HUMAN RIGHTS COMMITTEE

Semey v. Spain

Communication No. 986/2001**

30 July 2003

CCPR/C/78/D/986/2001*

VIEWS

Submitted by: Mr. Joseph Semey

Alleged victim: The author

State party: Spain

Date of communication: 18 December 1999 (initial submission)

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

Meeting on 30 July 2003,

Having concluded its consideration of communication No. 986/2001, submitted to the Human Rights Committee by Mr. Joseph Semey under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Joseph Semey (**1**), a Canadian and Cameroonian citizen, currently being held at the Penitentiary Centre in Segovia, Spain (**2**). He claims to be a victim of violations by Spain of article 14, paragraphs 1, 2, 3 (d) and (e), and 5, and article 26 of

the International Covenant on Civil and Political Rights. In a later communication he also claims to be the victim of a violation by Spain of article 9, paragraph 1, of the Covenant. He is not represented by counsel.

The facts as submitted by the author **(3)**

2.1 On 29 October 1991, a woman named Isabel Pernas arrived in Lanzarote, one of the Canary Islands, aboard a flight from Madrid. On her arrival in Lanzarote, she was detained by police for a check. At that instant, a black passenger wearing cap and glasses quickly left the baggage retrieval hall without collecting a travel bag that supposedly belonged to him. The bag had been checked in under the name of Remi Roger. The woman, who was carrying drugs under her clothing, said that the drugs had been supplied to her by a man named Johnson in Madrid.

2.2 The author of the communication, Joseph Semey, states that he was detained in Madrid on 7 February 1992 and wrongly sentenced to 12 years' imprisonment by the Las Palmas Provincial Court in March 1995 for a supposed offence against public health which he had never committed. According to the author, he was implicated in the incident solely on the basis of verbal statements made by Ms. Isabel Pernas. He maintains that he was implicated on account of hostile relations between himself, Joseph Semey, and the family of Ms. Pernas' boyfriend, a man named Demetrio. He explains that he had previously been in prison for direct involvement in the killing of Demetrio's cousin and had just got out of jail when he was wrongly caught up in this incident.

2.3 The author states that Ms. Pernas told the police she had met him in a Madrid discotheque the night before she was detained with the drugs, and it was at that meeting that he had supposedly arranged with her to transport the drugs from Madrid to Lanzarote. This, he says, is untrue, since on 28 October 1991 the discotheque (Discoteca Los Sueños) was closed for the day (he supplies a letter to that effect signed by the manager).

2.4 The story that he, Joseph Semey, accompanied Isabel Pernas on her trip to Lanzarote using the name Remi Roger is, the author explains, an invention by Ms. Pernas. According to the author, Remi Roger was a close friend of Isabel and her boyfriend, Demetrio. He, Remi Roger and another black man shared an apartment in Madrid. At the trial, Ms. Angela Peñalo Ortiz, the author's girlfriend, confirmed that Remi Roger, who is also black and resembles the author, really existed. It has never been shown, the author adds, that the items found in the bag left on the baggage conveyor at Lanzarote airport belonged to him.

2.5 According to the author, the examining magistrate departed from proper procedure when one of the members of the Civil Guard responsible for investigating the case, Francisco Falero, was allowed to pick him out in an identification parade and testify against him over a year after the incident had taken place. The police, says the author, knew all the details of the case and had his photographs on the police file.

2.6 The author also maintains that the Court found him guilty solely on the basis of the statements made by Ms. Pernas during the pre-trial proceedings and took no account of the

evidence and defence witnesses that he put forward. He claims that on the morning of the incident he went to Herrera de la Mancha prison to see his compatriot, Nong Simon, but was unable to do so because visiting hours had changed; in the afternoon, after visiting the prison, he travelled with a Mr. and Mrs. Bell to Estepona. Mr. Bell stated as much to a notary. What Ms. Pernas says cannot, in the author's opinion, carry more weight than the evidence of other witnesses; he repeats that there is no proof he was in Lanzarote.

2.7 The author applied to the Supreme Court for judicial review of his case, but the Court limited itself to pronouncing on the grounds for review and upheld the sentence of the lower Court; at no time did it review the evidence on which the Provincial Court said it had based its guilty verdict. He also submitted an appeal to the Constitutional Court which was not entertained because it had been submitted too late, i.e. not when the Supreme Court handed down its decision.

