



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1892/2009

**Decision adopted by the Committee at its 106th session (15 October–
2 November 2012)**

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| <i>Submitted by:</i> | J.J.U.B. (not represented by counsel) |
| <i>Alleged victim:</i> | The author |
| <i>State party:</i> | Spain |
| <i>Date of communication:</i> | 3 February 2009 (initial submission) |
| <i>Document reference:</i> | Special Rapporteur's rule 92/97 decision, transmitted to the State party on 10 August 2009 (not issued in document form) |
| <i>Date of decision:</i> | 29 October 2012 |
| <i>Subject matter:</i> | Scope of reviews in cassation by the Spanish Supreme Court |
| <i>Procedural issues:</i> | Non-exhaustion of domestic remedies; non- substantiation of claims |
| <i>Substantive issues:</i> | Right to have the conviction and sentence reviewed by a higher tribunal |
| <i>Article of the Covenant:</i> | 14, paragraph 5 |
| <i>Articles of the Optional Protocol:</i> | 2; and 5, paragraph 2 (b) |

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (106th session)

concerning

Communication No. 1892/2009*

Submitted by: J.J.U.B. (not represented by counsel)

Alleged victim: The author

State party: Spain

Date of communication: 3 February 2009 (initial submission)

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

Meeting on 29 October 2012,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. J.J.U.B., a Spanish national. He claims to be a victim of a violation by Spain of his right under article 14, paragraph 5, of the Covenant. The author is a lawyer and is representing himself before the Committee.

The facts as submitted by the author

2.1 Mr. J.J.U.B. had been providing legal advisory services to various companies including Mercantil Sima Construcciones Deportivas S.A. since 1 January 1996. As part of these services, the author had filed a civil claim against another company for a total amount of €36,000. A court of first instance in Alicante ruled on the case and ordered the respondent company to pay €42,176.36 to Mercantil Sima Construcciones Deportivas S.A. Subsequently Mercantil Sima Construcciones Deportivas S.A. accused the author of appropriating this amount for himself by crediting it to his personal account and filed a suit against him. Madrid Investigating Court No. 20 initiated proceedings against the author on charges of misappropriation and referred the case to the Provincial High Court of Madrid for a decision.

2.2 In the proceedings before the Provincial High Court of Madrid, the author asked, as a preliminary question, for the hearing to be postponed until the State party established a

* The following members of the Working Group participated in the consideration of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev and Mr. Krister Thelin.

system of appeal or second hearings in criminal cases for offences that, as in the case in question, are heard at first instance by a provincial high court. The request was dismissed by the Provincial High Court of Madrid on the grounds that the alleged lack of a second hearing in the Spanish criminal system was not relevant to the proceedings before it and should instead be raised in an appeal before the Supreme Court.

2.3 On 24 January 2007, the Provincial High Court of Madrid sentenced the author to 2 years' imprisonment for misappropriation, specifically disqualified him from standing for election to public office during the term of imprisonment and ordered him to pay a fine and cover the cost of the proceedings. It also ruled that the author should pay Mercantil Sima Construcciones Deportivas S.A. €12,176.36 in civil damages. In addition, the Court confirmed its position on the preliminary question regarding the lack of access to a second hearing in criminal cases which the author had raised during the proceedings and pointed out that the author had the option of filing an appeal in cassation to challenge the lower court's decision.

2.4 On 9 May 2007, the author filed an appeal in cassation before the Supreme Court, in which he questioned the lack of access to a higher tribunal empowered to examine convictions and sentences handed down and to thoroughly review them through an appeal process, as required under article 14 of the Covenant. He maintained that the expanded scope of appeals in cassation in criminal cases heard by the Supreme Court, which extended the review of the evidence in respect of sentences handed down in provincial high courts, did not satisfy the obligations established in article 14, paragraph 5, of the Covenant. The author also claimed that his right to be presumed innocent had been violated, that the assessment of evidence had been arbitrary and contained errors of fact, that the criminal charges of embezzlement and misappropriation and the legal provisions relating to civil damages had been improperly applied, and that the proceedings had been unduly lengthy.

