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HUMAN RIGHTS COMMITTEE
Ninety-fifth session
16 March-3 April 2009

**VIEWS**

**Communication No. 1388/2005**

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|---|---|
| *Submitted by*: | José Luis de León Castro (represented by counsel Fátima de León) |
| *Alleged victim*: | The author |
| *State party*: | Spain |
| *Date of communication*: | 23 August 2004 (initial submission) |
| *Document references*: | Special Rapporteur's rule 97 decision, transmitted to the State party on 4 May 2005 (not issued in document form)<br>CCPR/C/89/D/1388/2005: Decision on admissibility, adopted on 9 March 2007 |
| *Date of adoption of Views*: | 19 March 2009 |
| *Subject matter*: | Arbitrary detention owing to the denial of parole; lack of full review of the lower court's judgement on appeal in cassation |

* Made public by the decision of the Human Rights Committee.

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| *Procedural issues*: | Exhaustion of domestic remedies, insufficient substantiation of the alleged violations |
| *Substantive issues*: | Arbitrary detention; right to have sentence and conviction reviewed by a higher court in accordance with the law |
| *Articles of the Covenant*: | 9, paragraph 1; 14, paragraph 5 |
| *Articles of the Optional Protocol*: | 2; 5, paragraph 2 (b) |

On 19 March 2009, 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. 1388/2005.

**[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**

**Ninety-fifth session**

**concerning**

**Communication No. 1388/2005***

| | |
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| *Submitted by*: | José Luis de León Castro (represented by counsel Fátima de León) |
| *Alleged victim*: | The author |
| *State party*: | Spain |
| *Date of communication*: | 23 August 2004 (initial submission) |
| *Decision on admissibility*: | 9 March 2007 |

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

*Meeting* on 19 March 2009,

*Having concluded* its consideration of communication No. 1388/2005, submitted on behalf of José Luis de León Castro 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:

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* The following members of the Committee participated in the examination of this communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The text of an individual opinion of Committee member Ms. Ruth Wedgwood is appended to the present document.

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

1.1 The author of the communication, dated 23 August 2004, is José Luis de León Castro, a Spanish citizen born on 25 February 1929. The author claims to be the victim of violations by Spain of articles 9, paragraph 1, and 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel.

1.2 On 13 July 2005 the Special Rapporteur on New Communications and Interim Measures decided that the admissibility of the communication should be considered separately from the merits.

### Factual background

2.1 The author served as a lawyer for a housing association in a lawsuit against various construction companies and architects and an insurance company concerning defects in the construction of a building. In 1996 a court upheld the association's claim and ordered the defendants to pay 2,000 million pesetas in compensation. The insurance company paid its share, which amounted to 86 million pesetas. The association had reached an agreement with the author and the court attorney handling the case that they should be paid in accordance with the guidelines established by the Madrid Bar Association and with the schedule of attorneys' fees. Payment would be made when the association had sufficient funds.

2.2 In April 1997 the attorney collected his fee of 6 million pesetas, remitted 50 million pesetas to the author and then wrote out a cheque to the association for the remaining amount of 30 million pesetas.

2.3 Following a disagreement over the amount of the fee paid to the author, on 20 January 1998 the housing association brought criminal proceedings against him for alleged misappropriation of funds. The prosecutor's office classified the offence as either misappropriation of funds or fraud. On 8 February 2001 the Madrid Provincial Court sentenced the author to three years' imprisonment for fraud. The author states that the court invented the story that he had deceived the attorney into giving him the 50 million pesetas and that, in determining that the maximum amount the lawyer could charge was 22 or 23 million pesetas, it failed to take into account the fees he could charge for an appeal. The author maintains, in addition, that the essential element of the offence of fraud, namely deception, was introduced by the judges at the sentencing stage, and it was therefore impossible for him to mount a defence against this new accusation during the trial.

2.4 On 21 April 2001, the author submitted an appeal in cassation to the Supreme Court. In a ruling dated 20 January 2003, the Supreme Court found that the author's guilt had been established on the basis of lawfully obtained evidence which had been assessed by the court and that the assessment of evidence was a matter for the sentencing court, not the Supreme Court. The author claims that this judgement, too, distorted the facts proved at trial by finding that the

author had concealed from the attorney the terms on which his fee had been set so that the attorney would pay him the 50 million pesetas. Moreover, the Supreme Court's assertions could not be reviewed by a higher court.[1]

2.5 On 20 February 2003, the author submitted an application for amparo to the Constitutional Court, claiming, inter alia, that his right to be informed of the charges against him and his right to presumption of innocence had been violated. On 26 January 2004, the Constitutional Court found that there was sufficient evidence against the author and rejected the application. The author states that the Constitutional Court does not permit any challenges to the evidence considered in the sentences that are handed down.