2.8 The author applied to the European Court of Human Rights in Strasbourg but his application was declared inadmissible on the grounds that he had not exhausted domestic remedies (his appeal for protection - *amparo* - was not timely).

The complaint

3.1 The author maintains that he is the victim of violations by Spain of the following articles of the International Covenant on Civil and Political Rights.

(a) Article 26 and article 14.1

3.2 The author considers that he was found guilty because he was black, and says people in Spain have the idea that blacks and Latin Americans are bound up with the drugs trade. This, he claims, in combination with the racism that exists in the country, means that anything a Spaniard can say carries much more weight than anything said by a black. Had he been Spanish, he says, he would not have been sent to prison on the strength of the statements made against him. In this sense he claims that the principle of equality set forth in article 26 of the Covenant has been violated.

3.3 He also alleges a violation of article 14.1 of the Covenant, since in his case there was no equality before the courts and the courts were not impartial. Isabel Pernas was sentenced to 3 years in prison; he was sentenced to 12. The sentencing court, in the author's view, violated procedural safeguards in passing judgement on him on the strength of statements made during the pre-trial proceedings. He argues that an order for his imprisonment as the culprit was issued solely on the basis of what Isabel Pernas said, without his being given a hearing beforehand. The Court also summoned the same civil guards who had conducted the entire investigation against him so that one could testify for the prosecution and pick him out in an identification parade a year after the incident at issue (prosecution witness Francisco Falero). Mr. Falero had been involved several times in helping to transport him from the Penitentiary Centre to the chambers of the investigating magistrate during the judicial inquiries, and thus knew who he was. The

committal for trial was also based on statements by Isabel Pernas and took no account of the various points in his favour. He claims that it is not up to him to prove that he was not in Lanzarote that day, but up to the prosecution to show that he was. He maintains it has not been shown that he was using the name of Remi Roger, nor that he was the owner of the travel bag abandoned at the airport. He repeats that a mere accusation cannot be regarded as convincing proof that an individual is guilty of a crime.

(b) Article 14.2

3.4 According to the author's account, Ms. Isabel Pernas was detained in the Canary Islands and, on the basis of her statements, he was detained in Madrid. Before he was transferred to the Canary Islands to appear before the judicial authority that had ordered his detention, an order for his imprisonment was issued citing him as the perpetrator of an offence against public health. On the strength of a mere verbal accusation, the author says, the imprisonment order should have cited him as a suspect, not the perpetrator of an offence. Ms. Pernas' statements cannot counteract the presumption of innocence. Anyone, the author says, must be given a hearing by the competent judicial authority before an order for imprisonment on charges can be issued. The only way to establish whether a person is guilty is by conducting a trial, and guilt can be pronounced only in a final judgement, not in an imprisonment order.

(c) Article 14.3 (d)

3.5 The author states that the investigating magistrate (Arrecife Trial Court No. 2) forced him to make his initial statements without his counsel present. He says that Ms. Carmen Dolores Fajardo was the roster attorney on duty, but she was not there and the magistrate made him make his statements in the presence of counsel for the prosecution, Ms. Africa Zabala Fernandez, alone. He maintains that the Supreme Court was wrong to state that he and the individual who implicated him had appointed the same counsel, Ms. Africa Zabala, to defend them: that was completely incorrect. He affirms that there is nothing to suggest that he appointed Ms. Zabala to defend him.

(d) Article 14.3 (e)

3.6 The author says that his counsel requested a face-to-face meeting between him and Ms. Isabel Pernas on a number of occasions (28 September, 22 October and 6 November 1992) but this was refused by the examining magistrate in the case. What is more, Ms. Pernas was put on trial before the author and could not be questioned either by the court or by author's counsel. The author says that Ms. Pernas' counsel and the public prosecutor came to an arrangement under which she was tried and sentenced to three years in prison.

(e) Article 14.5

3.7 The author claims that the Supreme Court did not re-evaluate the circumstances which led the Provincial Court to sentence him to 12 years in prison without verifying the oral accusation

at his trial. He adds that the right to an effective remedy before the Supreme Court is routinely violated in all applications for judicial review (*casación*), as the Human Rights Committee has acknowledged.

