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International Covenant on Civil and Political Rights

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Views

Communication No. 1363/2005

Submitted by:	Gerardo Gayoso Martínez (represented by counsel, Joaquín Ruiz-Giménez Aguilar)
Alleged victim:	The author
State party:	Spain
Date of communication:	29 May 2003 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 February 2005 (not issued in document form)
	Admissibility decision of 24 July 2008 (CCPR/C/93/D/1363/2005)
Date of adoption of Views:	19 October 2009
Subject matter:	Evaluation of evidence and scope of the review of criminal cases on appeal by Spanish courts
Procedural issues:	Non-exhaustion of domestic remedies; failure to substantiate claims
Substantive issues:	Right to have the conviction and sentence reviewed by a higher tribunal according to law
Article of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	3; 5, paragraph 2 (b)

* Made public by decision of the Human Rights Committee.

On 19 October 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. 1363/2005.

[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-seventh session)

concerning

Communication No. 1363/2005*

Submitted by:	Gerardo Gayoso Martínez (represented by counsel, Joaquín Ruiz-Giménez Aguilar)
Alleged victim:	The author
State party:	Spain
Date of communication:	29 May 2003 (initial submission)
Decision on admissibility:	24 July 2008

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

Meeting on 19 October 2009,

Having concluded its consideration of communication No. 1363/2005, submitted to the Human Rights Committee by Mr. Gerardo Gayoso Martínez under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author of the communication, dated 29 May 2003, is Gerardo Gayoso Martínez, a Spanish lawyer, born in 1967. The author 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, Joaquín Ruiz-Giménez Aguilar.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, 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 on an individual opinion signed by Committee member Mr. Krister Thelin is appended to the present document.

1.2 On 11 May 2005, the 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 On 28 February 1997, Investigating Court No. 4, Arenys de Mar, opened an investigation into three persons suspected of drug trafficking. The three suspects were arrested on 21 June 1997 and several kilos of hashish were found in the truck they were travelling in and impounded, along with their mobile phones. None of those arrested implicated the author, nor did the police mention him in their first report on the investigation. The judicial investigation went on for several months and culminated in a court decision dated 16 December 1997, which does not mention the author in connection with the case.

2.2 On 16 January 1998, police officers from Barcelona's second narcotics unit presented a report to the investigating court, accusing the author of involvement in the drug-trafficking operation. According to the report, the author had been seen by two police officers on 20 June 1997 talking to a Mr. C., one of the persons arrested on 21 June 1997, in Galicia, in one of the locations where the drugs were transported. As a consequence of this new report, the judge opened a separate confidential sub-file within the case and ordered the tapping of the telephones the author used in his capacity as a lawyer. Three months later, the police decided to stop the telephone taps, as the conversations were of no police interest.

2.3 On 29 April 1998, the author was called to a police station in Chamartín, Madrid, supposedly to act as defence counsel for a detainee. When he arrived, a police officer from Barcelona asked him several questions in relation to an alleged offence against public health, in which he denied any involvement, but the police did not tell him that there was a specific accusation against him. According to the author, these acts were unlawful as they had not been authorized by a court.

2.4 On 18 May 1998, Investigating Court No. 4, Arenys de Mar, rendered an order relinquishing jurisdiction over the investigation. The order makes no mention of the author as involved in the offences. The investigation was transferred to Central Investigating Court No. 6 of the National High Court, which took a statement from the author for the first time on 27 November 1998 and informed him of the charge against him.

2.5 The court ordered an investigation to establish whether the author had made telephone calls to his client, one Laureano Oubiña, who was under investigation for drug trafficking, between 10 and 25 June 1997, when the operation in question took place. It was found, however, that the author had not made or received any telephone calls from Mr. Oubiña on 19, 20 or 21 June 1997. On 9 December 1998, the author was picked out of a line-up by two police officers as the person they had seen in conversation with Mr. C. in Galicia on 20 June 1997. The author maintains that one of the police officers was the one who had called him to the police station in Chamartín (Madrid) in April 1998 and that the purpose of that meeting had been to meet the author so as to be able to accuse him later of having been seen in the company of those involved in the drug-trafficking operation. He adds that on 20 June 1997 he had been in Madrid and had had lunch at a restaurant along with the rest of his client Mr. Oubiña's legal team.

2.6 The court terminated the investigation into the case on 16 December 1998. According to the author, the police had no conclusive evidence of his involvement in drug trafficking and what they were trying to do was to find a way of obtaining evidence against Laureano Oubiña.