2.6 On 11 February 2003, the author filed a petition for a pardon with the Ministry of Justice. On 12 February 2003, after the Supreme Court had rejected his appeal in cassation, he applied to the Madrid Provincial Court for a suspension of his sentence. On 7 April 2004, the Provincial Court rejected that request. The author went to prison on 25 April 2003. He applied for reconsideration, citing his age (74) and asserting that there was no danger that he would escape, that he had no previous convictions and that his family would be left destitute if he were to go to prison. His request for reconsideration was rejected on 3 June 2003. The author pointed out that

[1] With regard to the assessment of evidence, the Supreme Court's judgement in cassation stated the following: "There is an abundance of evidence - both direct and circumstantial - that weakens the presumption of innocence. This evidence includes the following: (a) the statement made by the accused acknowledging that he received 50 million pesetas and that he did not transfer any of the money to the housing association, an acknowledgement to which he adds that he was perfectly entitled to receive this amount of money; (b) the fact that he was not entitled to obtain the full amount is proven by a number of documents contained in the file, including one sent by the present appellant to the housing association on 10 April 1992, in which a contract for the provision of services was considered to exist between the two parties and in which it was stated that, if the case was taken to court (as it was) and an amount of 650 million pesetas was obtained, lawyers' fees (for the lawyer and attorney) would be set at 8 million pesetas, plus 6 per cent value added tax (VAT); there was also a document dated 24 July 1992 sent to the housing association by the accused, in his capacity as its lawyer, stating that the fee would be brought into line with the guidelines established by the Bar Association; from the attached copy of these guidelines it could be deduced that the fee would normally be between 15 and 16 million pesetas, or between 22 and 23 million pesetas in an especially complicated case; another series of documents drafted and consequently acknowledged by the accused, such as those of 31 October and 16 December 1996, are similar in content; (c) there is also the witness statement given by Mr. Vélez, in which he said, in his capacity as the court attorney, that he had given the 50 million pesetas in question to the accused because the latter, in addition to informing him of the relationship of trust he enjoyed with the housing association, had concealed from the attorney the terms on which his fee had been set. Therefore, lawfully obtained evidence was assessed by the trial court based on logic, coherence and the lessons of experience, with its authority to undertake such an assessment being established by article 741 of the Criminal Procedure Act, which is based on no less an important principle than that of immediacy."

on 11 April 2004 a local newspaper had reported that the Provincial Court had suspended the sentences of two bankers of advanced years pending a decision on their petition for a pardon. On 21 July 2003, the author applied to the Constitutional Court for a suspension of his sentence; this appeal was not examined until January 2004, when the application was rejected.

2.7 Before going to prison, the author applied to the Prisons Department for conditional release. On 17 June 2003 he was interviewed in prison by the Assessment Board. On 6 August 2003 the Prisons Department informed him that he had been placed under the ordinary (grade 2) prison regime, after determining that he was not eligible for the semi-open regime. The Department decided that this regime should apply to the author with effect from 31 July 2003. The author explains that the reason for selecting that date was that Act No. 7/2003 of 30 June on reform measures for the full execution of sentences had entered into force in early July. This law made access to the restricted-release regime and to parole conditional upon prior payment of the civil liabilities arising from the offence. This law required that declarations of insolvency be taken into account, however, and the author had submitted such a declaration on 18 November 1999; it did not restrict the applicable rules in respect of people in their 70s.

2.8 On 7 August 2003, the author appealed his prison regime assignment before the Prison Supervision Court, requesting that he be granted parole and, subsidiarily, that he be placed under a grade 3 regime. In a decision communicated on 9 December 2003, the Prison Supervision Court accepted the author's application and placed him under a restricted-release regime (grade 3 restricted: weekend leave). It also stated that he would be eligible for parole once he had paid the compensation corresponding to the civil liabilities arising from the offence. On 19 December 2003, the Assessment Board granted him leave on alternate weekends but denied him parole, which he had requested on the grounds of his advanced age.

