



## International Covenant on Civil and Political Rights

Distr.: General  
4 December 2012  
English  
Original: Spanish

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### Human Rights Committee

### Communication No. 1891/2009

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

<i>Submitted by:</i>	J.A.B.G. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	9 March 2009 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 10 August 2010 (not issued in document form)
<i>Date of decision:</i>	29 October 2012
<i>Subject matter:</i>	Scope of the review in cassation by the Spanish Supreme Court
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies, failure to substantiate claims
<i>Substantive issues:</i>	Right to have the conviction and sentence reviewed by a higher tribunal
<i>Articles of the Covenant:</i>	14, paragraphs 3 (c) and 5
<i>Articles of the Optional Protocol:</i>	2; and 5, paragraph 2 (b)

[Annex]

## 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. 1891/2009\***

*Submitted by:* J.A.B.G. (not represented by counsel)

*Alleged victim:* The author

*State party:* Spain

*Date of communication:* 9 March 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.A.B.G., a Spanish national, born on 21 September 1944. He claims that he is a victim of a violation by Spain of his right under article 14, paragraph 5, of the Covenant. The author is not represented by counsel. At the time of submission of the communication, he was being held in the Madrid VI prison.

#### **The facts as presented by the author**

2.1 In 1998, Central Investigating Court No. 3 of the National High Court opened case No. 313/1998 against the author, on charges of involvement, along with others, in banking transactions and the transfer of money to and from the State party's territory in order to launder the proceeds of drug trafficking.

2.2 In 2001, Central Investigating Court No. 5 brought a second case against the author. The Court contended that in the mid-1990s the author, along with others, attempted to smuggle a large quantity of cocaine from South America, undertaking to find suppliers and a vessel to transport it to the State party's territory. The author was accused of contacting the shipowner and making a number of payments to secure the transport of the drugs.

2.3 On 28 January 2004, the National High Court found the author guilty of an offence against public health, sentencing him to a prison term of 4 years and a fine of €600,000.

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\* The following members of the Committee 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.

The author filed an appeal in cassation, claiming that there were errors of fact in the assessment of the evidence and that certain facts portrayed as having been proven in the judgement were in reality never proven during the proceedings.

2.4 On 27 April 2006, the Supreme Court upheld the author's appeal, overturned the judgement handed down by the National High Court on 28 January 2004 and acquitted the author of the offence against public health. The Supreme Court examined the National High Court's assessment of the evidence in detail and ruled that the conviction was based largely on evidence from traffickers who had turned informers five years after the events in question and that there was no firm evidence or factual basis to corroborate or back up their statements.

2.5 On 27 July 2005, the National High Court issued a judgement in case No. 313/1998 and sentenced the author to 3 years and 3 months of imprisonment and a fine of €1.8 million for laundering the proceeds of drug trafficking. In September 2005, the author submitted an appeal in cassation to the Supreme Court for violation of the right to the confidentiality of telephone communications and the right to the presumption of innocence and for improper application of articles 301 and 302 of the Criminal Code on the offence of money-laundering and receiving. The author contended that no grounds had been given for the decision authorizing his telephone to be tapped, that neither the telephone account holder nor the persons who set up the tap had been identified, and that he had not been able to question the informer. He claimed that there was no evidence, even circumstantial, of the commission of any drug trafficking offence or that he was aware of any laundering of the proceeds of criminal offences. The Public Prosecution Service also appealed against the sentence, citing the aggravating circumstance of membership in a criminal organization.