(f) Article 9.1

3.8 In a second communication, the author maintains that requiring him to serve his full sentence of 12 years breaches article 9.1 of the Covenant, because article 98 of the Spanish Penal Code provides for parole after three quarters of the sentence. He says that he ought to have been granted parole but, because of the complaints he has lodged about the Spanish justice system, he is being made to serve his whole sentence.

3.9 The author goes on to say, without specifying which article of the Covenant might have been violated, that procedural safeguards have been breached since two trials have been conducted on the same offence. On 26 November 1993 the First Division of the Provincial Court in Las Palmas, Gran Canaria, tried Isabel Pernas and sentenced her to three years of short-term ordinary imprisonment. Two years later, the Fifth Division of the same Court conducted a second trial, against Joseph Semey, which Isabel Pernas did not attend. According to the author, the sentencing court says in its judgement that the statements made by Isabel Pernas can definitely be taken into consideration despite her absence from his trial; this contradicts the Criminal Proceedings Act, which states that pre-trial proceedings are merely a preparation for trial, and a trial can never be just a rubber stamp on the pre-trial proceedings. The police officers who conducted the investigation against him also failed to appear at the trial.

Information and observations of the State party on admissibility

4.1 In observations dated 17 September 2001, the State party requests the Committee to declare the communication inadmissible. It explains that, under article 2 of the Optional Protocol to the Covenant, the individual must have exhausted all available domestic remedies; that means that the domestic remedies have been correctly used and, thus, that they have been exercised within the legally established deadlines. If an individual seeks to exercise an available domestic remedy outside the deadlines, the domestic body must reject it for being outside the deadlines. The State party maintains that the author has not exhausted available domestic remedies, since exhausting means "exhausting correctly".

4.2 In this specific case, the Supreme Court handed down a judgement on 16 May 1996 which was communicated to Mr. Semey's representative on 13 June 1996. The deadline for applying for judicial protection (*amparo*) to the Constitutional Court is "within 20 days following notification of the court's decision", according to article 42.3 of the Constitutional Court Organization Act (No. 2/1979) of 3 October 1979. Mr. Joseph Semey submitted his application for judicial protection on 11 November 1998, two years after he had been notified of the verdict. Under the law, therefore, the Constitutional Court declared his application for judicial protection inadmissible for having been submitted after the deadline. Failure to exhaust domestic remedies because his application for judicial protection was submitted after the

deadline was the reason why Mr. Semey's application to the European Court of Human Rights was rejected.

Comments of the author on admissibility

5.1 By communication dated 14 November 2001, the author explains that the Human Rights Committee has on several previous occasions rejected the claim of failure to exhaust the remedy of appeal to the Constitutional Court for judicial protection (*amparo*) advanced by the State party as grounds for requesting that the communication should be declared inadmissible - specifically in the case of Cesáreo Gómez Vázquez, whose counsel applied to the Committee immediately after the Supreme Court passed judgement, without exhausting the remedy of appeal to the Constitutional Court. As in the case of *Cesáreo Gómez Vázquez v. Spain*, the grounds advanced by Spain should be rejected in this instance.

5.2 The author claims that he did apply for judicial protection within the stated deadline but his application was not accepted. The Constitutional Court has on various occasions turned down basic appeals, in clear violation of the presumption of innocence. The author also claims the Court says that it cannot modify facts that have already been established, because it is not possible for a higher court in Spain to return to and evaluate the evidence in a case.

5.3 Regarding the stipulation in article 2 of the Optional Protocol, the author affirms that under article 5, paragraph 2 (b), of the Protocol not all domestic remedies have to be exhausted if their application is unreasonably prolonged: he is thus perfectly entitled to apply to the Committee without having exhausted the remedy of application for judicial protection under the Constitution. Lastly, it must be borne in mind that individuals' rights are more than just bureaucratic matters, and the fact that he has not exhausted the remedy of applying to the Constitutional Court for judicial protection is no reason why the violations of his rights that he has suffered should all go unpunished.

