no previous relationship between the court and the subject of the proceedings can be found that might give rise to prejudice or partiality.

4.3 Regarding the alleged violation of article 7, the State party considers that the author's claims lack credibility and points out that the author was always assisted by counsel, and that no lawyer would have permitted the actions allegedly taken by the judge. The State party asserts that, notwithstanding the author's insistence that the statements were obtained under duress, the National Court judgement reviewed the extensive evidence attesting to the facts deemed proven on which the conviction was based.

4.4 With regard to article 14, paragraph 5, the State party argues that the author makes statements of a generic nature but does not say specifically which facts were not reviewed, thereby leaving him without a defence. Although cassation may not constitute a second hearing, that does not mean that the Supreme Court does not consider whether there was evidence for the prosecution and whether such evidence was legal. The State party further points out that the Supreme Court conducted an extensive assessment of the verdict and the sentence, even going so far as to revoke the National Court's finding of guilty of misrepresentation of facts in a public instrument. The State party refers to various of the Committee's Views in which it found that an appeal in cassation complies with the requirements of article 14, paragraph 5, of the Covenant.[7]

4.5 Accordingly, the State party argues that the communication should be declared inadmissible on the grounds that the same matter has been submitted to another international procedure, that the author is availing himself of the Covenant in clear abuse of its purpose, and that the communication fails to substantiate any violation of the Covenant.

Author's comments

5.1 On 20 December 2006, the author responded to the State party's observations. With regard to the consideration of the matter by the European Court of Human Rights, he points out that, since it declared the application inadmissible, that Court did not consider the case on the merits, and he cites the Committee's case law to the effect that complaints dismissed by other international procedures on formal grounds are not deemed to have been considered on the merits and may be brought before the Committee for its consideration. Moreover, cases that have been submitted to another international procedure may be brought before the Committee if they claim the broader protection afforded by the Covenant.

[7] See, inter alia, communications Nos. 1356/2005, *Parra Corral v. Spain*, decision on admissibility, 29 March 2005; and 1399/2005, *Cuartero Casado v. Spain*, decision on admissibility, 25 July 2005.

5.2 The author again claims a violation of article 14, paragraph 5, of the Covenant, since the Supreme Court, as a court of cassation, is not a second tribunal able to make a fresh assessment of the facts and the evidence.

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 notes that the State party has not submitted any information suggesting the non-exhaustion of domestic remedies, and therefore considers there to be no impediment to examining the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.3 As to the State party's contention that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol in conjunction with the State party's reservation to this provision,[8] the Committee notes that, with the exception of the claim under article 7 of the Covenant, the claims submitted by the author to the European Court of Human Rights were the same as those now brought before the Committee. The Committee also observes that, after analysing in detail the complaints regarding the right to presumption of innocence and to be tried by an impartial tribunal, the European Court, in a reasoned 15-page decision, declared those complaints inadmissible under article 35, paragraphs 3 and 4, of the European Convention as manifestly unfounded. In this regard the Committee recalls its case law to the effect that, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of the case, then the same matter should be deemed to have been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.[9] Accordingly, the Committee finds that the complaints relating to article 14, paragraphs 1 and 2, of the Covenant are inadmissible under article 5, paragraph 2 (a), of the Optional Protocol and Spain's reservation to that provision.

6.4 With regard to article 14, paragraph 5, of the Covenant, the Committee notes that the European Court declared inadmissible that part of the application concerning the right to a second hearing in criminal matters on the grounds that this right is not guaranteed in the

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[8] "The Spanish Government accedes to the Optional Protocol to the International Covenant on Civil and Political Rights, interpreting article 5, paragraph 2, of the Protocol to mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement."

[9] See, inter alia, communications Nos. 1396/2005, *Rivera Fernández v. Spain*, decision on admissibility, 28 October 2005, para. 6.2; *Ferragut Pallach v. Spain*, *loc. cit.*; 744/1997, *Linderholm v. Croatia*, decision on admissibility, 23 July 1999, para. 4.2; 168/1994, *V.O. v. Norway*, decision on admissibility, 17 July 1985, para. 4.4; 121/1982, *A.M. v. Denmark*, decision on admissibility, 23 July 1982, para. 6.

European Convention and that Spain is not a party to Protocol No. 7 to that Convention. The Committee recalls that, according to its case law, where the rights protected under the European Convention differ from the rights established in the Covenant, a matter that has been declared inadmissible by the European Court as incompatible with the Convention or its protocols cannot be deemed to have been "examined" within the meaning of article 5, paragraph 2, of the Optional Protocol, such as to preclude the Committee considering it.[10]

6.5 The Committee notes, however, that the Supreme Court decision makes it clear that the Court thoroughly examined each of the grounds for appeal adduced by the author, and that the Court considered that the author's claim regarding the misrepresentation of facts in a public instrument was valid and accordingly found the author not guilty of that offence and reduced the penalty initially imposed. With regard to the principle of presumption of innocence, the Supreme Court found that there was sufficient evidence to outweigh such presumption. The Committee therefore considers that the complaint under article 14, paragraph 5, has not been sufficiently substantiated for the purposes of admissibility and accordingly finds it inadmissible under article 2 of the Optional Protocol.[11]

6.6 Regarding the alleged violation of article 7 of the Covenant, the Committee notes the author's claims that his treatment during the investigation phase of the trial was contrary to this provision. However, the Committee believes this complaint has not been sufficiently substantiated for the purposes of admissibility and accordingly finds it inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 and article 5, paragraph 2 (a), 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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[10] See communication No. 441/1990, *Casanovas v. France*, Views of 15 July 1994, para. 5.1.

[11] See communications Nos. 1375/2005, *Subero Biesti v. Spain*, decision of 1 April 2008, para. 6.4; 1399/2005, *Cuartero Casado v. Spain* decision of 25 July 2005, para. 4.4, and 1059/2002, *Carvallo Villar v. Spain*, decision of 28 October 2005, para. 9.5.