



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-eighth session
16 October-3 November 2006

VIEWS

Communication No. 1325/2004

Submitted by: Mario Conde Conde (represented by
José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 7 January 2003 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the
State party on 11 November 2004 (not issued in document
form)

Date of adoption of Views: 31 October 2006

Subject matter: Imposition of heavier penalties by the higher court;
scope of review in cassation proceedings in the
Spanish Supreme Court

Procedural issues: Failure to substantiate claims

* Made public by decision of the Human Rights Committee.

Substantive issues: Right to have sentence and conviction reviewed by a higher court

Articles of the Covenant: 14, paragraph 5

Articles of the Optional Protocol: 2

On 31 October 2006, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1325/2004.

[ANNEX]

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-eighth session

concerning

Communication No. 1325/2004*

Submitted by: Mario Conde Conde (represented by
José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 7 January 2003 (initial submission)

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

Meeting on 31 October 2006,

Having concluded its consideration of communication No. 1325/2004, submitted on behalf of Mario Conde Conde 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 Committee members participated in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

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

1. The author of the communication, dated 7 January 2003, is Mario Conde Conde, a Spanish national born in 1948 and currently detained in Alcalá-Meco prison in Madrid. He claims to be a victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, José Luis Mazón Costa.

Factual background

2.1 The author was President of the Banco Español de Crédito (Banesto) at the time the events took place. In early 1989, exercising the powers conferred on him by virtue of his office, but without the authorization of the Banesto administration, he disposed unilaterally of 300 million pesetas (€1,803,339) for purposes other than the proper business of the company. This incident was followed by a number of other corporate transactions and accounting fraud operations by companies with links to Banesto.

2.2 On 14 November 1994, the prosecutor's office attached to the National High Court brought criminal proceedings against 10 individuals, including the author, who was charged on eight counts relating to nine transactions: four counts of misappropriation, three of fraud and one of forgery of a commercial document. In addition to the proceedings brought by the Government Advocate, 14 *acusaciones particulares* (private prosecutions) and *acusaciones populares* (citizens' actions) were brought. In the course of the hearings, which lasted two years, statements were taken from 470 witnesses and expert witnesses. The case file consisted of 53 volumes of pretrial proceedings and 121 volumes of evidence.

2.3 On 31 March 2000, the National High Court:

(1) Found the author guilty of misappropriation in relation to the "Cementeras" operation and sentenced him to four years and two months' imprisonment and payment of joint and several compensation to Banesto in the amount of 1,556 million pesetas (€9,353,322);

(2) Found the author guilty of a continuing offence of fraud in relation to the Centro Comercial Concha Espina y Oil Dor operations and sentenced him to six years' imprisonment and payment of joint and several compensation to Banesto in the amount of 1,880,016,900 pesetas (€11,301,900);

(3) Found the author not guilty of misappropriation in relation to the Carbueros Metálicos operation;

(4) Found the author not guilty of misappropriation for the withdrawal of cash funds from Banesto (referred to as the "300 million in cash" operation). The court took the view that an offence of misappropriation had been committed, but classed it as a single offence and thus time-barred, five years having passed as required by the relevant law, and the author consequently incurred no criminal liability;

(5) Found the author not guilty on one count of misappropriation and one of fraud in relation to the Isolux operation;

(6) Found the author not guilty on one count of misappropriation and one of fraud in relation to the Promociones Hoteleras operation; and

(7) Found the author not guilty of forgery of a commercial document in relation to the accounting fraud operation.

2.4 The author submitted an appeal in cassation on 39 grounds, most of which alleged errors in the assessment of the evidence at trial and violations of the principle of presumption of innocence, maintaining that he had been convicted on the basis of insufficient incriminating evidence. Separate appeals in cassation were also lodged, one by the Government Advocate, three in the form of *acusaciones populares* and six as *acusaciones particulares*.