2.9 On 15 January 2004 the author again applied to the Prison Supervision Court for parole, arguing that he was over 70 years old and that he understood from the Supervision Court decision placing him under the restricted-release regime that the requirement to discharge his civil liabilities would be deemed fulfilled once he had signed an express undertaking to pay the corresponding compensation if he received any income; in that regard, he stated that he was awaiting a ruling in a case from which he expected to receive 90 million pesetas. This request was turned down on 13 May 2004 on the basis of a prison report dated 1 April 2004. On 1 April 2004, the author had applied to the Provincial Court for the suspension of his sentence; this was denied on 21 April 2004 because the sentence was longer than two years. On 26 April 2004, the Prisons Department granted the author daily leave between 5.30 p.m. and 9.45 p.m. as well as weekend leave. On 2 June 2004, the author submitted a complaint to the General Council of the Judiciary concerning the delay in processing his requests for conditional release in the Prison Supervision Court and the Provincial Court. This complaint was dismissed on 30 June 2004. On 6 May 2005, the Madrid Provincial Court upheld the author's appeal against the decisions of Prison Supervision Court No. 3, according to which the author was to remain under the semi-open (grade 3 restricted) regime, and approved his application for the full open regime. The prison administration did not implement this decision immediately; in response to this situation, the author submitted several written requests and an application for amparo. The Constitutional Court rejected this application on 18 January 2006.

2.10 A further parole application submitted to Madrid Prison Supervision Court No. 2 was rejected on 5 December 2005. The author appealed this decision before the Madrid Provincial Court, which dismissed his appeal on 3 February 2006.[2] On 16 March 2006, the author submitted an application for amparo to the Constitutional Court against the decision of the Madrid Provincial Court.

2.11 The author considers that he has exhausted domestic remedies. He says that, although in the application for amparo before the Constitutional Court he did not adduce a violation of the right to a second hearing, this remedy was in any case ineffective because of the Constitutional Court's refusal to apply the Committee's jurisprudence relating to article 14, paragraph 5, of the Covenant. The author asserts that he has exhausted all available domestic remedies before the prison authorities and the Prison Supervision Court in his attempts to obtain conditional release.

**The complaint**

3.1 The author claims to be a victim of arbitrary detention in violation of article 9, paragraph 1, of the Covenant. He states that a law limiting his eligibility for prison privileges was applied retroactively. The purpose of Act No. 7/2003 of 31 July 2003[3] is to regulate access to prison privileges by persons convicted of terrorism or of fraud or misappropriation involving large sums of money that adversely affect large numbers of people. In such cases, the civil liabilities arising from the offence must be discharged before parole is granted. The author argues that his case does not meet any of those criteria. Under the guidelines drawn up by the Prisons Department for the application of this law, prison authorities must take the existence or absence of a prior declaration of insolvency into account. The author maintains that he has a declaration of insolvency dated 18 November 1999, while the events in question occurred on 15 April 1997.

3.2 The author says that in order to be granted parole he is required to settle the civil liabilities arising from the offence. He considers this to be unfair, unlawful and discriminatory because he is not financially solvent, having been unable to practise as a lawyer for three years as a result of his conviction. He adds that nobody is willing to offer him an employment contract because he is 75 years old.

3.3 He claims that the Prison Supervision Court handed down erroneous rulings in order to delay the processing of his parole applications and thereby allow the full term of his sentence to

[2] The decision states the following: "Apart from the fact that the Assessment Board's recommendation on the proposal for parole was unfavourable ... we do not see that the prisoner's response to the prison regime has been sufficiently positive to allow him to be granted as important a privilege as the one requested, especially given that he has not accepted criminal responsibility. On the other hand, age is not currently a serious impediment to the prisoner's serving his sentence, since José Luis de León Castro is, fortunately, in good health and benefits from a grade 3 prison regime that gives him a considerable margin of freedom, his presence being required at the open prison centre for only six hours a day."

[3] The correct date of Act No. 7/2003 is 30 June 2003; it entered into force on 2 July 2003.

elapse. He cites the Prison Supervision Court ruling of 10 June 2004, in which the Court quashed the order issued by the Prisons Department placing him under the restricted-release (grade 3 restricted) regime and decided that he should remain under the ordinary (grade 2) prison regime. The author requested that the error be corrected, but this was not done until 6 July 2004. On the same day, he was informed of a ruling by the Prison Supervision Court dated 26 July 2004 (sic) that refused him parole on health grounds because he was subject to the ordinary (grade 2) regime. The author maintains that he had not applied for parole on health grounds, but on the grounds of age, and that he was not subject to the grade 2 regime. He further states that he asked for these rulings to be rectified.