5.4 The author asserts that his application to the Constitutional Court for judicial protection was not submitted after the deadline. Under Spanish law, the deadline for submitting any kind of judicial appeal is reckoned from the day following final legal notification of the sentence or order against which appeal is to be lodged, and in this case the final legal notification was the official transcript of the final sentence by the sentencing court. This final official transcript of the final sentence, signed and sealed by the clerk of the court, is, according to the author, dated 25 September 1998, and he submitted his application to the Constitutional Court for judicial protection within the legal 20-day deadline. The author claims that in judgement No. 29/1981 of 24 July 1981, the Constitutional Court accepted that an appellant was entitled to lodge an appeal once he was in possession of the official transcript of the sentence.

5.5 The author explains that the Constitutional Court declared his application for judicial protection inadmissible, having been submitted outside the deadline, because in the Court's view he ought to have appealed in 1996, within 20 days of being notified of the Supreme Court's ruling. He points out that no one notified him of that ruling. He feels that, as a party concerned

and as the party convicted, he ought to have been notified of it personally.

5.6 As the file shows, the Supreme Court notified Mr. Vázquez Guillén, the attorney who brought the application for judicial review (*casación*) before the Court. The author argues that notifying the attorney on his behalf is not legally valid, because he never gave the attorney any sort of authorization to accept any notification on his behalf. For someone to represent him legally would require a power of attorney signed by him before a notary, as stipulated by the Spanish Criminal Proceedings Act. At the time when the application for judicial review was submitted to the Supreme Court, the author says, he as a foreigner was unaware of what an attorney did. Mr. Guillén never spoke to him and they are not acquainted. For his appeal, the author says, he appointed Mr. Caballero as counsel.

Further observations by the State party on admissibility and the merits

6.1 In observations dated 16 January 2002, the State party returns to the question of admissibility. It mentions that the applicant expressly acknowledges that domestic remedies were not exhausted, since the application for judicial protection was submitted after the deadline, and seeks to justify his actions with three arguments:

(a) First day of reckoning for the 20-day deadline for appealing the Supreme Court's ruling to the Constitutional Court. According to the author, the period to the deadline does not begin to run with notification of sentence, but with final notice thereof. The State party says that the author is incorrect in this, and it is against all procedural standards to seek to confuse notification of a sentence for the purpose of challenge and receipt of an official transcript of the Court's final judgement for the purpose of execution of sentence. The applicant also alleges that he was given notice of the official transcript on 25 September 1998 and submitted his application for judicial protection within the 20-day deadline: 11 November 1998 is 47 days later;
(b) The applicant says he did not appoint Mr. Vázquez Guillén as his attorney before the Supreme Court. The State party submits a copy of the application to the Supreme Court for judicial review, which says "for the purposes of representation before this Chamber of the Court, he appoints the attorney Mr. Argimiro Vázquez Guillén, and the Lanzarote lawyer, Mr. Felipe Callero González, will continue to handle his defence";

(c) The applicant considers that the Committee's ruling in the Cesáreo Gómez Vázquez case should apply to him. The State party sees no resemblance between the case of Joseph Semey and the subject of the decision on admissibility in communication 701/96. In Joseph Semey's case, an application for judicial protection (*amparo*) was submitted - after the deadline, but it was submitted. No application for judicial protection was made in communication 701/96. In Joseph Semey's case the application for judicial protection discussed the presumption of innocence. Communication 701/96 claimed that judicial protection was unnecessary, given the Constitutional Court's repeated position that application for judicial review (*casación*) could be regarded as fulfilling the requirements of article 14.5 of the Covenant.

6.2 To conclude, the actual situation, as the applicant admits, is that domestic remedies were not exhausted correctly, and as a result the communication is inadmissible under article 2 of the Optional Protocol.

6.3 On the merits, the State party points out that the author indicates dissatisfaction with the way the domestic courts weighed up the evidence. The Committee, an international body, does not weigh up evidence, for that is the province of the domestic courts. Its task is to determine whether the weighing-up of the evidence in a criminal case, taken as a whole, was reasonable or, alternatively, arbitrary. The State party adds that the author was convicted in criminal proceedings in which the court gave appropriate reasons for its sentence and the sentence was subsequently upheld by the Supreme Court on reviewing the weighing-up of the evidence.