2.5 On 26 December 2007, the Supreme Court dismissed the appeal in cassation. The author provided the Committee with a copy of the judgement. In it the Supreme Court indicated that, although in some of its past decisions the Human Rights Committee had found that in criminal proceedings an appeal in cassation did not guarantee the right to a second hearing, its more recent decisions recognized that an appeal in cassation did in fact offer the possibility of a conviction and sentence being reviewed by a higher tribunal. Accordingly, an appeal in cassation was indeed an effective remedy that allowed for a second examination of the conviction and sentence handed down. This was the case even before the amendment of the Organic Act on the Judiciary, via Act No. 19/2003 of 22 December, which guarantees a second hearing in criminal cases but is not being applied pending adjustment of the corresponding procedural laws.

2.6 The Supreme Court also examined each of the allegations on which the author based his appeal, including those relating to the probative value accorded to certain items of evidence and the application of criminal law to the case in question. The Court found that there was sufficient evidence to uphold the assessment of the facts made by the Provincial High Court of Madrid, that the sentence was duly reasoned, including with regard to the arguments that disputed or lent credence to certain testimonies, and also that it was supported by specific empirical evidence.¹ The Supreme Court also upheld the application

¹ With regard to the author's allegations of errors in the assessment of evidence, the Supreme Court examined the documents submitted by the author in the first instance as well as his arguments, recalled its case law on similar offences of misappropriation and concluded that the author's intention to appropriate the amount in dispute for himself was evident, since, despite the passage of several years, it was only on being taken to court that the author produced the series of documents that would serve as his defence.

of the aggravated form of embezzlement defined in article 250, paragraph 6, of the Criminal Code, which establishes that aggravating circumstances apply when the amount embezzled exceeds €36,000. It noted, however, that the Provincial High Court of Madrid had not specifically explained the grounds for the sentence handed down, for which reason it proceeded to rectify this omission, detailing the criteria that justified the author's sentence and concluding that the sentence was correct and proportionate to the seriousness of the offence. With regard to the allegations of undue delay in the proceedings, the Supreme Court observed that the complaint had been submitted on 12 February 2004, that the order which had concluded the investigation and had signalled the switch to a summary procedure had been issued on 22 June 2005, and that the first instance judgement had been served on 24 January 2007. Thus, there had been no period of procedural inactivity and for this reason it could not be considered that the proceedings were unduly prolonged.

2.7 The author submitted an application for *amparo* to the Constitutional Court on 10 March 2008. The application questioned the probative value accorded to the evidence presented in the criminal proceedings before the Provincial High Court of Madrid and subsequently before the Supreme Court, and maintained that the proceedings were in violation of the right to be presumed innocent and the right to a duly reasoned court judgement established in article 24, paragraph 2, of the Constitution. As part of his allegations, the author observed that the criminal proceedings did not guarantee his right to have his conviction and sentence reviewed by a higher tribunal, in accordance with the obligations established in the Covenant. He added that he was not unfamiliar with recent case law but that, in his opinion, it should not be applied until the necessary legislative reforms had been adopted to ensure that the legal system provided for the right to a second criminal hearing.

2.8 In a ruling issued on 15 December 2008, the Constitutional Court decided not to admit the application for *amparo* on the grounds that the author had not satisfied the requirement to demonstrate the constitutional significance of the case, as established in article 41, paragraph 1, of Organic Act No. 6/2007 of 24 May on the Constitutional Court.

2.9 The author claims that he has exhausted all domestic remedies as required to satisfy the provisions of article 5, paragraph 2 (b), of the Optional Protocol.