2.5 On 29 July 2002, the Supreme Court rejected the author's appeal and partially upheld the Government Advocate's appeal, the *acusaciones populares* and two of the *acusaciones particulares*. The Court upheld the National High Court's sentence, except in relation to points (4) and (7) above:

With regard to point (4), the Supreme Court characterized the charge of misappropriation (the "300 million in cash" operation) as a continuing offence and therefore not time-barred. Consequently, the Court sentenced the author to six years and one day's imprisonment and payment of 300 million pesetas (€1,803,339) in compensation.

With regard to point (7), the Supreme Court found an offence of forgery of a commercial document in connection with the accounting fraud operation, and sentenced the author to four years' imprisonment and a fine of 1 million pesetas (€6,011).

The Supreme Court partially set aside the High Court sentence against the author and increased the penalty imposed in first instance, characterizing the charge of misappropriation (the "300 million in cash" operation) as a continuing offence and therefore not time-barred, and finding an offence of forgery of a commercial document in connection with the accounting fraud operation.

The complaint

3.1 The author alleges a violation of article 14, paragraph 5, of the Covenant, arguing that he was unable to secure a full review of the sentence handed down by the National High Court since the review in the higher court dealt only with points of law. He argues that the sentence was based on an evaluation of a great deal of evidence that the Supreme Court had been unable to reconsider.

3.2 The author alleges a second violation of article 14, paragraph 5, on the grounds that he was denied any kind of review in relation to his conviction and the increased sentence imposed by the Supreme Court. The author claims that Spain, unlike other States parties, did not enter reservations to article 14, paragraph 5, to ensure that this provision would not apply to first-time convictions handed down by an appeal court. He adds that the settled practice of the Constitutional Court is that there is no right of appeal for *amparo* in respect of a sentence handed down by the court of cassation, so it was futile to submit an application for *amparo* in this case.

State party's observations on admissibility and the merits

4.1 In its note verbale of 3 January 2005, the State party maintains that the communication is inadmissible under article 5, paragraph 2 (b), of the Covenant because domestic remedies have not been exhausted. It argues that the author's appeal in cassation made no mention of the right to review of the sentence and did not invoke article 14, paragraph 5, of the Covenant or any similar provisions of domestic or international law. Furthermore, the author failed to submit an application for *amparo* to the Constitutional Court claiming a violation of his right to a review of the sentence.

4.2 The State party submits that, in contrast with past practice, as a result of the development of the Constitutional Court's case law and doctrine, there has been a considerable broadening of the scope of the remedy of cassation, which now permits a thorough review of the facts and the evidence. The State party cites as an example of that transformation the judgement in cassation in the author's own case, which ruled on many points of fact raised by the appellants in connection with the presumption of innocence and errors of fact in the evaluation of the evidence. The State party quotes from the judgement handed down by the Supreme Court, which reads: "... the various parties have had the opportunity to formulate more than 170 grounds for cassation, frequently invoking errors of fact in the assessment of evidence and the subsequent review of proven facts. The presumption of innocence is also invoked as grounds for challenging the rationality and logic applied in assessing the evidence. This implies that we are speaking of a remedy that goes beyond the strictly defined, formal limits of cassation in the conventional sense and satisfies the requirement of a second hearing."

4.3 As to the conviction and heavier sentence imposed on appeal, the State party points out that the Constitutional Court has established that "there is no denial of the right of appeal even where [the sentence] is handed down by exactly the same court as tried the case on appeal". Moreover, article 14, paragraph 5, cannot be interpreted as denying the prosecuting parties the right of appeal. In the State party's view, the fact that a number of States parties have made reservations to article 14, paragraph 5, of the Covenant, thereby excluding its application to cases in which a heavier sentence is handed down, does not imply that the provision itself precludes the imposition of a heavier sentence.

4.4 The State party argues that the author claimed only a violation of article 14, paragraph 5, yet the points raised, had they been borne out, would have constituted violations of numerous articles of the Covenant, which raises the question of what the real purpose of the communication is.

4.5 In a note verbale dated 10 January 2006, the State party repeats that the author's appeal in cassation included no claim of a violation of the right of appeal, and that he failed to apply for *amparo*, which would have allowed him to make such a claim.