6.4 The State party mentions that Mr. Semey's defence strategy was to deny that he had been the person who gave the woman the drugs, bought her the clothes and plane ticket, and accompanied her on her trip, abandoning a large bag on the baggage retrieval conveyor. It refers to the judgement of the Provincial Court, which has the following to say about this claim:

> "The accused denied having ever had any connection to the delinquent behaviour of Isabel Pernas San Román, attributing the fact that she accused him directly of having supplied her with the drugs … to the fact that she was the girlfriend of Demetrio, whose cousin the accused had killed. The defence also expressed regret that Isabel had not been brought to the full court hearing for cross-examination, since that had not been possible during the earlier trial on the case.
>
> "It is our belief … that Isabel's statement can perfectly well be taken into account despite her absence from this trial because, first, her statements during the pre-trial proceedings, always made in the presence of a lawyer, have found their way into this trial in documentary form taken to be reproduced with the assent of the parties, thus providing access both to what Isabel said at the earlier trial, to which the representatives of the individual standing trial today and, hence, those representatives' managers, were expressly summoned, although they attended only the statements made during the investigation stage, including in particular her testimony under questioning during which, in the presence of and under questions from the accused Joseph Semey's defence lawyer then and now, she was cross-examined and said she was unaware that Joseph Semey had been convicted of killing one of Demetrio's cousins; second, Isabel's story is solidly backed up by the testimony of Civil Guard member Francisco Falero Guerra …"

6.5 Second, the author claims that he was not in Lanzarote on 29 October 1991 since he was visiting a friend in the Herrera jail that day and then travelled with an English couple to Estepona on the Costa del Sol. It is not at all clear that he did visit the prison, however, and prison officials deny that the visit took place since 29 October was not a visiting day. As for the journey from Herrera to Madrid and from Madrid to Estepona with an English couple, the Court says that this second alibi "proved utterly contrived and scarcely credible since, on the one hand, in his first statement to the examining magistrate (in the presence of two lawyers) the

accused spoke only of his visit to Herrera and unpardonably omitted any reference to his trip to Estepona and on the other hand, because the Bells' statement to the notary was made just eight days before Semey made his statement, in response to a telephone call along those lines from the defence lawyer, and this really robs what the English couple has to say of any spontaneity or unrehearsedness".

6.6 The State party says that one may agree or disagree with the weight attached by the court to this alibi, but its opinion cannot be criticized as arbitrary.

6.7 The State party also refers to the Supreme Court's ruling:

> "In view of the above, it must be recognized that the lower court had at its disposal during the trial oral evidence of the facts, and found, moreover, sufficient material in the proceedings to assess the credibility of that evidence, which rules out a breach of the right to presumption of innocence.
>
> "Furthermore, it has to be acknowledged that the trial court has given appropriate reasons for its sentence and that the accused has been suitably defended by a lawyer of his choosing, having received a reasoned response from the competent court."

6.8 The author regrets that there was no face-to-face confrontation between him and Isabel Pernas. Semey's lawyer asked the woman all the questions he thought appropriate during her interrogation, with due regard for the principle of adversarial proceedings. It is pointed out that in his response to the charges against him and at the opening of his trial, Mr. Semey did not suggest any face-to-face meeting between him and the woman. A copy of the court record is appended, showing that the principle of adversarial proceedings was respected and that the author of the communication and his lawyer made no complaint about his rights having been violated. If Mr. Semey's defence counsel wished to interrogate the woman and bring her face to face with his client at the trial, it was essential that he should suggest as much in the response to the charges. By communication dated 24 January 2002, moreover, the State party asserts that nowhere in his response to the charges did Mr. Semey request the appearance of Ms. Pernas at the trial.

6.9 As regards the difference in sentence between him and Ms. Pernas, the reason is obvious. The woman was tried for an offence against public health (as a mere accessory) and, given the mitigating circumstance of her spontaneous repentance, sentenced to three years in prison. Joseph Semey was put on trial as a drug trafficker and, given the aggravating circumstance of a previous offence (he was found guilty on 13 July 1987 of criminal homicide), sentenced to 12 years in prison.