2.6 On 25 April 2007, the Supreme Court dismissed the author's appeal in cassation relating to case No. 313/1998. As for the sentence, the Court upheld the Public Prosecution Service's appeal, which claimed that the National High Court had miscalculated the number of years of imprisonment applicable to an offence committed with aggravating circumstances, including membership in a criminal organization. As a result, the Court increased the prison sentence to 4 years and 7 months for the laundering of the proceeds of drug trafficking. The author attaches a copy of the judgement, in which the Supreme Court states that the monitoring of telephone conversations was clearly and objectively justified in view of information received from the Guardia Civil and, in particular, the statement made by the informer who had been involved in the money-laundering operation and that the non-disclosure of the informer's identity and the fact that the author was unable to question the informer did not affect any of his rights, given that the information was not considered as evidence but merely used by the Guardia Civil and the investigating judge as grounds for the phone tap. With regard to the existence of the alleged offence, the right to the presumption of innocence and the improper invocation of the offence of money-laundering and membership in a criminal organization under articles 301 and 302 of the Criminal Code, the Supreme Court stated that, in accordance with its case law, the standard of proof in respect of a money-laundering offence under article 301 of the Criminal Code does not require a previous conviction for drug trafficking or even the identification of such an offence. It is enough to establish a link between the author and drug-trafficking activities to which the money may be traced, and for the facts, or at least some of the facts, to make it reasonable to deduce that the money came from an illicit source, but the person involved cannot hide behind ignorance when he made no attempt to overcome that ignorance. In this context, the Court observed that the proven facts showed that the author, along with others, took part in currency exchanges and banking transactions under a false or assumed identity and in secret transfers of large sums of money. This approach revealed a minimum amount of information, but enough to deduce that the money came from an illicit source.

2.7 In June 2007, the author filed an application for *amparo* against the National High Court and Supreme Court judgements of 27 July 2005 and 25 April 2007 respectively, claiming that the right to the presumption of innocence, to privacy and to a fair trial had been violated, and that the judgements were arbitrary and violated the principle of legality, since the 10-year criminal proceedings in which he was sentenced had been unduly protracted, despite being an abridged procedure. On 29 September 2008, the Constitutional Court found the application inadmissible on the grounds that the author had failed to show that the case had particular constitutional significance, and dismissed it.

2.8 The author claims that he has exhausted all domestic remedies and thus meets the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

### **The complaint**

3.1 The author asserts that Spain violated its obligation under article 14, paragraph 5, of the Covenant. The author requests the Committee itself to ascertain whether the facts set out in his communication reveal a violation of any other rights contained in the Covenant.

3.2 The author claims that he has been denied the right to appeal and to have his conviction and sentence reviewed by a higher tribunal. In both the cassation appeal and the application for *amparo*, the author challenged all aspects of the judgement rather than only claiming the existence of defects of form. However, the author claims that he was in practice denied the right to appeal against the sentence imposed by the National High Court.

3.3 The author complains about the unreasonable length of the proceedings in which he was convicted, which began in 1998 and ended on 27 September 2008 with the dismissal of the application for *amparo* filed against the National High Court's ruling. Despite being abridged proceedings, they lasted approximately 10 years: 5 years at the preliminary investigation stage, 2 years before the National High Court and 2 years before the Supreme Court, and the Constitutional Court took a year to dismiss the application for *amparo*. He adds that there was no justifiable reason for such dilatoriness.

### **State party's submissions on admissibility**

4.1 On 15 October 2009, the State party submitted its observations on the admissibility of the communication and requested that the communication should be declared inadmissible on grounds of abuse of rights, non-exhaustion of domestic remedies and failure to substantiate claims under articles 3; 5, paragraph 2 (b); and 2 of the Optional Protocol respectively.

4.2 The State party notes that it is an abuse of rights to submit a communication that, in addition to the violations referred to explicitly, requests the Committee to identify any other violation it may observe in the account of the facts. In the procedure for submitting individual communications to the Committee, it is the author's responsibility to identify, in general terms at least, any violations they believe they have suffered, without recourse to generic forms that prevent the State party from conducting its defence.

4.3 Domestic remedies were not exhausted within the meaning of article 14, paragraph 5, of the Covenant, since no violation of the right to a second hearing was invoked either in cassation or in the application for *amparo*. The application for *amparo* was based solely on the alleged violation of the right to the presumption of innocence and the right to privacy. Likewise, no mention was made in either appeal of the alleged undue delays in the proceedings. The application for *amparo* was declared inadmissible because of counsel's incompetence in submitting an application that was irremediably flawed inasmuch as it failed to demonstrate its constitutional significance, as required under the State party's legislation.

4.4 The author has failed to fully substantiate the rights violations of which he claims to be a victim. The mere length of proceedings does not in itself imply undue delay, in violation of article 14, paragraph 3 (c), of the Covenant, since other elements must be taken into account such as the complexity of the case, a common feature of cases involving money-laundering. Besides, the Supreme Court took into account the length of the proceedings and used it as a mitigating factor in this regard.