The complaint

3.1 The author maintains that the State party violated its obligation under article 14, paragraph 5, of the Covenant, in that it denied him the right to appeal and to have his conviction and sentence reviewed by a higher tribunal. In the Spanish legal system, provincial courts are first instance courts that hear criminal cases seeking a prison sentence exceeding 6 years and 1 day. A sentence handed down in a provincial court can only be appealed in cassation before the Supreme Court. However, appeals to the Supreme Court are restricted in their scope, as the Court is not empowered to review the entire proceedings that gave rise to the provincial court's judgement. Thus, there being no means to appeal against the first instance judgement, the State party violated the requirement established under article 14, paragraph 5, of the Covenant.

3.2 The author adds that the preamble to Organic Act No. 19/2003 of 23 December, amending the Organic Act on the Judiciary, admitted the need to guarantee a second hearing in criminal cases, and proposes that the criminal divisions of the High Courts of Justice should review the first instance decisions reached in provincial courts, and that the National High Court should be endowed with an appeals division. This amendment was intended to settle the debate that had arisen as a result of the Human Rights Committee's position on the State party's system of review in cassation. However, at the time of the communication's submission, the Act had yet to be implemented because of the lack of implementing regulations.

State party's observations on admissibility and on the merits

4.1 On 5 October 2009, the State party submitted its observations on admissibility to the Committee and asked for the communication to be declared inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol on the grounds of non-substantiation and non-exhaustion of domestic remedies, respectively.

4.2 Domestic remedies were not exhausted in relation to article 14, paragraph 5, of the Covenant, as the application for *amparo* filed with the Constitutional Court was dismissed owing to an inexcusable error attributable to a lack of procedural expertise on the part of the author, in that he failed to explain in his petition the special constitutional significance of the application.

4.3 The author's claims in relation to article 14, paragraph 5, of the Covenant are insufficiently substantiated since, in response to the author's appeal in cassation, the Supreme Court examined the assessment of the evidence conducted by the Provincial High Court of Madrid, considering, in particular, whether it had interpreted any of the facts erroneously or had failed to take any of them into account. In its judgement, the Supreme Court indicated that "this court of cassation reviews not only the legitimacy of the evidence on which the judgement is based but also whether it is sufficient to satisfy the requirements associated with the right to be presumed innocent, as well as the reasonableness of the conclusions reached and the term of the sentence served". It adds that, in the past, the Committee had declared communications relating to violations of article 14, paragraph 5, of the Covenant inadmissible on the grounds of insufficient substantiation.²

5.1 On 11 February 2010, the State party submitted its observations on the merits of the communication and asked the Committee to declare the communication inadmissible or, alternatively, to declare that there has been no violation of the Covenant.

5.2 The State party reiterates the arguments put forward with regard to the admissibility of the communication. It adds that in the judgement issued on 26 December 2006, the Supreme Court partially dismissed the appeal in cassation because, after assessing the facts on which the Provincial High Court's ruling was based, it had concluded that the factum, on which the author's criminal responsibility was established, should be accepted. This demonstrates the thoroughness of the Supreme Court's review in cassation of convictions and sentences handed down by a lower court. In similar cases, the Committee ruled that the review in cassation was, in the specific case, sufficient to satisfy the requirements of article 14, paragraph 5, of the Covenant.³

² The State party refers to the Committee's case law in relation to communication No. 1305/2004, *Villamón Ventura v. Spain*, decision on admissibility adopted on 31 October 2006; communication No. 1489/2006, *Rodríguez Rodríguez v. Spain*, decision on admissibility adopted on 30 October 2008; and communication No. 1490/2006, *Pindado Martínez v. Spain*, decision on admissibility adopted on 30 October 2008.