4.6 The State party also repeats that the Constitutional Court has developed its interpretation of the remedy of cassation in Spain, broadening it so that it now allows a thorough review of the facts and the evidence.

4.7 It further repeats that the author claimed only a violation of article 14, paragraph 5, even though the claims made in the communication would constitute a violation of a considerable number of articles of the Covenant.

Author's comments

5.1 On the question of exhaustion of domestic remedies, the author refers to the Committee's Views in *Pérez Escobar v. Spain* (communication No. 1156/2003), which relates to the same judicial proceedings and which the Committee found admissible since the remedy of *amparo* was ineffective.

5.2 The author repeats that the limitations of Spain's remedy of cassation precluded any review of the credibility of witnesses or reconsideration of the allegedly conflicting documentary evidence on which the conviction rested.

5.3 The author argues that he had been found not guilty by the lower court in the "accounting fraud" and "300 million in cash" operations but had been convicted by the higher court and sentenced by it to four years' imprisonment and to six years' imprisonment plus a fine of 300 million pesetas, respectively. He repeats that there was no possibility of review of the heavier sentence by a higher court. He recalls that, in its Views on *Gomariz v. Spain* (communication No. 1095/2002), the Committee found that the lack of a remedy in respect of a first-time sentence handed down on appeal with no possibility of review was a violation of article 14, paragraph 5, of the Covenant.

Issues and proceedings before the Committee

6.1 In accordance with rule 93 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, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee has noted the State party's argument that domestic remedies were not exhausted, since the alleged violations that were referred to the Committee were never brought before the domestic courts. However, the Committee recalls its established jurisprudence that it is only necessary to exhaust those remedies that have a reasonable prospect of success.¹ An application for *amparo* had no prospect of success in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considers that domestic remedies have been exhausted.

6.4 The author claims a violation of article 14, paragraph 5, of the Covenant, on the grounds that the evidence that proved decisive for his conviction was not reviewed by a higher court owing to the limited scope of Spain's remedy of cassation. However, the Committee finds from

the judgement that the Supreme Court looked carefully and in detail at the trial court's evaluation of the evidence relating to the charges against him and that it did indeed diverge to some extent from the High Court's assessment in respect of two of the charges. The Committee finds that this complaint of a violation of article 14, paragraph 5, has not been sufficiently substantiated for the purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

6.5 The Committee finds that the author's complaint in respect of his conviction and the imposition of a heavier sentence on appeal with no possibility of review by a higher court raises issues under article 14, paragraph 5, of the Covenant, and declares it admissible.

Consideration of the merits

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

7.2 The Committee takes note of the author's contention that his conviction by the appeal court on two counts of which he had been cleared by the trial court, and the subsequent imposition of a heavier penalty, could not be reviewed by a higher court. It recalls that the absence of any right of review in a higher court of a sentence handed down by an appeal court, where the person was found not guilty by a lower court, is a violation of article 14, paragraph 5, of the Covenant.² The Committee notes that, in the present case, the Supreme Court found the author guilty of an offence of forgery of a commercial document, a charge of which he had been acquitted in the lower court, and that it characterized the offence of misappropriation as a continuing offence and thus not time-barred. On that basis the Supreme Court partially set aside the lower court's sentence and increased the penalty, with no opportunity for review of either the conviction or the sentence in a higher court in accordance with the law. The Committee finds that the facts before it constitute a violation of article 14, paragraph 5.

8. 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. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy which allows a review of his conviction and sentence by a higher tribunal. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. 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 furnish them

with an effective and applicable remedy should it be proved that a violation has occurred. 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.]

Notes

¹ See, for example, communications Nos. 1095/2002, *Gomariz v. Spain*, Views of 22 July 2005, para. 6.4, and 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, para. 6.5.

² In this context, see communications Nos. 1095/2002, *Gomariz v. Spain*, Views of 22 July 2005, para. 7.1, and 1421/2005, *Larrañaga v. Philippines*, Views of 7 July 2006, para. 7.8.