3.4 The author also alleges a violation of article 14, paragraph 5, of the Covenant on the grounds that he was not granted a full review of the sentence handed down by the Madrid Provincial Court. He cites the Human Rights Committee's concluding observations of 3 April 1996 on the fourth periodic report of Spain and the Committee's Views on communications Nos. 701/1996, *Gomez Vásquez v. Spain*; 986/2001, *Semey v. Spain*; 1007/2001, *Sineiro Fernández v. Spain*; and 1101/2002, *Alba Cabriada v. Spain*. He argues that the review carried out by the high court was confined to legal aspects and did not include an examination of the facts of the case because he had been unable to obtain a review of the evidence by the Supreme Court. The reason for this, he claims, is that the Supreme Court ruled that the credibility of statements cannot be the subject of review, since nothing that depends on the immediacy of the proceedings can be subject to appeal.

**State party's observations on admissibility**

4.1 By note verbale dated 11 July 2005, the State party submitted its observations on the admissibility of the communication. It maintains that the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol because domestic remedies have not been exhausted and because the communication is clearly without merit.

4.2 According to the State party, the author challenged various decisions of the prison authorities in the Prison Supervision Court but did not at any time challenge the various rulings of the Court itself, despite the fact that the Court's rulings indicated that they were subject to the remedy of reconsideration. In addition, the only application for amparo submitted by the author was related to the trial in which he was convicted rather than to prison-related matters, and no reference was made to the right to review of conviction and sentence by a higher court.

4.3 The State party adds that the author was deprived of his liberty for reasons defined by law and pursuant to legally established procedures in accordance with article 9, paragraph 1, of the Covenant. The State party argues that allegations in respect of the right of pardon or clemency and suspension of sentence fall outside the scope of article 9, paragraph 1, of the Covenant.

4.4 As to the alleged violation of article 14, paragraph 5, the State party repeats that the matter was never raised in the domestic courts, not even in the application for amparo submitted to the Constitutional Court. The State party denies that the application for amparo was futile. It argues that the only exception to the exhaustion of domestic remedies rule is unreasonably prolonged

proceedings. The remedies must exist and be available, but they cannot be considered ineffective simply because the author's claims were not upheld. It adds that any over-interpretation of the Protocol could open the way for dispensing with domestic remedies whenever the relevant jurisprudence has been established by the domestic courts, which would clearly run counter to the letter and spirit of article 5, paragraph 2 (b).

4.5 The State party refers to Constitutional Court jurisprudence, which establishes that, to ensure that the remedy of cassation meets the standards of the Covenant, a broad interpretation of the scope of review by the court of cassation must be applied (Constitutional Court judgements of 3 April 2002, 28 April 2003 and 2 June 2003, inter alia). The State party argues that, because this claim was not brought before the Constitutional Court, it is now impossible to know whether that Court would have found the Supreme Court's review of the conviction and sentence sufficiently comprehensive or not.

4.6 The State party further considers that the judgement handed down in cassation shows that the second chamber of the Supreme Court did carry out a full review of the sentence issued by the Provincial Court. Quoting the third and seventh grounds of the judgement, it concludes that the author alleges a lack of review because he disagrees with the assessment of the facts and evidence. The State party refers to the decision of the Constitutional Court, which states that "the appellant's claim that there was insufficient evidence against him cannot be upheld … on the contrary, from the record it can only be concluded that there was an abundance of evidence, both direct and circumstantial ...". The State party asserts that the Constitutional Court also reviewed the evidence and the assessment of it made in the course of the appeal in cassation.

**Author's comments on the State party's observations**

5.1 In his comments of 20 September 2005, the author states that the prison administration did not place him under the open prison regime or process his application for parole, despite the Madrid Provincial Court decision of 6 May 2005 granting the application of the full open regime and its decision of 25 May 2005 ordering the prison administration to process his parole application. The author states that he repeatedly requested that, in view of his age and his health, these court rulings be applied, but that the judicial decisions adopted in that regard were arbitrary and constituted a denial of justice.