2.7 Hearings were held between May and July 1999 in the fourth section of the Criminal Division of the National High Court. Statements were made by the police officers who claimed to have seen the author on 20 June 1997 in the company of the accused, Mr. C. The author points out that the testimony of these police officers, who are members of Barcelona's second narcotics unit, contrasts with that of the police officers at the Mataró police station, who were involved in the arrest of the detainees and did not claim to have seen the author. Furthermore, eight persons stated that they had seen the author on 20 June 1997 in a restaurant in Madrid having lunch with the rest of Mr. Oubiña's lawyers. The police officers who had identified the author said they had done so from a photograph, which they had requested from the general archive of the National Identity Card Office. The author obtained a document from that office stating that no request had been made to the archive in respect of the author on the dates indicated by the police. To prove that he had been in Madrid on 20 June 1997, the author also submitted to the hearing an expert's report showing that he had signed his company's bookkeeping journal on that date.

2.8 The National High Court did not admit the defence evidence presented by the author's counsel. The Court considered that his involvement in the crime was proven by the statements of the police officers who saw him on 20 June 1997 and the telephone calls between the author and his client Mr. Oubiña between 2 and 26 June 1997.

2.9 In a ruling of 4 October 1999, the National High Court convicted Mr. Oubiña of an offence against public health. The ruling also sentenced the author for the same crime to four years' imprisonment and a fine of 1.4 billion pesetas.

2.10 On 1 February 2000, the author lodged an appeal in cassation before the second chamber of the Supreme Court, requesting a full review of the conviction and sentence. He alleged irregularities and errors of fact and of law in 13 separate grounds for appeal. The Supreme Court upheld the contested verdict in a ruling dated 5 July 2001. The Court rejected the request for a review of the prosecution evidence, arguing that that was not a matter for the remedy of cassation since technically it was a question of fact that the Supreme Court could not deal with owing to the "very procedure of the appeal". Specifically, the Court stated the following:

> "*… The National High Court thoroughly considered the arguments made by the appellant in his defence and reached the conclusion that the grounds for the conviction were the statements made during the hearing by the police officers involved in the case and the telephone conversations with the accused Oubiña. The ruling on the evaluation of the evidence is therefore based on the credibility of the witnesses who claimed to have seen the appellant engaged in activities directly linked to the transport of drugs, driving one of the vehicles, etc. It is clear, therefore, that the High Court's (...) arguments are based on the direct apprehension of the evidence, i.e., it was the judges' own perception that formed the basis of their evaluation and their determination of credibility. Consequently, this is not a matter for the remedy of cassation, since technically it is merely a question of fact that this Chamber cannot deal with owing to the very procedure of the appeal.*"

2.11 On 31 July 2001, the author submitted an application for *amparo* to the Constitutional Court alleging, inter alia, violations of his rights to a fair trial, to the presumption of innocence and to a second hearing under article 14, paragraph 5, of the Covenant. In a decision of 30 September 2002 the Constitutional Court decided not to admit his appeal, finding, inter alia, that the Supreme Court had reviewed the conviction and sentence in accordance with the requirements of article 14, paragraph 5, of the Covenant.

The complaint

3.1 The author argues that the appeal in cassation is an extraordinary remedy that is limited in scope and does not allow for a re-evaluation of the evidence or a review of the facts deemed to have been proven in the lower court. The aim of cassation is to check the application of the law by the courts and to harmonize legal precedents, but it does not provide for a review of the facts, the classification of the offence, the determination of guilt or the sentence.

3.2 The author argues that article 5, paragraph 4, of the Judiciary Organization Act attempts to mitigate the limitations of cassation by allowing, at least in theory, allegations of violations of constitutional rights and the presumption of innocence in the cassation hearing, and obliging the Supreme Court to ascertain that the conviction is based on authentic evidence and that the grounds for the conviction are in keeping with that evidence. However, in practice, the Supreme Court continues to describe itself as an extraordinary instance where no review of the evidence admitted in the lower court is possible.

3.3 The author argues that the factual elements of the lower court's conviction were not reviewed, in violation of the right set out in article 26 of the Covenant, according to which all persons are equal before the law and are entitled without discrimination to the equal protection of the law. The Supreme Court did not review the lower court's evaluation of the evidence and, therefore, did not review the facts deemed to have been proven by that court or the grounds for conviction.

3.4 The author further argues that in the appeal in cassation he challenged the veracity of the police statements against him and the incorrect evaluation of the documentary evidence concerning the telephone calls. In relation to the first point, the Supreme Court indicated: "It is clear that the High Court's arguments … are based on its direct apprehension of the evidence, i.e., it was the judges' own perception that formed the basis of their evaluation and their determination of credibility. Consequently, it is not a matter for the remedy of cassation since it is a question of fact that this Chamber cannot deal with owing to the very procedure of the appeal."

