UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/90/D/1370/2005
22 August 2007

ENGLISH
Original: SPANISH

HUMAN RIGHTS COMMITTEE
Ninetieth session
9-27 July 2007

DECISION

Communication No. 1370/2005

Submitted by:	José Antonio González Roche and Rosa Muñoz Hernández (represented by counsel, José Luís Mazón Costa)
Alleged victim:	The authors
State party:	Spain
Date of communication:	1 September 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 March 2005 (not issued in document form)
Date of adoption of decision:	24 July 2007

Subject matter:	Evaluation of the evidence and full review of the conviction and sentence by a higher tribunal; undue delay in the proceedings; absence of a verbatim record; presumption of innocence
Procedural issues:	Non-exhaustion of domestic remedies; failure to sufficiently substantiate the alleged violations
Substantive issues:	Right to have the evidence, conviction and sentence reviewed by a higher tribunal according to law
Articles of the Covenant:	14, paragraphs 1 and 5
Article of the Optional Protocol:	2

[ANNEX]

Annex

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

Ninetieth session

concerning

Communication No. 1370/2005*

Submitted by:	José Antonio González Roche and Rosa Muñoz Hernández (represented by counsel, José Luís Mazón Costa)
Alleged victims:	The authors
State party:	Spain
Date of communication:	1 September 2002 (initial communication)

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 authors of the communication, dated 1 September 2002, are José Antonio González Roche and Rosa Muñoz Hernández, born in 1967 and 1959 respectively. They claim to be the victims of violations by Spain of article 14, paragraphs 1, 2, 3 (c) and 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The authors are represented by counsel, José Luís Mazón Costa.

* 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.

Factual background

2.1 The authors state that on 14 February 1996 they travelled to the Isla de Margarita, Venezuela, to celebrate St. Valentine's Day. A man named Pedro López García, who comes from the same home town as Rosa Muñoz Hernández, was travelling on the same flight for reasons of his own. When he returned to Spain, on 21 February 1996, Pedro López García was detained at the airport after having been found to be in possession of cocaine. In September 1996 the police arrested the authors and charged them with having brought cocaine into Spain when they returned from their trip to the Isla de Margarita in February 1996. The evidence against the authors consisted of a statement by Pedro López García incriminating them.

2.2 On 8 March 1999, the Provincial High Court of Madrid sentenced each of the authors to a prison term of eight years and one day and a fine of 110 million pesetas for the offence of cocaine trafficking. The authors submitted an appeal in cassation to the Second Division of the Supreme Court, but the application was dismissed on 21 November 2001. They subsequently filed for *amparo* with the Constitutional Court, and this appeal was also rejected, on 1 July 2002.

2.3 The authors applied to the Ministry of Justice for a pardon, alleging a violation of their rights under the Covenant. They applied to the Provincial High Court for a suspension of sentence, which was granted.

The complaint

3.1 The authors claim to have been deprived of their right under article 14, paragraph 5, of the Covenant to a full review of their conviction and sentence by a higher tribunal, because they were unable to have the credibility of Pedro López García's statement - the evidence on which the verdict hinged - examined in the Supreme Court. The authors allege that Pedro López García implicated them as part of a sentence-reduction deal with the prosecutor, and that his sentence was in fact reduced to three years' imprisonment. They add that the Supreme Court denied them the opportunity to examine the credibility of the testimony, stating that testimony could "only be examined by a court that had observed the oral evidence at first hand, that is to say, directly and in person", and they recall the Committee's case law in *Gómez Vásquez*.[1]

3.2 The authors argue that the absence of a verbatim record of the public hearing violates article 14, paragraph 1, of the Covenant, because where there is no verbatim record reflecting the entire proceedings there can be no fair trial. They also claim a violation of article 14, paragraph 5, of the Covenant because there can be no effective appeal without a verbatim record. The authors assert that an application for *amparo* would be unsuccessful in this regard and that, in any event, the Constitutional Court has already found that the absence of a verbatim record does not constitute a procedural defect.