6.10 The State party says it was never claimed either during the trial or in the application for judicial review that the author's counsel was not present when he made his first statement to the magistrate. By communication dated 24 January 2002, the State party reports that, after being detained in Madrid on 7 February 1992, Joseph Semey said he was appointing "the duty lawyer"

as his counsel. That same day he made a statement before the magistrate in Madrid, asserting that his real name was Joseph Semey, not Spencer, in the presence of Ms. Carmen Martínez González, a lawyer. In Lanzarote, on 14 May 1992, he gave a statement to the magistrate in the presence of the duty counsel, Ms. Carmen Dolores Fajardo.

6.11 As regards the failure to apply the principle of *in dubio, pro reo*, the State party says that the sentencing court follows this principle when it is not certain if the accused is guilty, and then the doubt must be resolved in favour of the accused. In the present case, the sentencing court "found the appellant guilty without any doubt", as the Supreme Court put it.

6.12 The State party concludes by saying that it finds no violation of the safeguards established by article 14 of the Covenant, and submits that the communication should be declared inadmissible or, if appropriate, not entertained.

Comments by the author on the State party's observations

7.1 By communication dated 11 February 2002, the author points out that the document advanced by the State party as proof that he appointed Vázquez Guillén as his attorney is not legally valid. Under article 874 of the Criminal Proceedings Act, the attorney who will submit an application for judicial review (*casación*) to the Supreme Court in Spain has to be appointed by the appellant in writing before a notary, and for the power to represent to be legally accredited, besides the appellant and the notary, the attorney appointed must also sign himself. The document furnished by the State bears only one signature, the author points out: his own. The author also states that he never had any contact with the attorney in question, and that none of the notifications which the Supreme Court sent to Mr.Vázquez on his behalf were valid.

7.2 On his failure to exhaust the remedy of application to the Constitutional Court for judicial protection, the author refers once again to communication 701/96 and repeats that article 5, paragraph 2 (b), of the Optional Protocol does not require all domestic remedies to be exhausted if their application is unreasonably prolonged. Whereas the State party sees no resemblance between the two cases, he believes the opposite, i.e. that failing to lodge an appeal and doing so after the established deadline amount to the same thing. In either case the remedy is regarded as unexhausted, and the Committee's ruling on communication 701/96 ought to apply to him.

7.3 Regarding the State party's claim that the case was found inadmissible by the European Court of Human Rights because domestic remedies had not been exhausted, the author says that the Committee does not necessarily apply the same doctrine as the Court, especially given that article 5, paragraph 2 (b), of the Optional Protocol does not require all domestic remedies to be exhausted if their application is unreasonably prolonged.

7.4 On the merits, the author repeats what he said in earlier communications to the effect that a verbal accusation cannot amount to conclusive proof, and repeats his comments about the statements by Civil Guard member Francisco Falero.

7.5 The author repeats that he did indeed visit the prison at Herrera de la Mancha. He was given permission to visit his friend, Nong Simon, who was in the closed section (module 2). The visit was authorized four days before the incident at issue. The author explains that visiting days at module 2 were Mondays and Thursdays, and on Monday, 29 October 1991, he went there but was informed that Simon had been moved to another module three days previously and could not be visited, because in the new module the visiting days were Wednesdays and Fridays. As he was unable to visit Simon, it is logical, the author explains, that the visit did not officially take place. While he was there he did meet Trainer D. Juanjo, who said he remembered talking to him in late October but could not remember the exact date.

7.6 The fact that he had not mentioned the alibi of his journey to Estepona in his first statement to the examining magistrate did not mean that it was not true. He had said nothing because he feared compromising his friends by citing them as witnesses in an affair involving drug-trafficking. He had mentioned the point to his lawyer, who said that their testimony was very important and decided to telephone them.

7.7 Under the law, anyone accused of a crime is innocent until proved guilty; nowhere does the law say that a person shall be guilty until his innocence is proven. The author repeats that there is no physical evidence to implicate him in the incident, because he was detained, tried and convicted solely on the basis of the story told by Isabel Pernas.

7.8 On the reasons for his being sentenced to 12 years' imprisonment given the aggravating circumstance of a previous offence, the author says that under article 22.8 of the Spanish Penal Code it is considered that there is a repeat offence when, at the time he commits an offence, the culprit has previously been the subject of an enforceable judgement for a similar offence. In his case, this was the first time he had been arrested and found guilty of an offence related to drug-trafficking.

