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HUMAN RIGHTS COMMITTEE
Eighty-second session
18 October - 5 November 2004

VIEWS

Communication No. 1101/2002

Submitted by:	José María Alba Cabriada (represented by counsel, Mr. Gines Santidrán)
Alleged victim:	The author
State party:	Spain
Date of communication:	19 June 2002 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 18 July 2002 (not issued in document form)
Date of adoption of Views:	1 November 2004

On 1 November 2004 the Human Rights Committee adopted the Committee's Views, under article 5, paragraph 4, of the Optional Protocol, in respect of communication No. 1101/2002. The text of the Views is contained in an annex to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-second session

concerning

Communication No. 1101/2002[**]

Submitted by:	José María Alba Cabriada (represented by counsel Mr. Ginés Santidrán)
Alleged victim:	The author
State party:	Spain
Date of communication:	19 June 2002 (initial submission)

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

Meeting on 1 November 2004,

Having concluded its consideration of communication No. 1101/2002, submitted by José María Alba Cabriada 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:

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

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

1. The author of the communication is José María Alba Cabriada, a Spanish citizen, born in Algeciras, Cádiz, in 1972. He claims to be a victim of violations by Spain of article 14, paragraph 5, and article 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel.

The facts as submitted

2.1 On 4 April 1997 the Cádiz Provincial Court sentenced the author for an offence against public health to 10 years and 1 day in prison, suspension from public office, and payment of a fine of 120 million pesetas. The judgement stated that the author had been under surveillance by agents of the narcotics squad for alleged participation in the distribution of narcotic substances. The author was arrested together with an Irish citizen, from whom 2,996 tablets were confiscated containing a substance that proved to be an amphetamine derivative known as MDA. The judgement stated that the author was an intermediary for the Irish citizen in the distribution of drugs to third parties.

2.2 The author filed an application with the Supreme Court for judicial review and annulment, alleging violation of his right to the presumption of innocence and errors in the appraisal of evidence. With regard to the presumption of innocence, the author alleged that his conviction had been based on circumstancial evidence and that the conclusions drawn by the court of first instance were not such as to preclude his innocence. Regarding errors in the appraisal of evidence, the author alleges that the court found that the confiscated substance was MDA, while a report prepared by the Ministry of Health and Consumer Affairs established that the substance was MDEA.

2.3 In a judgement dated 27 January 1999, the Supreme Court rejected the application for annulment. Regarding the alleged violation of the presumption of innocence, the Court stated that it only had a duty to consider whether there was multiple, duly verified, concomitant, mutually corroborative evidence, and that the reasoning in the court's conclusions and deductions was based on logic and experience , in order to ascertain that the logical inference made by the trial court is not irrational, capricious, absurd or extravagant, but is in accordance with the rules of logic and standards of experience. The Court stated that it was strictly prohibited from reappraising the facts that the court of first instance had considered as evidence, since, by law, the appraisal function fell within the exclusive competence of the sentencing court. With respect to the alleged error of fact in appraising the evidence, the Supreme Court stated that the Ministry of Health and Consumer Affairs had initially identified the seized substance as MDMA, but that it had turned out to be MDEA or MDA, both amphetamine derivatives.

The complaint

3.1 The author alleges a violation of the right enshrined in article 14, paragraph 5, of the Covenant, owing to the fact that the Supreme Court did not appraise the evidence. According to the author, this limitation constitutes a violation of the right to review of the judgement and conviction by a higher tribunal.

3.2 The author also alleges that the Spanish Criminal Prosecution Act violates article 14, paragraph 5, and article 26 of the Covenant, since cases involving individuals accused of the

most serious crimes are tried by a single judge (examining court), who, once the relevant investigations have concluded, transfers the case to the provincial court, where proceedings are conducted by three judges, who pronounce sentence. The decision may be appealed on very limited legal grounds only. The court of cassation may not reappraise the evidence. On the other hand, cases involving individuals sentenced for lesser offences, with sentences of less than six years, are investigated by a single judge (examining court), who, when the case is ready for oral proceedings, transfers the case to a single judge ad quo (criminal court); this decision may be appealed before the provincial court, which guarantees effective review not only of application of the law but also of the facts.