³ The State party refers to the Committee's case law in relation to communication No. 1389/2005, *Bertelli Gálvez v. Spain*, decision on admissibility adopted on 25 July 2005; communication No. 1399/2005, *Cuartero Casado v. Spain*, decision on admissibility adopted on 25 July 2005; communication No. 1323/2004, *Lozano Aráez et al. v. Spain*, decision on admissibility adopted on 28 October 2005; communication No. 1059/2002, *Carvallo Villar v. Spain*, decision on admissibility adopted on 28 October 2005; communication No. 1156/2003, *Pérez Escolar v. Spain*, decision on admissibility adopted on 28 March 2006; and communication No. 1094/2002, *Herrera Sousa v. Spain*, decision on admissibility adopted on 27 March 2006.

Author's comments on the State party's submission

6.1 The author submitted his comments on the State party's observations on the admissibility of the communication on 15 March 2010.

6.2 The author reiterates that the violation by the State party of the right to a second hearing in criminal cases was clearly demonstrated in 2000, when the Committee ruled that appeals in cassation did not satisfy the obligation established in article 14, paragraph 5, of the Covenant. Subsequently, on 29 March 2005, the Committee upheld its position and ruled that the Spanish legal system did not guarantee a second hearing in criminal cases in military courts.⁴

6.3 The author claims that he has exhausted all domestic remedies. He maintains that an application for *amparo* is not a remedy that must be exhausted since it is not an effective remedy. Although the applicant has not previously made any application for *amparo*, the Committee has considered the merits of similar communications and the case law of the Constitutional Court is consistent in maintaining that an appeal in cassation satisfies the requirements of the Covenant in relation to the right to a second hearing in criminal cases.

Issues and proceedings before the Committee*Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's argument that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol because the author did not exhaust domestic remedies, as his application for *amparo* was dismissed by the Constitutional Court owing to an inexcusable error attributable to the author, in that he failed to explain in his petition the special constitutional significance of the application. The Committee recalls that it has consistently held that only those remedies that have a reasonable prospect of success need to be exhausted. In the specific circumstances, the application for *amparo* had no reasonable prospect of succeeding with regard to a possible violation of article 14, paragraph 5, given the Constitutional Court's case law on appeals in cassation. The Committee therefore considers that there is nothing to prevent it from considering the present communication under article 5, paragraph 2 (b), of the Optional Protocol.⁵

7.4 The Committee notes the author's allegations that he was denied the right to have his conviction and sentence reviewed by a higher tribunal, since he had access only to an appeal on cassation before the Supreme Court, which effectively denied him the right to appeal against the sentence handed down by the Provincial High Court of Madrid. The Committee further notes the State party's arguments that, as the Supreme Court indicated in

⁴ The author refers to the Committee's case law in relation to communication No. 1104/2002, *Martínez Fernández v. Spain*, Views adopted on 29 March 2005.

⁵ See communication No. 1101/2002, *Alba Cabriada v. Spain*, Views adopted on 1 November 2004, para. 6.5; communication No. 1555/2007, *Suils Ramonet v. Spain*, decision on admissibility adopted on 27 October 2009, para. 6.3; and communication No. 1617/2007, *L.G.M. v. Spain*, decision on admissibility adopted on 26 July 2011, para. 6.3.

its ruling of 26 December 2007, appeals in cassation provide for an extensive review of the evidence submitted in the lower court, allowing for the revision of judgements in relation to the facts, the evidence and the law.

7.5 The Committee notes that, in its judgement of 26 December 2007, the Supreme Court reviewed the conviction and sentence handed down by the Provincial High Court of Madrid and concluded that there was sufficient evidence to uphold the assessment of the facts made in the lower court. It also concluded that the aggravated form of embezzlement defined in article 250, paragraph 6, of the Criminal Code had been properly applied and that the judgement issued by the Provincial High Court of Madrid did not specifically explain the grounds for the sentence handed down, for which reason the Supreme Court had proceeded to detail the criteria justifying the sentence, confirming that it was correct and proportionate to the seriousness of the offence. Thus, the Committee considers that the allegations concerning article 14, paragraph 5, of the Covenant have been insufficiently substantiated for the purposes of admissibility and concludes that they are inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the authors.

[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.]