4.5 Concerning the author's claims that the right to presumption of innocence has been violated, as provided under article 14, paragraph 2, of the Covenant, the State party notes that, in the appeal in cassation against the National High Court ruling of 28 January 2004, recognizing that the prosecution evidence was insufficient, the Supreme Court acquitted the author of an offence against public health. This case was taken up by the Supreme Court itself, in relation to case No. 313/1998, solely for the purpose of determining whether the author was involved or connected with the drugs world, but that had no bearing on the establishment of criminal liability.

4.6 With regard to the right to a second hearing provided for in article 14, paragraph 5, of the Covenant, the State party notes that the Supreme Court judgement reviewing the National High Court's conviction dated 28 January 2004 and acquitting the author of an offence against public health shows that Spain's remedy of cassation allows for an extensive review of the evidence presented in the lower court, guaranteeing the right to a second hearing and to the presumption of innocence. The Supreme Court therefore has broad powers to review the facts, the evidence and the application of the law in lower court rulings through the remedy of cassation.

#### **Author's comments on the State party's submissions on admissibility**

5.1 On 3 February 2010, the author submitted his comments on the State party's observations on admissibility.

5.2 The author states that his communication is based solely on the violation of article 14, paragraph 5, of the Covenant. However, the sentence for money-laundering was increased by the Supreme Court and the delay in the proceedings was never taken into account as a mitigating factor. He therefore argues that the length of the proceedings must be assessed in accordance with article 14, paragraph 3 (c), of the Covenant.

5.3 He reiterates his allegations concerning the use made by the Supreme Court of the information relating to the second set of proceedings in which he was accused of an offence against public health, and in which he was eventually acquitted. The author maintains that this information was used to establish his criminal liability. The Court thus considered a judgement of acquittal as evidence, and he therefore requests the Committee to ascertain whether this could be a violation of article 14, paragraph 2, of the Covenant.

5.4 With regard to article 14, paragraph 5, of the Covenant, he claims that, in respect of the National High Court conviction, he had been able to submit only a cassation appeal and that cannot be considered a remedy of appeal.

5.5 Lastly, the author reiterates that he has exhausted domestic remedies, even though in his opinion they are ineffective.

#### **State party's submissions on the merits**

6.1 On 11 February 2010, the State party submitted its comments on the merits of the communication and requested the Committee to declare the communication inadmissible or, alternatively, that there was no violation of the Covenant.

6.2 Regarding the claims in connection with article 14, paragraph 5, of the Covenant, the State party notes that the author merely makes general references to alleged limitations

on the Supreme Court review in cassation, without establishing which facts or arguments were not taken into account or considered by the Supreme Court in dealing with his cassation appeals.

6.3 The individual communications submitted to the Committee cannot rest on abstract or general opinions on the system of judicial remedies. In the present case, the communication lacks specific indications as to which details or proven facts the Court claimed to have reviewed when it had not. The Committee's case law on the subject has accepted that the system of cassation is robust enough to ensure, in a given case, a complete review of the conviction and sentence for the purposes of article 14, paragraph 5, of the Covenant.<sup>1</sup>

#### **Author's comments on the State party's submissions on the merits**

7.1 On 26 January 2011, the author submitted his comments on the State party's submissions on the merits of the communication.

7.2 The author gives a detailed review of the origin of the remedies of appeal and cassation, and the differences between them as established in legal doctrine, how they were regulated in the State party's legal order and what he sees as the shortcomings in the system of appeal and cassation. He argues that the remedy of appeal is an ordinary remedy whereby a higher court is asked to modify a lower court ruling, in accordance with the law, in respect of any point of fact or law discussed in the proceedings. The remedy to which the author had access cannot be considered an appeal, which means he was denied the right to apply to a higher court for a review of the conviction and sentence imposed.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

8.1 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 case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained that the same matter is not being examined under any other procedure of international investigation or settlement, as required by article 5, paragraph 2 (a), of the Covenant.

8.3 With regard to the exhaustion of domestic remedies, the Committee takes note of the State party's arguments that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol on grounds of the author's non-exhaustion of domestic remedies, as his application for *amparo* was declared inadmissible by the Constitutional Court on the grounds that it was irremediably flawed because he had failed to demonstrate its particular constitutional significance. The State party also notes that the author did not allege a violation of the right to a second hearing either in his cassation appeal or in his application for *amparo*. The Committee recalls its settled jurisprudence, according to which it is necessary to exhaust only those remedies that have a reasonable prospect of success.