3.3 The author did not make any application to the Constitutional Court for *amparo*. He maintains that the long-standing precedent of the Constitutional Court is to deny applications for *amparo*, rendering it ineffective. The author maintains that the Committee's precedent has established that it is necessary only to exhaust effective remedies actually available to the author.

Observations of the State party on admissibility and merits

4.1 The State party indicates that the author submitted his communication more than two and a half years after the Supreme Court judgement. It adds that the author made no application to the Constitutional Court for *amparo*, and sought to justify the absence of a domestic appeal by alleging the existence of extensive and varied precedent such that the remedy of *amparo* was denied, and thus ineffective.

4.2 The State party maintains that paragraph 5 of article 14 does not establish the right for an appeal court to reconduct the trial *in toto*, but the right to review by a higher tribunal of the proper conduct of the trial at first instance, with review of the application of the rules that led to the finding of guilt and the imposition of the sentence in the specific case. The object of the review is to verify that the decision at first instance is not manifestly arbitrary and that it does not constitute a denial of justice.

4.3 The State party maintains that the remedy of judicial review is based on the French system and that for historical and philosophical reasons it arose as a review limited to questions of law, and that it maintains this character in various European countries. The State party points out that the European Court of Human Rights has affirmed that State parties retain the right to determine the means for the exercise of the right to review, and may restrict such review to questions of law.

4.4 According to the State party, the Spanish remedy of judicial review is broader than the original French procedure, and complies with the requirements of article 14, paragraph 5, of the Covenant. It adds that the right to review by a second court does not include the right to reappraisal of the evidence, but means that courts of second instance examine the facts, the law and the judicial decision, and, excepting a finding of arbitrariness or denial of justice, uphold it. The State party points out that this is precisely what happened in the case of the author: the Supreme Court judgement noted the existence of evidence establishing the guilt of the author, noted that the evidence was concomitant and mutually corroborative, and ascertained that the court of first instance had considered the evidence in establishing the author's guilt and that the process of deduction had not been arbitrary but reflected the maxims of logic and experience.

4.5 The State party asserts that the Committee's Views in *Cesario Gómez Vásquez v. Spain*, could not be generalized and applied to other cases, since they were restricted to the specific case in which they were adopted. It also notes the manifest contradiction existing in international protection of the right to two levels of jurisdiction arising from the different interpretation of the European Court of Human Rights and the Human Rights Committee in respect of the same text.

4.6 The State party concludes that the alleged violation of article 14, paragraph 5, should be found inadmissible as constituting an abuse of the right to submit a communication.

4.7 With regard to the violation of article 14, paragraph 5, in connection with article 26 of the Covenant, the State party cites the Committee's Views in the *Gómez Vásquez* case, in which the Committee considered that the different treatment for different offences did not necessarily constitute discrimination. It concludes that this part of the communication should be found inadmissible, under article 2 of the Optional Protocol, since the allegation was not sufficiently substantiated.

Author's comments on the State party's observations

5.1 The author maintains that he was not required to submit an application for *amparo* before the Constitutional Court since such an appeal does not constitute an effective remedy for the violation reported to the Committee. The author observes that in his case the State party cited the text of a Supreme Court judgement in which it was expressly noted that both the Supreme Court and the Constitutional Court lacked competence to make a fresh appraisal of the facts and evidence.

5.2 The author indicates that the Committee's Views in the *Gómez Vásquez* case show the inadequacy of Spanish legislation in connection with article 14, paragraph 5, of the Covenant, and that the State party has not adopted measures to rectify that situation, despite the Committee's recommendation.

5.3 The author maintains that he has not asked the Committee to conduct an *in abstracto* review of the State party's legislation, but its inappropriateness to his specific case. He insists that the right to review includes a reappraisal of the evidence and that the Supreme Court expressly excluded that possibility, by stating that "… the Constitutional Court, on an application for *amparo*, and this review chamber, on appeal, are strictly prohibited from reappraising the basic facts and evidence, since, pursuant to article 117.3 of the Constitution and article 741 of the Criminal Prosecution Act, this function lies exclusively within the competence of the sentencing court, so that any possible reassessment of the merits of the evidence would represent an inadmissible invasion of the exclusive competence of the sentencing court". The author considers that the review by the Supreme Court was limited to formal and legal aspects of the judgement and did not constitute a comprehensive review of the judgement and conviction.