7.9 Concerning the statements he made without a lawyer, the author says it is true that when he was moved to the island for questioning by the investigating magistrate, Ms. Carmen Dolores Fajardo was the duty counsel. When he was taken to make his first statement to the magistrate in late April 1992, she was not there because of ill health, and the only lawyer in attendance was Isabel Pernas' lawyer, counsel for the prosecution Ms. Africa Zabala Fernández. At the time, the author says, he thought that the counsel present was his, since they were unacquainted. Only when he made his second statement, on 14 May 1992, and Ms. Carmen Dolores was present, did he realize that he had made his earlier statement without his lawyer there. He adds that his private counsel lodged a legal protest about this in the appeal for amendment against the order for trial, and did so again in the application for judicial review (*casación*).

7.10 The author points out that the statement he made before examining magistrate No. 6 in Madrid in the presence of Ms. Carmen Martínez had nothing to do with the Lanzarote case which prompted his communication to the Committee. That statement (to which the State party refers) was to do with the forged British passport he had when he was detained; the

Madrid court could not take statements from him about the Lanzarote case because the Madrid magistrate had not been asked by his counterpart in Arrecife to take statements about the drug-trafficking issue.

7.11 The author repeats once again that his rights to be heard, to a fair trial and to effective legal protection have been violated. He again alludes to the falsehood of the statements made by Isabel Pernas and the irregularities in the statements and identifications made by the civil guard.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party is contesting the communication on the grounds of failure to exhaust domestic remedies. However, the Committee has consistently taken the view that a remedy does not have to be exhausted if it has no chance of being successful. The Committee considers, as it did in the case of *Cesáreo Gómez Vázquez v. Spain* (communication No. 701/1996), that the case law of the Spanish Constitutional Court shows repeated rejections of applications for *amparo* against conviction and sentence. The Committee therefore considers that there is no obstacle to the communication's admissibility.

8.3 Pursuant to article 5, paragraph 2 (a), of the Optional Protocol, before considering a communication the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee is aware that there is a discrepancy between the Spanish text of article 5, paragraph 2 (a), and the English and French versions **(4)** which goes beyond a mere translation error and reveals fundamental differences in substance. This discrepancy was discussed by the members of the Committee at its fourth session in New York on 19 July 1978 (CCPR/C/SR.88) **(5)**. Therefore, bearing in mind the decision taken on the matter in 1978, the Committee reiterates that the term "*sometido*" in the Spanish version should be interpreted in the light of the other versions, i.e. that it should be understood as meaning "is being examined" by another procedure of international investigation or settlement. On the basis of this interpretation, the Committee considers that the case of Joseph Semey is not being examined by the European Court. The Committee also notes that the State party has not invoked its reservation to article 5, paragraph 2 (a), of the Optional Protocol. Consequently, there is no obstacle to the communication's admissibility in this respect.

8.4 As to the author's allegation of a violation of article 26 of the Covenant, to the effect that he was convicted because he was black, the Committee believes that the author has not provided information to back up his complaint for purposes of admissibility within the meaning of article 2 of the Optional Protocol. Similarly, the Committee considers that the author's allegation of a violation of article 9, paragraph 1, of the Covenant, in that he was obliged to serve

his entire sentence, has not been substantiated sufficiently for purposes of admissibility under article 2 of the Optional Protocol.

8.5 Concerning the claim that Isabel Pernas and the author were tried at different times, the Committee notes that the author has not established a link with the rights violated under the Covenant, hence this allegation is also inadmissible under article 3 of the Optional Protocol.

8.6 The Committee notes that the author's allegation of a violation of article 14, paragraphs 1 and 2, refers especially to the weighing of facts and evidence. As the Committee has stated on other occasions (*934/2000 G. v. Canada*), it is for the courts of States parties, and not for the Committee, to weigh up the facts in a particular case. It is not within the Committee's competence to review facts or statements that have been weighed up by the domestic courts unless the weighing-up was manifestly arbitrary or there was a miscarriage of justice. The information before the Committee does not show that the Spanish courts' weighing-up of the facts was manifestly arbitrary or can be considered to amount to a denial of justice. Consequently, this allegation too has not been substantiated for the purposes of admissibility under article 2 of the Optional Protocol.