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<sup>1</sup> The State party refers to the Committee's case law in communications Nos. 1389/2005, *Bertelli Gálvez v. Spain*, decision on admissibility adopted on 25 July 2005; 1399/2005, *Cuartero Casado v. Spain*, decision on admissibility adopted on 25 July 2005; 1323/2004, *Lozano Aráez et al. v. Spain*, decision on admissibility adopted on 28 October 2005; 1059/2002, *Carvallo Villar v. Spain*, decision on admissibility adopted on 28 October 2005; 1156/2003, *Pérez Escobar v. Spain*, Views adopted on 28 March 2006; and 1094/2002, *Herrera Sousa v. Spain*, decision on admissibility adopted on 27 March 2006.

The author's application for *amparo* did not have a reasonable prospect of success in respect of a possible violation of article 14.5, given the Constitutional Court's case law, according to which *amparo* is not a remedy that allows for a complete review of convictions and sentences handed down by criminal courts.<sup>2</sup> In addition, the Committee observes that the author challenged the judgements of the National High Court on the two criminal proceedings against him through two appeals in cassation, which were ultimately dismissed by the Supreme Court on 27 April 2006 and 25 April 2007, and that he subsequently submitted an application for *amparo* against these judgements, which was found inadmissible by the Constitutional Court on 29 October 2008. The Committee therefore finds that there is no impediment under article 5, paragraph 2 (b), of the Optional Protocol to consideration of the communication.

8.4 The Committee notes the author's claims that he was denied the right to appeal and to have his conviction and sentence reviewed by a higher tribunal, since he had access only to the remedy of cassation before the Supreme Court, which in practice implied a denial of the right to appeal against the National High Court's conviction. The Committee further notes the State party's arguments that the remedy of cassation permits an extensive review of the evidence considered by the lower court, since it is possible to review judgements with regard to the facts, the evidence and points of law.

8.5 The Committee observes that in its judgement of 25 April 2007, relating to case No. 313/1998, the Supreme Court examined very closely the grounds for cassation argued by the author, including the right to the confidentiality of communications, the presumption of innocence and the proper characterization of criminal offences, and not restricted solely to the formal aspects of the National High Court judgement.<sup>3</sup> The Supreme Court increased the sentence because of a miscalculation by the High Court and it did not change the essential characterization of the offence but merely reflected the Supreme Court's assessment that the seriousness of the circumstances of the offence merited a higher penalty.<sup>4</sup> Thus, the Committee considers that the claims under article 14, paragraph 5, of the Covenant have been insufficiently substantiated for the purposes of admissibility and it concludes that they are inadmissible under article 2 of the Optional Protocol.

8.6 The Committee takes note of the author's claim that the unreasonable length — almost 10 years — of the judicial proceedings that established his criminal liability, contravenes article 14, paragraph 3 (c), of the Covenant. Taking into account the State party's arguments on the complexity of the case, which were not refuted by the author, the Committee considers that the author's claim is insufficiently substantiated for the purposes of admissibility and deems it to be inadmissible under article 2 of the Optional Protocol.

8.7 In light of the above, the Committee considers that the author's contentions concerning the possibility of a violation of article 14, paragraph 2, of the Covenant are also insufficiently substantiated and are inadmissible under article 2 of the Optional Protocol.

9. Therefore, the Human Rights Committee decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the decision shall be transmitted to the State party and to the author.

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<sup>2</sup> See communications Nos. 701/1996, *Gómez Vázquez v. Spain*, Views adopted on 20 July 2000, paras. 6.2 and 10.1; 1366/2005, *Rocco Piscioneri v. Spain*, Views adopted on 22 July 2009, para. 6.3; and 1073/2002, *Terrón v. Spain*, Views adopted on 5 November 2004, para. 6.5.

<sup>3</sup> See communications Nos. 1399/2005, para. 4.4; and 1059/2002, para. 9.5.

<sup>4</sup> See communication No. 1156/2003, para. 9.2.

[Adopted in Spanish, French and English, 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.]

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