



**International covenant
on civil and
political rights**

Distr.
RESTRICTED*

CCPR/C/88/D/1098/2002
13 November 2006

ENGLISH
Original: SPANISH

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

DECISION

Communication No. 1098/2002

<i>Submitted by:</i>	Fernando Guardiola Martínez (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	8 March 2001 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 16 July 2002 (not issued in document form)
<i>Date of adoption of decision:</i>	31 October 2006
<i>Subject matter:</i>	Trial with proper judicial safeguards

* Made public by decision of the Human Rights Committee.

Procedural issues:

Exhaustion of domestic remedies, insufficient
substantiation of the alleged violations

Substantive issues:

Right to a fair trial and to be tried by an impartial
court. Right to have sentence and conviction
reviewed by a higher court in accordance with the
law

Articles of the Covenant:

14 (1) (2) (3) (5)

Articles of the Optional Protocol:

2; 5 (2) (b)

[ANNEX]

Annex

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

Eighty-eighth session

concerning

Communication No. 1098/2002*

Submitted by: Fernando Guardiola Martínez (not represented by counsel)

Alleged victim: The author

State party: Spain

Date of communication: 8 March 2001 (initial submission)

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

Meeting on 31 October 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 8 March 2001, is Mr. Fernando Guardiola Martínez, a lawyer and a Spanish citizen, born on 1 December 1960. The author claims to be a victim of a violation by Spain of article 14, paragraphs 1, 2, 3 and 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

Factual background

2.1 On 12 April 1994, the author and his brother, Juan Guardiola Martínez, both lawyers, accompanied a client to a notary's office where an acquittance relating to a sale was drawn up in

* 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. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

favour of a private company. The sum received by the client was placed in a briefcase owned by the brothers. Later the same day, the brothers went to the police and reported the theft by the client of the briefcase and its contents. The briefcase and its contents were recovered forthwith and, on 13 April 1996, Liria Examining Court No. 2 entrusted the contents of the briefcase, which included bearer cheques and bills of exchange, among other things, to the author and his brother for safekeeping.

2.2 On 21 May 1998, Division IV of the Valencia Provincial Court convicted the author and his brother of misappropriation for not having returned the money and commercial papers that they had received for safekeeping from the Examining Court. The sentence they received was a three-year term of imprisonment and general disqualification for six years.

2.3 During the proceedings, the author lodged a number of appeals against various procedural measures with Division IV of the Valencia Provincial Court. According to the author, the Valencia Provincial Court had failed to act impartially and objectively in dealing with the successive appeals referred to it from the Examining Court.

2.4 According to the author, the Provincial Court had denied his right to submit key evidence, namely the judicial decision on entrustment for safekeeping. He further alleges that he was convicted of misappropriation by analogy, since he was not a public servant and the money in question was not from public funds.

2.5 On 9 March 1999, the author lodged an application for review on points of law with the Supreme Court, but this application was rejected in a ruling of 24 January 2000. The application for *amparo* to the Constitutional Court was declared inadmissible on 2 June 2000 on the ground that it had been lodged out of time. The author considers that domestic remedies have been exhausted.

2.6 On 10 March 2001, following the submission of the communication to the Human Rights Committee, the author lodged another appeal to the Supreme Court on the grounds of miscarriage of justice, requesting that the prison sentence be suspended.

The complaint

3.1 The author claims a violation of article 14, paragraph 1, of the Covenant, as the Valencia Provincial Court allegedly failed to act impartially and objectively in dealing with the successive and repeated appeals referred to it from the Examining Court.

3.2 The author also alleges violations of article 14, paragraph 2, of the Covenant, on presumption of innocence, and article 14, paragraph 3, by having been precluded from presenting evidence in the form of the judicial decision on entrustment for safekeeping.

3.3 The author also maintains that he was tried in sole instance, as the application to the Supreme Court for review on points of law does not involve a second instance, and this raises questions in relation to article 14, paragraph 5, of the Covenant.

State party's observations on admissibility and merits

4.1 On 13 and 31 May 2003, the State party contended that the communication was inadmissible since it constituted an abuse of the right of appeal and was manifestly groundless. The State party also contends that the author failed to exhaust domestic remedies.

4.2 According to the State party, the author is being deliberately vague in referring in a general way to the rights which have allegedly been violated. The State party argues that the communication also contains many deliberate omissions and wilfully misleading suggestions contradicted by the examination of the facts and the court documents in this case.

4.3 The State party argues that the author makes a series of sweeping claims, without specifically indicating what facts are disputed. When he claims that he was denied the right to submit key evidence, he does not specify what evidence was refused or how this prejudiced his defence. The State party refers to the ruling of the Supreme Court which states that a great deal of evidence was admitted and examined in the case under consideration. With regard to the evidence, the Supreme Court observed that the need for the judicial decision on the entrustment for safekeeping to be submitted in evidence is obviated by the documentary evidence relating to the entrustment arrangements.