3.3 Rosa Muñoz Hernández claims a violation of her right to presumption of innocence because the Supreme Court established her guilt on the basis of mere conjecture and supposition rather than conclusive proof. She argues that the Court assumed, on the basis of

[1] Communication No. 701/96 of 20 July 2000.

Pedro López García's statement, that, as José Antonio González Roche's partner, she must have been aware of the drug trafficking activities, and that it was unlikely that a domestic servant could afford a trip costing €1,000 and obtain a week's leave from work. She was not given the benefit of the doubt.

3.4 The authors claim that the fact that five years and three months passed between their arrest in September 1996 and the rejection of their application for *amparo* in July 2002 constitutes a violation of their right to be tried without undue delay, under article 14, paragraph 3 (c), of the Covenant. They maintain that this delay was unjustified.

3.5 The authors contend that the Constitutional Court's failure to rule on the alleged violation of article 14, paragraph 5, of the Covenant, is itself a violation of that provision, as well as of article 14, paragraph 1. They argue that the failure of a judicial body to rule on a claim is a breach of the right to due process.

State party's observations

4.1 In its written submissions of 30 April and 4 August 2005, the State party argues that the communication should be declared inadmissible under articles 2 and 3 of the Optional Protocol, for failure to exhaust domestic remedies and because it is manifestly unfounded and an abuse of the right to submit communications. The State party adds that the authors themselves refer in their appeals to the evidence considered by the domestic courts, though they dispute the courts' conclusions; and that the Supreme Court ruling clearly reflects a review of that evidence.

4.2 According to the State party, there is no indication of any limitations on the evidence or on the reconsideration of the evidence. In this case the Supreme Court conducted an evaluation and review of the facts and the evidence, so it is not comparable with the *Gómez Vásquez* case. The State party recalls the Committee's case law[2] that in specific cases where an appeal in criminal cassation includes thorough review of the conviction and sentence there is no violation of article 14, paragraph 5, of the Covenant.

4.3 The State party contends that the proceedings were not unreasonably lengthy, since this was a complex case involving the investigation and trial of an offence committed by a criminal gang, with 10 people on trial at the same time. Moreover, that complaint was not raised in the domestic courts.

4.4 The State party claims that there is no right in law to a verbatim record of the trial; in any case, the record of proceedings was signed by the authors' lawyers, who could have submitted a complaint at the time. Furthermore, the oral hearing was documented in a record certified by the clerk of the court, which is not a summary, as the authors claim, but a representation of what actually took place. According to the State party, the central issue in the communication is the dispute over the facts declared proven in the judgement. The State party recalls the Committee's case law that findings of fact are, in principle, a matter for the State party's own courts.

[2] Communication No. 1356/2005, *Antonio Parra Corral v. Spain*, decision of 29 March 2005, para. 4.3.

4.5 The State party maintains that domestic remedies have not been exhausted for the purposes of article 2 of the Optional Protocol, since the authors' complaints regarding the alleged constraints on the effective review of the conviction and sentence were not put to the Supreme Court and, in the case of Ms. Muñoz Hernández, were not even raised in the application for *amparo*. Nor was any complaint put to the trial court or the Supreme Court regarding the unreasonable length of proceedings.

Authors' response to the State party's submissions

5.1 In their letter of 31 October 2005, the authors claim that in an appeal in cassation there can be no full review of a conviction in accordance with article 14, paragraph 5, of the Covenant, because the court is unable to review the credibility of witness statements or the evaluation of the evidence by the lower court, except, theoretically, in the extreme case of an error in the examination of a reliable, authentic document that is not contradicted by other evidence, which rarely happens. The authors add that their convictions were based on prosecution testimony that could not be reviewed by a higher tribunal.

5.2 The authors argue that an error in the evaluation of the evidence cannot constitute a ground for appeal in the remedy of cassation to the Supreme Court, as it can in the remedy of appeal against other criminal sentences. The only ground on which they could appeal was the violation of the presumption of innocence, which they did. The authors claim that, since the Gómez Vázquez decision, the State party has tried to adjust its language to suit the Committee's requirements, but in reality continues to carry out only a limited reconsideration of convictions, rather than a full or genuine review. They claim that the Supreme Court confines itself to a consideration of "whether the evaluation of the evidence was rational", and does not consider the evaluation of the evidence in itself.