8.7 Concerning the allegation of a violation of article 14, paragraph 3 (e), of the Covenant, relating to the refusal to arrange a face-to-face meeting, the material before the Committee shows that the parties participated in an adversarial procedure and that the author's defence counsel had the opportunity to interrogate Ms. Isabel Pernas. Similarly, the information before the Committee does not show that the author raised this question before the national courts before he submitted it to the Committee. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.8 With regard to the alleged violation of article 14, paragraph 3 (d), in that the duty lawyer was not present when the author made his statements before the examining magistrate in Arrecife, the Committee notes that, according to the State party, no such claim was made either during the trial or in the application for judicial review. It also notes that, according to the author, this was mentioned in the appeal for amendment against the order for trial and in the application for judicial review. The Committee has thoroughly examined the appeal for amendment and concludes that there is no mention of this point. Similarly, on examining the application for judicial review, the Committee found a note in the papers submitted by the author, reading "have not found the application for judicial review". Consequently, on the basis of the information submitted by the author, the Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.9 The Committee considers that the allegation of a violation of article 14, paragraph 5, has been substantiated with regard to admissibility and therefore proceeds to consider it on the merits.

Consideration on the merits

9.1 The Committee takes note of the author's arguments regarding a possible violation of

article 14, paragraph 5, of the Covenant in that the Supreme Court did not re-evaluate the circumstances which led the Provincial Court to convict him. The Committee also notes that, according to the State party, the Supreme Court did review the sentencing court's weighing-up of the evidence. Despite the State party's position to the effect that the evidence was re-evaluated in the context of the judicial review, and on the basis of the information and papers which the Committee has received, the Committee reiterates its Views expressed in the Cesáreo Gómez Vázquez case and considers that the review was incomplete for the purposes of article 14, paragraph 5, of the Covenant. The Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation of article 14, paragraph 5, of the Covenant in respect of Joseph Semey.

9.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author should be entitled to have his conviction reviewed in conformity with the requirements of article 14, paragraph 5, of the Covenant. The State party is under an obligation to prevent similar violations in the future.

9.3 Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[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.]

* Made public by decision of the Human Rights Committee.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.Notes

Notes

1. Also known as Johnson or Spencer Mas vickky.

2. The International Covenant on Civil and Political Rights and the Optional Protocol to the

Covenant entered into force for the State party on 27 July 1977 and 25 April 1985 respectively.

3. The facts are set by the author in three communications dated 18 December 2000, 22 March 2001 and 14 November 2001.

4. Article 5, paragraph 2 (a) "El Comité no examinará ninguna comunicación de un individuo a menos que se haya cerciorado de que: El mismo asunto no ha sido sometido ya a otro procedimiento de examen o arreglo internacionales" / "Le Comité n'examinera aucune communication d'un particulier sans s'être assuré que: La même question n'est pas déjà en cours d'examen devant une autre instance internationale d'enquête ou de règlement." "The Committee shall not consider any communication from an individual unless it has ascertained that: The same matter is not being examined under another procedure of international investigation or settlement."

5. In the discussion, Committee members differed in the views on the subject:

Mr. Mora Rojas said that the Spanish text denied the Committee the possibility of considering matters which had already been submitted to another procedure of international investigation or settlement, and thus differed in substance from the other language versions. (…) He had doubts as to the competence of the Committee to initiate the correction procedure *proprio motu* or to ignore contradictions or mistakes in certain language versions and decide to apply the English text.

Mr. Tomuschat said that an international covenant could not have different meanings for the different State parties. Sir Vincent Evans said that the retention in the Spanish text version of a text which had been amended in the other versions had clearly been a mistake. (…) it was only fair to the Spanish-speaking States to make them aware of an issue which might affect their position on a given communication or influence their attitude towards ratifying the Optional Protocol or making a reservation on ratifying it.

At the end of the meeting the Chairman said that the report could reflect the consensus that the Committee would work on the basis of the English, French and Russian texts of article 5, paragraph 2 (a), of the Optional Protocol. Mr.Opsahl noted that the Committee had not made any decision in the abstract on the interpretation of the Optional Protocol, which was not within its competence.