5.2 The author disputes the State party's assertion that he did not appeal the various rulings of the prison authorities; in this connection, he refers to the complaint he lodged with the General Council of the Judiciary concerning the delay in proceedings and to article 5, paragraph 2 (b), of the Optional Protocol. He adds that as a result of the constant delays in the appeal proceedings, he brought two criminal actions for obstruction of justice. He maintains that the unreasonable prolongation of proceedings in these appeals and in the issuance of rulings is the reason why he did not submit an application for amparo.

5.3 As to the State party's claim that the communication is clearly without merit because it falls outside the scope of article 9, paragraph 1, the author refers to the jurisprudence of the Committee in communication No. 44/1979, *Alba Pietraroia v. Uruguay* and to its Views on communication No. 305/1988, *Van Alphen v. The Netherlands*. He also refers to the views of

the Working Group on Arbitrary Detention and argues that there cannot possibly be any legal grounds for keeping a 77-year-old man in prison when he has served three quarters of his sentence, is subject to the grade 3 open prison regime and has shown good behaviour. He also refers to the 3 December 2003 decision of Madrid Prison Supervision Court No. 1, which found that the likelihood that he would reoffend tended to be low and noted his good behaviour and normal personality. He argues that this situation constituted a violation of article 9, paragraph 1, of the Covenant. The author again asserts that Act No. 7/2003, which was published on 31 July 2003 and entered into force on 1 August 2003, contains an unconstitutional transitional provision for retroactive application.

5.4 As to the State party's claim that domestic remedies have not been exhausted, the author repeats that the Constitutional Court systematically rejects any application for amparo that is based on the lack of a second hearing, for the Court takes the view that the scope of the remedy of cassation is consistent with the right to a second hearing established in article 14, paragraph 5, of the Covenant.

5.5 The author also refutes the State party's claim that the Supreme Court examined factual issues in this case. The remedy of cassation in criminal matters in Spain is subject to strict limitations in respect of the re-examination of evidence, and no facts declared proven in the judgement may be reviewed. The author refers to the replies of the Spanish State in communications Nos. 1101/2002 and 1104/2002, in which he says the State party recognizes that judicial review, or appeal in cassation, is a legal remedy intended essentially to standardize the interpretation of the law. For the author, the adoption of Act No. 19/2003, establishing a genuine second judicial instance in criminal cases, is confirmation of the fact that the Spanish system of cassation does not comply with the requirements of the Covenant.

5.6 The author contends that the main issue in the criminal trial was the existence or absence of deception and that the resolution of that issue would require an evaluation and review of the facts declared proven in the Provincial Court sentence. The high court, in the third legal ground of its judgement as quoted by the State party, considers the question of whether or not there was a violation of the right to presumption of innocence by assessing whether or not there was an absence of evidence, but it does not enter into an assessment of the evidence as such. According to the author, in its judgement the high court acknowledged that the weighing of evidence is conducted by the trial court, whose competence to do so is established by article 741 of the Criminal Procedure Act based on the principle of immediacy. The high court confined itself to determining whether the reasoning set forth in the lower court's sentence was inconsistent with the content of specific documents. Such a review could never entail a full re-examination of the evidence (and therefore of the verdict reached), much less of the facts declared proven in the trial court's sentence.

5.7 The author also contests the State party's contention that the Constitutional Court reviewed the prosecution evidence and its evaluation in cassation. He observes that the Constitutional Court confined itself to establishing that there was no lack of evidence, without evaluating the evidence as such.

**The Committee's decision on admissibility**

6.1 On 9 March 2007, at its eighty-ninth session, the Committee decided that the communication was admissible in respect of the complaints related to articles 9, paragraph 1, and 14, paragraph 5, of the Covenant.

6.2 With regard to the author's complaint of violations of article 9, paragraph 1, the Committee found that the complaint had been sufficiently substantiated for the purposes of its admissibility and that the author had exhausted the remedies available to him.

6.3 As to the complaint under article 14, paragraph 5, the Committee took note of the State party's argument that domestic remedies had not been exhausted because the alleged violations referred to the Committee had never been brought before the Constitutional Court. The Committee recalled its jurisprudence, which indicates that it is necessary to exhaust only those remedies that can reasonably be expected to prosper.[4] An application for amparo had no prospect of prospering in relation to the alleged violation of article 14, paragraph 5, of the Covenant, and the Committee therefore considered that domestic remedies had been exhausted.

6.4 As to the alleged failure to substantiate the communication in respect of the complaint under article 14, paragraph 5, the Committee found that the author had sufficiently substantiated this part of the communication for the purposes of its admissibility and concluded that the communication was admissible in respect of the alleged lack of a full review in cassation of the sentence handed down by the Provincial Court.