5.3 The authors claim that, in a ruling of 26 December 2000, the Supreme Court made a general statement to the effect that in no case of appeal in cassation was it admissible to seek a review of the credibility of statements made at trial, which could "only be examined by a court that had observed the oral evidence at first hand, that is to say, directly and in person". They argue that the remedy of cassation is confined to points of law and an interpretation of the right to presumption of innocence that assumes that the evidence was obtained by lawful means, and the right not to be convicted in the absence of any evidence.

5.4 The authors contend that the length of the criminal proceedings was unreasonable, since they lasted five years and three months and there was nothing to justify that delay. They claim that, in its Views on communication No. 526/1993, *Hill v. Spain*,[3] the Committee found that proceedings lasting three years had been unreasonably lengthy, despite the State party's argument that the delay was due to the complexities of the case.

5.5 The authors maintain that, in contrast with the civil procedure, Spanish criminal procedure does not provide for a verbatim record, thus precluding a re-evaluation of the evidence. They state that they did in fact raise the failure to conduct a full or effective review of the conviction

[3] Adopted on 2 April 1997.

and the issue of undue delay in their application for *amparo* and argue that it is an inherent obligation of States parties to guarantee a reasonable duration for criminal proceedings. Furthermore, in its decision on inadmissibility, the Constitutional Court made no reference to their complaint of lack of a second hearing.

Proceedings before the Committee

Consideration of admissibility

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 has ascertained that the same matter has not been submitted to any other procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

6.3 The Committee notes the authors' contention that the absence of a verbatim record of the public hearing violated article 14, paragraph 1, of the Covenant, because where there is no verbatim record reflecting the entire proceedings there can be no fair trial. The Committee also notes, however, that, as the State party points out, the authors did not raise this complaint in the Spanish courts. The Committee accordingly decides that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, since domestic remedies were not exhausted.

6.4 As to the complaint relating to article 14, paragraph 3 (c), of the Covenant, the Committee observes that, as asserted by the State party, the complaint of undue delay in the proceedings was not submitted to the domestic courts. The Committee therefore considers that this part of the complaint is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, as domestic remedies have not been exhausted.

6.5 The Committee notes the authors' submissions that they have been deprived of their right under article 14, paragraph 5, to a full review of their conviction and sentence by a higher tribunal because the Supreme Court did not examine the credibility of Pedro López García's statement, and that, in the case of Rosa Muñoz Hernández, there was a violation of the right to presumption of innocence because the Supreme Court established her guilt on the basis of mere conjecture. The authors also claim that the Constitutional Court's failure to rule on the alleged violation of article 14, paragraph 5, of the Covenant, is itself a violation of that provision, as well as of article 14, paragraph 1. The State party maintains that in the authors' case, the Supreme Court conducted a thorough evaluation and review of the facts and the evidence, and it recalls the Committee's case law that, in principle, the evaluation of facts and evidence is a matter for State parties' domestic courts, unless such evaluation is manifestly arbitrary or constitutes a denial of justice.

6.6 The Committee notes that, in the copy of the 20 November 2001 ruling of the Criminal Division of the Supreme Court in the case of José Antonio González Roche, the Supreme Court took account of the statements of other co-defendants, documentary evidence of the purchase of tickets, evidence from his bank account, and the fact that he was unemployed. In the case of

Rosa Muñoz Hernández, the Court also considered circumstantial evidence relating to her employment and the funds she had at her disposal to pay for such a trip, and came to the conclusion that the evidence, although circumstantial, was sufficient to warrant conviction. The Committee accordingly considers that, in this case, the authors have not substantiated their allegations with respect to article 14, paragraph 5, of the Covenant for the purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides that:

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

(b) This decision shall be communicated to the State party, the authors, and the authors' counsel.

[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.]