3.5 The author claimed that there was an error in the evaluation of the telephone calls, since the High Court had concluded that the content of the conversations between the author and his client Oubiña showed criminal intent, despite the fact that there were no transcripts of the telephone calls. In that respect, the Supreme Court indicated that: "It is true that the defence strenuously challenged this evidence, but as we have already stated, such challenges are not admissible in the context of an appeal in cassation." In light of the foregoing, the author concludes that he was denied the right to have his conviction and sentence reviewed by a higher court, in accordance with article 14, paragraph 5, of the Covenant.

3.6 The author notes that he filed a complaint before the European Court of Human Rights claiming a violation of articles 5, 6 and 8 of the European Convention on Human Rights. However, that complaint did not claim a violation of the right to a second hearing, since Spain has not ratified Protocol 7 to the European Convention. The complaint concerning a violation of that right was submitted only to the Committee.

The State party's observations on admissibility

4.1 In its observations dated 27 April 2005, the State party argues that the communication should be considered inadmissible due to non-exhaustion of domestic remedies. In the appeal in cassation the author did not raise the issue that he has now brought before the Committee, and therefore the requirements of articles 2 and 5, paragraph 2 (b), of the Optional Protocol have not been met.

4.2 The State party also argues that the communication is unfounded. The author had the right to three hearings, since the decision of the National High Court was appealed before the Supreme Court, and that judgement was subsequently reviewed by the Constitutional Court. The system for effective review of convictions is well established in Spain. It is not true that the appeal in cassation is restricted to an analysis of legal and formal issues and that it does not allow for a review of evidence. Currently, in accordance with article 852 of the Criminal Procedures Act, an appeal in cassation may be lodged on the grounds of a violation of a constitutional provision. Furthermore, by invoking the right to a fair trial and the presumption of innocence under article 24, paragraph 2, of the Constitution, it is possible for the Supreme Court to check not only that the legal and constitutional conditions governing the evidence on which the conviction is based have been fulfilled, but also that the evidence is sufficient to attribute guilt. Therefore, the appellant had a remedy available to him that allowed the Supreme Court to carry out a "thorough review", i.e., to consider not only the legal issues, but also the factual elements on which the evaluation of evidence was based.

4.3 In examining the alleged violation of the appellant's right to be presumed innocent, the Supreme Court referred to previous evaluations of the prosecution evidence (the statements of the police officers who testified against him) and, finding that that evidence had been obtained in compliance with due process and "thoroughly and rationally" evaluated by the trial court, concluded that there was sufficient prosecution evidence to set aside the presumption of innocence. In combination with the rest of the legal argumentation in the judgement, in which the Supreme Court responds to the many issues raised in the appeal, this makes it possible to state that, in this case, the requirements of a second hearing have been met, since not only the legal and formal aspects, but also the factual elements, have been reviewed.

4.4 In light of the foregoing, the State party argues that the communication is clearly unfounded and constitutes an abuse of the purpose of the Covenant and should therefore be declared inadmissible in accordance with article 3 of the Optional Protocol.

Author's comments

5. On 6 July 2005, the author responded to the State party's observations. He stated that through the appeal in cassation he had requested the sole competent higher authority (the Supreme Court) to thoroughly review the judgement handed down by the National High Court. However, the Supreme Court did not review either the factual elements of the ruling or their evaluation by the National High Court, arguing that the scope of the remedy in cassation prevented the Court from evaluating or re-evaluating the inconsistencies between the police statements for the prosecution and the testimony for the defence presented by the author, nor could it nor would it scrutinize the incorrect evaluation of evidence in relation to the telephone calls, of which there were none during the period in question. Furthermore, the author went to the Constitutional Court claiming a violation of his right to a second hearing. Not only did that Court not review the evidence or the grounds for the conviction, but it did not consider the complaint concerning the violation of article 14, paragraph 5, of the Covenant, since it confined itself to declaring the case inadmissible without examining the grounds. In the light of the foregoing, the author denies that his claims are abusive or unfounded.

Decision of the Committee on admissibility

6.1 At its ninety-third session, on 30 June 2008, the Committee considered the admissibility of the communication.

6.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 With regard to the State party's contention that domestic remedies were not exhausted, the Committee noted that the author brought his complaint of a violation of the right to a second hearing before the Constitutional Court, and that that Court gave a ruling on the complaint. The State party did not say what other effective remedy the author could have invoked. Accordingly, the Committee found that domestic remedies had been exhausted.

6.4 The Committee concluded that the author's complaint raised significant issues with respect to article 14, paragraph 5, of the Covenant and that it was sufficiently substantiated for the purposes of admissibility. The Committee therefore declared the communication admissible.

State party's observations on the merits and author's comments

7.1 In its observations on the merits, dated 21 January 2009, the State party referred to its submission of 25 July 2005 stating that the communication was clearly unfounded. It reiterates that in this case it is only necessary to read the judgement in cassation to see that the Supreme Court carried out a full review, not only of the legal points but also of the facts and the evidence.