**State party's observations on the merits**

7.1 On 18 October 2007 the State party submitted its observations on the merits of the communication. With regard to the alleged violation of article 9, paragraph 1, of the Covenant, the State party claims that the author's complaint refers to the application of prison privileges, the granting or denial of which does not call into question the fact that he was obliged to serve the three-year prison sentence that had been lawfully imposed upon him.

7.2 The author began by requesting a suspension of his sentence, which is ruled out under the Criminal Code for sentences of more than two years. He began to serve his prison sentence on 28 April 2003, and the Prison Supervision Court placed him under the semi-open (grade 3) regime on 3 December 2003. This was done despite the fact that the author had not yet served a quarter of his sentence or discharged his civil liabilities, both of which are prerequisites for the granting of this privilege; the requirements were waived because the author had served almost a quarter of the sentence and had undertaken to discharge the civil liabilities in question.

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[4] See, for example, communications Nos. 701/1996, *Cesario Gómez Vázquez v. Spain*, Views of 20 July 2000, para. 10.1; 986/2001, *Joseph Semey v. Spain*, Views of 30 July 2003, para. 8.2; 1101/2002, *Alba Cabriada v. Spain*, Views of 1 November 2004, para. 6.5; 1293/2004, *Maximino de Dios Prieto v. Spain*, decision of 25 July 2006, para. 6.3; and 1305/2004, *Villamón Ventura v. Spain*, decision of 31 October 2006, para. 6.3.

7.3 While under the semi-open regime, the author applied for parole. The request was rejected by decision of 5 May 2004 on the grounds of a failure to meet the requirements for parole, namely the discharge of civil liabilities and completion of three quarters of the sentence. Although under the law the requirement that the author serve three quarters of the sentence could have been waived owing to his age, it would have been inappropriate to grant parole because of the author's failure to even partially discharge his civil liabilities. No appeal of this decision was lodged. On several subsequent occasions, applications by the author for parole were again rejected by the courts on the grounds that he showed no remorse or any intention of discharging his civil liabilities and that the illness he invoked was not of a serious nature. At no point did he submit an application for amparo against these decisions. Nor did he inform the Committee of the legal provisions he considered to have been violated or the specific circumstances on which such an allegation would be based. The author has deliberately omitted any reference to the judicial decisions dismissing his applications from the information provided to the Committee. In support of his argument that the necessary remedies were not available, he mentions only the decision of the Provincial Court ordering that an application be processed. However, once that application had been processed, it was rejected by reasoned decision on repeated occasions.

7.4 With regard to the alleged violation of article 14, paragraph 5, the author confines himself to making general comments, without specifying which evidence he disputes or which particular pieces of evidence or facts he was unable to have reviewed. In addition, the ruling on the appeal in cassation shows that the Court carried out a thorough review of the prosecution evidence, leading to the conclusion that "lawfully obtained evidence was assessed by the trial court based on logic, coherence and the lessons of experience, competence for this assessment being established by article 741 of the Criminal Procedure Act". The Court also examined various documents contained in the case files that the author had referred to when claiming that the evidence had been erroneously assessed by the Provincial Court.

**Author's comments on the State party's observations on the merits**

8.1 On 12 December 2007, the author submitted comments on the State party's observations. He reiterates that it was arbitrary to hold him in prison from the age of 74 years and 2 months to the age of 77 years and 5 months. Contrary to the State party's claims, the author did challenge his conviction, since he submitted an appeal in cassation and an application for amparo.

8.2 With regard to the suspension of sentence, he states that, under article 80 of the Criminal Code, any sentence may be suspended without it being necessary to meet any requirement whatsoever in the case of a serious illness with incurable symptoms. The Views and the relevant jurisprudence equate old age (70 years and over) with serious illness. In addition, article 92 of the Criminal Code provides that anyone who is 70 years old or reaches the age of 70 while serving his or her sentence may be granted parole. Thus, parole is in no way made conditional upon the length of the prison sentence.

8.3 Contrary to the State party's claims, it is not true that the author was placed under the semi-open (grade 3 restricted) regime. He entered prison on 25 April 2003 and, despite many favourable reports (from the psychologist, instructor, etc.), the prison placed him under the strict (grade 2) prison regime on 19 June 2003. On 6 August 2003, the Prisons Department confirmed

that he had been placed under that regime, but with effect from 31 July 2003 rather than from the date of the prison's decision on the placement, as provided for by law. This was done so that Act No. 7/2003 of 30 June 2003, which made parole conditional upon payment of the compensation corresponding to the civil liabilities arising from the offence, would be applicable to him.