4.4 The State party indicates that, contrary to what is alleged by the author, article 435.3 of the Criminal Code, which defines the crime of misappropriation, provides that, in addition to public servants, the crime can be committed by "the administrators or depositaries of money or goods embargoed, seized or deposited by public authority, even if they belong to private individuals".

4.5 According to the State party, the sweeping allegation that his case was tried in sole instance is contradicted by the many questions considered and resolved by the Supreme Court in the review procedure on points of law, including alleged errors of fact and in the evaluation of evidence, or procedural irregularities in the trial at first instance. The State party considers that the author has had repeated access to justice and obtained fully reasoned judicial decisions in which the competent legal authorities replied in detail to his allegations. It concludes that, taking into account the lack of substantiation of the claims, the communication is a pretext to request non-enforcement of the author's sentence and constitutes an abuse of rights.

4.6 With regard to the exhaustion of domestic remedies, the State party contends that the author failed to raise the questions now before the Committee at the domestic level, despite having alleged various grounds in his numerous appeals. In particular, the author did not raise the lack of impartiality of the Valencia Provincial Court in any of the numerous appeals lodged.

4.7 On the merits of the communication, the State party indicates that the ruling by the Supreme Court also has the effect of reviewing evidentiary matters, in terms of both the formal aspects and the facts on which the conviction is based, mentioning specifically the elements that determined the author's conviction. In addition, in a ruling of the same date, which clarifies the previous ruling and which the author himself invokes, the Supreme Court corrected the factual error which had occurred by modifying the evidentiary facts through the judgement on points of law in relation to the co-accused, which constitutes concrete evidence that the facts were reviewed.

Additional observations by the author

5. Despite receiving three reminders, the author failed to submit any comments on the State party's observations.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 In accordance with article 5, paragraph 2 (a), the Committee has established that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

6.3 With regard to the allegations that the Valencia Provincial Court acted arbitrarily and was not impartial or independent, in violation of article 14, paragraph 1, the Committee notes that the author made no appeal on those grounds to the Supreme Court, so that this part of the communication should be declared inadmissible for failure to exhaust domestic remedies, in accordance with article 5, paragraph 2 (b), of the Optional Protocol.

6.4 Furthermore, the Committee takes note of the allegations relating to a lack of objectivity and impartiality in the evaluation of the facts and evidence carried out by the Valencia Provincial Court. In that regard, the Committee recalls that it has repeatedly held that, in principle, it is for the courts of States parties to evaluate the facts and evidence, unless such evaluation is manifestly arbitrary or constitutes a denial of justice.¹ The Committee considers that the author has not demonstrated, for purposes of admissibility, that the procedures conducted by the courts of the State party in the author's case were arbitrary or constituted a denial of justice, and this part of the communication should therefore also be declared inadmissible under article 2 of the Optional Protocol.

6.5 On the alleged violation of article 14, paragraph 2, of the Covenant, the Committee notes that, in its ruling, the Supreme Court carefully examined the author's claims concerning alleged errors in the evaluation of the evidence. The Committee considers that the author has not sufficiently substantiated his claim in respect of article 14, paragraph 2, of the Covenant, for purposes of admissibility, and concludes that this part of the communication is inadmissible in accordance with article 2 of the Optional Protocol.

6.6 With regard to the alleged violation of article 14, paragraph 3, of the Covenant, the Committee notes that the author did not indicate the reasons for his view that this provision has

¹ See, among others, communications No. 541/1992, *Errol Simms v. Jamaica*, decision of 3 April 1995, para. 6.2; No. 842/1998, *Serguey Romanov v. Ukraine*, decision of 30 October 2003, para. 6.4; No. 1399/2005, *Cuartero Casado v. Spain*, decision of 25 July 2005, para. 4.3; No. 1102/2002, *Semey Joe Johnson v. Spain*, decision of 27 March 2006, para. 6.4.

been violated and that the facts described do not appear to reveal violations of the provision in question. Consequently, the Committee considers that the allegations have not been sufficiently substantiated for purposes of admissibility, and therefore finds this part of the communication to be inadmissible in accordance with article 2 of the Optional Protocol.

6.7 The author also alleges that the facts on which he was convicted at first instance were not reviewed by a higher court, since he considers that the Spanish review procedure on points of law is not an appeal procedure and is admissible only on specific grounds, which expressly exclude review of the facts. According to the author, this constitutes a violation of article 14, paragraph 5.

6.8 It is clear, however, from the ruling of the Supreme Court that it carefully examined the evaluation of evidence carried out by the court of first instance, concluding that much documentary evidence, *inter alia*, had been admitted and examined. The Committee notes the observations by the State party to the effect that the author fails to specify exactly what evidence was refused or how this prejudiced his defence. In the Committee's view, the complaint concerning article 14, paragraph 5, has not been sufficiently substantiated for purposes of admissibility, and the Committee finds that it is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