Issues and proceedings before the Committee

6.1 In accordance with rule 87 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must 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 is not being examined under another procedure of international investigation or settlement, so that the provisions of article 5, paragraph 2 (a), of the Optional Protocol do not preclude its consideration of the complaint.

6.3 The State party asserts that the author waited more than two and a half years after the date of the Supreme Court judgement before submitting his complaint to the Committee. It appears to allege that the communication should be considered inadmissible as constituting an abuse of the right to submit communications under article 3 of the Optional Protocol in view of the time elapsed. The Committee observes that the Optional Protocol does not establish any deadline for the submission of communications, and that the period of time elapsing before doing so, other than in exceptional cases, does not of itself constitute an abuse of the right to submit a communication. Neither has the State party duly substantiated why it considers that a delay of more than two years would be excessive in this case.

6.4 The State party has alleged that domestic remedies have not been exhausted, since the author did not file an application for *amparo* with the Constitutional Court. The author maintains that it was not necessary to file such an application, as there was no possibility of success owing to the existence of extensive and varied precedent that denied the remedy of *amparo*, rendering it ineffective.

6.5 The Committee reaffirms its established jurisprudence that it is only necessary to exhaust those remedies that have some prospect of success. With regard to the alleged violation of article 14, paragraph 5, of the Covenant, the Committee notes that both the author and State party accept the text of the Supreme Court judgement, which states that there is a legal prohibition preventing the Constitutional Court from reappraising the facts and evidence introduced at first instance. The Committee therefore considers that an application for *amparo* could not be effective with regard to the alleged violation of article 14, paragraph 5, of the Covenant, and that the author had exhausted domestic remedies in respect of the alleged violation.

6.6 The State party also maintains that the alleged violation of article 14, paragraph 5, of the Covenant should be found inadmissible as an abuse of the right to submit communications. The Committee observes that the State party has not sufficiently substantiated its view that the author's allegations constitute an abuse of the right to submit communications, and considers that the complaint raises issues that may affect the right recognized in article 14, paragraph 5, of the Covenant, so that this part of the communication is considered admissible.

6.7 The State party asserts that the alleged violation of article 14, paragraph 5, in connection with article 26 of the Covenant, should be found inadmissible on the ground that it has not been sufficiently substantiated. The author considers that the systems of appeal existing in the State party in connection with the various types of offence make it possible in some cases to fully review the judgement while preventing it in other cases. The Committee observes that the different treatment for different remedies according to the seriousness of the offence does not necessarily constitute discrimination. The Committee considers that the author has not substantiated this part of the communication for the purposes of admissibility, in view of which it finds it inadmissible pursuant to article 2 of the Optional Protocol.

Consideration on the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information supplied by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee observes that neither the author nor the State party has disputed the facts related in connection with the alleged violation of article 14, paragraph 5, of the Covenant. The Committee observes that the Supreme Court expressly stated that it was not competent to reappraise the facts forming the basis for the conviction of the author, a function which the Court considered the exclusive and sole prerogative of the court of first instance. Further, the Supreme Court considered whether or not the presumption of innocence of the author had been violated, and ascertained that there was evidence of his guilt, that the evidence was multiple, concomitant and mutually corroborative, and that the reasoning used by the sentencing court to deduce the liability of the author on the basis of the evidence was not arbitrary, since it was based on logic and experience. It is in this context that the Committee must consider whether the review carried out by the Supreme Court is compatible with the provisions of article 14, paragraph 5, of the Covenant.

7.3 The Committee notes the comments made by the State party about the nature of the Spanish remedy of judicial review, in particular that the court of second instance is limited to an examination as to whether the findings of the trial court amount to arbitrariness or denial of justice. As the Committee has determined in previous cases [701/1996; 986/2001; 1007/2001], such limited review by a higher tribunal is not in accordance with the requirements of article 14, paragraph 5. Therefore, in the light of the limited scope of review applied by the Supreme Court in the author's case, the Committee concludes that the author is a victim of a violation of article 14, paragraph 5, of the Covenant.

8. Accordingly, the Human Rights 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 before it disclose a violation of article 14, paragraph 5, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The author's conviction must be reviewed in accordance with article 14, paragraph 5, of the Covenant. The State party is under an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. Considering that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether 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 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 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.]