8.4 While serving his sentence, the prison regime under which the author was placed was as follows:

- From 25 April to 23 December 2003 he remained in prison, with no entitlement to leave
- On 3 December 2003 he was placed under the grade 3 restricted regime, under which, from 23 December 2003 on, he was granted leave on alternate weekends (from Saturday afternoon to Sunday afternoon)
- Starting on 23 January 2004, he was granted leave on weekends from 4 p.m. on Friday to 10 p.m. on Sunday
- On 2 March 2004, he was granted 22 days of leave every six months
- Starting on 20 May 2004, he was granted daily leave from 5.30 p.m. to 9.45 p.m., Monday through Friday, and weekend leave from 9 a.m. on Saturday to 9 a.m. on Monday
- From 1 December 2005 he was required to be in prison only from 3 p.m. to 9 p.m., Monday through Friday (he no longer spent the night in prison)
- By its decision of 10 March 2006, the Madrid Provincial Court, taking into account the fact that the author had almost completed his sentence and the author's age, health and the level of risk he posed, ordered that the periods he was required to be in prison would be from 4 p.m. to 6 p.m. on Monday, Wednesday and Friday
- On 20 August 2006, he obtained his unconditional release from prison

8.5 The author contests the State party's claim that he was granted prison privileges despite the fact that he had not yet served a quarter of his sentence or discharged his civil liabilities. Neither of these requirements was present in the Criminal Code or the prison legislation in force at the time he began his prison sentence or at the time that he should have been eligible for parole. Act No. 7/2003 introduced the additional requirement of discharging one's civil liabilities, taking into account the prisoner's personal and financial circumstances, and the additional criterion regarding particularly serious crimes likely to endanger a great number of people. In criminal law, however, new requirements are not retroactive. In addition, no account was taken of the fact that the author had declared he was insolvent during the pretrial phase, or that he would be unable to exercise his profession owing to his disqualification for the duration of his sentence. Nor was he allowed time to work unless he could produce an employment contract. In other words, the administrative authorities themselves denied him the possibility of discharging his civil liabilities.

8.6 The author contests the State party's claim that he did not appeal against the decision of 5 May 2004 refusing him parole. He appealed that decision before Prison Supervision Court No. 3 and the Provincial Court.

8.7 Article 4.4 of the Criminal Code provides that the judge or court may suspend a sentence pending a ruling on a request for pardon, if serving the sentence would render the pardon devoid of effect. At around the same time (11 April 2003), the same court suspended the prison sentences (of three years and four months) of two bankers because the nature and duration of the sentences would have rendered the pardon devoid of effect. Yet the author's sentence was not suspended, despite the fact that he had filed a petition for a pardon.

8.8 With regard to the State party's claim that the author's illness was not serious and that he was in good health, these considerations are not mentioned in the decision of 7 December 2005 refusing him parole. In addition, the courts referred to his "good health" despite the fact that prison doctors had not made such a diagnosis and that there had been no prior medical examination. On 18 May 2006, during medical examinations carried out because the author was suffering from thrombophlebitis, he was found to have lung cancer. The author did not inform the prison or the courts of this, but instead waited until he had completed his sentence before undergoing an operation on 1 September 2006.

8.9 The author reiterates that he was the victim of a violation of article 14, paragraph 5, of the Covenant, since there was no review of his sentence or conviction. In addition, a fine that had been levied on him was replaced by an additional four months in prison; this was unlawful, given his declaration of insolvency.

**Consideration of the merits**

9.1 The Committee has examined the merits of the present communication in the light of all the information provided by the parties.

9.2 The author alleges a violation of article 14, paragraph 5, of the Covenant because the Supreme Court did not carry out a full review of the sentence handed down by the Provincial Court. The Committee observes, however, that it is clear from the judgement handed down by the Supreme Court on 20 January 2003 that the Court had reviewed in detail the Provincial Court's assessment of the evidence. Consequently, the Committee cannot conclude that the author has been denied the right to have his conviction and sentence reviewed by a higher court in accordance with article 14, paragraph 5, of the Covenant.