7.2 The State party refers to the Committee's case law[1] to the effect that the remedy of cassation meets the requirements of article 14, paragraph 5, of the Covenant.

8.1 In his reply of 12 March 2009, the author summarizes the development over time of Spanish case law in respect of the compatibility between the remedy of cassation and the right to a second hearing in criminal cases under article 14, paragraph 5, of the Covenant. In that respect he points out that he submitted his appeal in cassation in February 2000, i.e., five months before the Committee's decision in *Gómez Vásquez*.[2] He also draws attention to apparent inconsistencies in the Supreme Court's case law: despite having stated that it would interpret the remedy of cassation broadly as a result of the *Gómez Vásquez* case, in its judgement of 5 July 2001 in the author's case it does not review the evidence, on the grounds that evidence is a matter of fact that lies outside the scope of that remedy.

8.2 The author reiterates that his conviction was based on telephone calls made to and from his office phone in the course of the preparation and execution of the offence. Yet, he contends, this is obviously incorrect since the documentary evidence itself shows that there were no calls between him and Mr. Oubiña between 18 and 22 June 1997 (paragraphs 2.5 and 5, above). Moreover, despite the existence of copious evidence contradicting the testimony of the police officers who maintained they had seen him at the place of the events, the Supreme Court failed to review the National High Court's examination of the evidence (para. 2.8, above).

[1] See, inter alia, communications Nos. 1389/2005, *Bertelli Gálvez v. Spain*, decision of 25 July 2005; 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005; 1323/2004, *Lozano Araez et al. v. Spain*, decision of 28 October 2005.

[2] Communication No. 701/1996, *Gómez Vásquez v. Spain*, Views of 20 July 2000.

Issues and proceedings before the Committee

Consideration on the merits

9.1 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.

9.2 With regard to article 14, paragraph 5, of the Covenant, the author maintains that his conviction, and in particular the evidence for the prosecution, was not subjected to a full review in accordance with the provisions of article 14, paragraph 5. In this regard the Committee notes that the Supreme Court found that a review of the evidence is a matter of fact that falls outside the scope of the remedy of cassation and may not be undertaken in that context.[3]

9.3 The Committee recalls that, while article 14, paragraph 5, does not require a retrial or a fresh hearing,[4] the court conducting the review should be able to examine the facts of the case,[5] including the evidence brought by the prosecution. As mentioned above, the Supreme Court stated that it was unable to reassess the evidence examined by the trial court because the remedy of cassation was "confined to questions of law".[6] The Committee concludes that the review conducted by the Supreme Court was limited to verifying the validity of the evidence, as assessed by the trial court, without reconsidering whether it was sufficient to justify the conviction and sentence based on the facts. Consequently, the review did not constitute a review of the conviction and sentence within the meaning of article 14, paragraph 5, of the Covenant.

10. 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 information before it discloses a violation by the State party of article 14, paragraph 5, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy that will permit his conviction and sentence to be reviewed by a higher court. The State party is also under an obligation to prevent similar violations in the future and to ensure the strict fulfilment of its obligations under article 14, paragraph 5, of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy where a violation is established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[3] See paragraph 2.10.

[4] Communications Nos. 1110/2002, *Rolando v. Philippines*, Views of 3 November 2004, para. 4.5; 984/2001, *Juma v. Australia*, decision of 28 July 2003, para. 7.5; 536/1993, *Perera v. Australia*, decision of 28 March 1995, para. 6.4.

[5] See general comment No. 32 on article 14 of the Covenant, "Right to equality before courts and tribunals and to a fair trial", CCPR/C/GC/32, para. 48.

[6] Supreme Court judgement No. 573/2001, eighth legal ground, last paragraph.

[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

Individual opinion of Committee member Mr. Krister Thelin (Dissenting)

The majority has found a violation of article 14, paragraph 5, of the Covenant.

I respectfully disagree.

Article 14, paragraph 5, does not require a retrial or a new hearing, but at a minimum that the court conducting the review itself sufficiently examines the facts presented at the lower court. A review that is limited to the formal and legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant (footnote reference to CCPR/C/GC/32, paragraph 48 and *Gomez Vazquez v. Spain*, paragraph 11.1)

In this case it is clear from the reading of the Supreme Court's judgement, that it did, indeed, take into account the credibility of the witnesses heard at the lower court in deciding on the appeal. This, in my view, is a sufficient examination of the facts by the reviewing court to satisfy the requirements of article 14, paragraph 5.

For this reason, no violation of article 14, paragraph 5, of the Covenant has been disclosed.

(*Signed*) Krister Thelin

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