9.3 With regard to the author's allegations that the retroactive application of Act No. 7/2003 of 31 July 2003 limited his access to prison privileges, including parole, and that the processing of his applications for parole was delayed in order to oblige him to serve his entire prison sentence, the Committee must decide whether these claims constitute a violation of article 9, paragraph 1, of the Covenant. The Committee observes that the various complaints made by the author to the prison and judicial authorities were dealt with by those authorities and that, as a result, the author obtained progressively increasing prison privileges. His complaints were addressed in accordance with the legislation in force, and the resulting judicial decisions made

available to the Committee by the author were reasoned. The Committee cannot conclude, in view of the documents in the case file, that the denial of parole to the author made his imprisonment for the entire duration of his sentence arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

10. In the light of the above, 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 do not reveal any violation of the articles of the Covenant.

[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.]

## Appendix

## SEPARATE OPINION (DISSENTING) OF COMMITTEE MEMBER RUTH WEDGWOOD IN *LEON CASTRO V. SPAIN*, NO. 1388/2005

In this case, the author (who is a lawyer) was sentenced to jail in Spain in 2001, following his conviction for fraud in the receipt of legal fees. This is indeed a serious offence that strikes at the heart of the integrity of a legal system. His conviction for fraud was affirmed by the Supreme Court of Spain in January 2003, after his appeal in cassation, and he began serving a three-year prison term in April 2003.

The author has claimed that the State party violated article 9 of the Covenant by retrospectively applying to him the restrictive provisions of a new parole statute passed after the date of his initial conviction and appeal. The parole statute, Act No. 7/2003, which came into force on 1 August 2003, provides that parole cannot be granted to a convicted defendant unless he has satisfied the civil liabilities arising from an offence. The State party admits that parole was denied to the author on several occasions because he had not yet discharged his civil liabilities. See Views of the Committee, paragraph 7.3.

Even within the terms of the new statute, no refusal of parole was supposed to be based on unpaid civil liabilities unless account was taken of a prisoner's declaration of financial insolvency. In addition, any prisoner who was aged 70 or older was not to be subject to the new parole restriction at all. See Views of the Committee, paragraph 2.7. The author apparently should have fallen within the second category, since he was sentenced to jail just before his 72nd birthday. See id., paragraphs 1.1 and 2.3. In addition, he states that he made a declaration of financial insolvency. See id., paragraph 3.1.

On this rather puzzling factual record, the Committee concludes that "the various complaints made by the author to the prison and judicial authorities were dealt with by those authorities" and that the Committee "cannot conclude ... that the denial of parole to the author made his imprisonment for the entire duration of his sentence arbitrary within the meaning of article 9, paragraph 1" of the Covenant. See id., paragraph 9.3.

But criminal penalties cannot be increased retrospectively to the detriment of a defendant, after the offence has been committed. This is the plain command of article 15 (1) of the Covenant. The State has claimed that parole amounts to a discretionary exercise of pardon or clemency that falls outside the Covenant. See Views of the Committee, paragraph 4.3. But even assuming that discretionary pardon and clemency are outside the realm of the law, the parole scheme here was regulated by statute, not by the pure clemency of a governor or head of state or the purely discretionary decision of a parole board. Indeed, the very purpose of the new statute that was applied retrospectively to the author was to prevent any discretionary exercise of clemency or parole unless and until the defendant's unpaid civil liabilities had been discharged. Nor does the gradual modification of the custodial regime imposed on the author suffice to cure the problem of *ex post facto* application of a harsher release statute. And while the State argues that the author did not exhaust all available domestic remedies, the Committee has found to the contrary, see paragraph 6.1.

The counsel for the author did not specifically invoke article 15 (1) of the Covenant. But a penalty imposed in violation of that article is also "arbitrary" within the meaning of article 9. The measure of arbitrariness under article 9 is not bounded by the positive law of a State party, much less by a retrospective and onerous change in the laws governing the availability of parole. In addition, the Committee's disposition of this Communication should not be misread as showing any indifference to the more difficult issue of article 11 of the Covenant, which specifically forbids imprisonment "on the ground of inability to fulfil a contractual obligation". Though the Committee has little jurisprudence on the issue, the measures used in criminal cases to coerce the payment of restitution may, at some future date, be worthy of examination in light of the language of that provision, at least in a case where the matter has been properly elucidated. Indeed, the State party's own statute, which instructed parole authorities to take account of a *bona fide* declaration of insolvency, may have proceeded from the same concern.

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