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International Covenant on Civil and Political Rights

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Decision

Communication No. 1555/2007

Submitted by:	Juan Suils Ramonet (represented by counsel, Mr. Jordi Llobet Pérez)
Alleged victim:	The author
State party:	Spain
Date of communication:	18 September 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 May 2007 (not issued in document form)
Date of decision:	27 October 2009
Subject matter:	Scope of the remedy of cassation in a criminal case
Procedural issues:	Failure to exhaust domestic remedies; failure to substantiate claims
Substantive issues:	Right to have the conviction and sentence reviewed by a higher tribunal
Article of the Covenant:	14, paragraph 5
Articles of the Optional Protocol:	2; 5, paragraph 2 (b)

[Annex]

* Made public by decision of the Human Rights Committee.

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (Ninety-seventh session)

concerning

Communication No. 1555/2007*

Submitted by:	Juan Suils Ramonet (represented by counsel, Mr. Jordi Llobet Pérez)
Alleged victim:	The author
State party:	Spain
Date of communication:	18 September 2006 (initial submission)

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

Meeting on 27 October 2009,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 18 September 2006, is Mr. Juan Suils Ramonet, a Spanish national born in 1953. He claims to be the victim of a violation by Spain of article 14, paragraph 5, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel, Mr. Jordi Llobet Pérez.

1.2 On 17 July 2007, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, agreed to the State party's request that the admissibility of the communication should be considered separately from the merits.

Factual background

2.1 In its judgement of 7 November 2001, the Barcelona Provincial High Court sentenced the author to four years and six months of imprisonment for the continuing offence of fraud in the course of operations whereby the author attracted venture capitalists with offers of high interest payments. The conviction was submitted for cassation review by the Supreme Court, which rejected the appeal on 23 December 2003.

* 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.

2.2 The author supplied a copy of the cassation judgement, which ruled on each of the various grounds for cassation adduced by the author and dismissed them all. First of all, the author alleged a violation of his right to effective legal protection on the ground that his sentence was unfounded. With regard to that ground, the Supreme Court found as follows: "The Court has imposed a sentence of four and one half years of imprisonment and a fine in view of the aggravated nature of the offence, for which the penalty is from one to six years of imprisonment and a fine. Moreover, it is a continuing offence, which carries a penalty of from three and one half to six years of imprisonment. The sentence of four and one half years falls within the lower half of the established range of penalties. The Court also takes into consideration not only the magnitude of the amounts that were defrauded per se, but also the fact that their sheer size speaks of a degree of unlawfulness that goes beyond that covered by aggravation. This situation may be addressed by means of the individualization of penalties, an approach which was employed in determining the fine and which can also be applied to the custodial penalty."

2.3 In advancing a second ground for cassation, the author challenged the classification of the acts as a continuing offence. In this respect the Supreme Court stated that the two instances of fraud, one involving a sum of 15 million and the other one of 6 million, were subsumed in the offence of aggravated fraud and that its classification as a continuing offence was due to the plurality of the actions comprising the fraud.

2.4 The third ground for cassation concerned undue delays in the proceedings. In this regard, the Court stated the following: "The allegation simply contends that an excessive amount of time elapsed between the initiation of the proceedings in April 1997 and the date when the oral proceedings were held in November 2001. The applicant did not complain of delays or describe them as undue during the pretrial proceedings or during the prosecution of the case itself; nor did he claim any violation of his right. The appeal of cassation merely refers to a delay in the proceedings, without indicating any period of time in which they failed to move forward for reasons not attributable to the parties."

2.5 The fourth ground for cassation cited by the author was the existence of an error of fact in the weighing of the evidence, in proof whereof he submitted a bank receipt, a letter signed by a bank representative, a complaint, a witness statement and the list of charges brought by one of the parties. In recalling the requirements that a document must meet in order to be used as evidence, the Court stated that: "None of the documents in question may be considered to attest to the error alleged in the author's request for judicial review. The letter is a personal account of certain facts which, had it been presented in the trial court, would constitute testimony subject to the court's immediate appraisal but which would not carry the weight of a formal document. Similarly, the complaints and the charges refer to the prosecution of an individual but do not substantiate the alleged error, inasmuch as the documentation of acts of this nature requires the bringing of evidence. The document referring to an accounting transaction appears to be a photocopy, and its content is lacking in the authenticity required as proof of an error, which, in any event, is not relevant to the actual economic damages sustained by the second victim."

2.6 The author also adduced the fact that the High Court had refused to admit into evidence two items that he had attempted to submit. One of those items was documentary in nature and consisted of photocopies of newspaper advertisements offering a stated rate of return on business transactions with certain banks. The other was a statement from someone unrelated to the events, which, according to the author, substantiated the existence of business transactions similar to those that he had offered. In respect of the former, the Court found the following: "The documentary evidence was justifiably dismissed. Firstly, because it was not documentary evidence properly speaking, but rather photocopies of newspaper clippings and thus lacked documentary status. Above all, however, it bore no relation to the proceedings. The fact that banks offer to conduct certain operations at high interest rates

has nothing to do with the object of the proceedings, namely a fraud in the terms established in the charge." Regarding the proposed testimony, the Court said the following: "The record of the hearing makes no mention of a formal protest against the refusal to admit evidence; if this requirement had been met, it would have enabled the Court to review the ruling handed down on this matter from the standpoint of the right to defence, which is the right being invoked. Nor does it present any justification concerning the reason why it was necessary for the witness to appear in court, which would permit a better understanding of the interests at stake. Moreover, as in the case of the documentary evidence, the testimony was not relevant to the trial. The application for review in cassation states that the witness would corroborate the existence of high-interest business operations with guarantees similar to those offered by the accused; even if the testimony were admitted, it would have no bearing on the charge that assets were obtained from another by deception based on a business proposition that was used to mount a typical confidence trick."

2.7 The author then challenged the ruling on the appeal in cassation by lodging an application for judicial review before the Second Chamber of the Supreme Court based on the existence of new evidence. In its ruling, the Court stated that: "The only items that can be admitted as new evidence are the (...) receipts of transfers in the name of Walter Marrozos, which purport to show that the applicant was simply an intermediary. Be that as it may, and although the documents prove nothing in themselves (one reason being that they are dated 11 June 1996, which was prior to the date on which the proven events took place), the demonstration that a third party was involved could lead to his or her criminal prosecution but would not reduce the applicant's participation in the acts in question. There is therefore no way in which they could be seen as demonstrating his innocence." The Chamber consequently rejected the appeal on 14 September 2004. Finally, the author filed an application for amparo with the Constitutional Court, which, in its ruling of 5 September 2006, denied leave to appeal because the application had been submitted after the deadline.

The complaint

3. The author alleges a violation of his right to have his conviction and sentence reviewed by a higher court pursuant to article 14, paragraph 5, of the Covenant, owing to the limited scope of cassation appeals in the Spanish judicial system.

State party's observations on admissibility

4.1 By a note verbale dated 7 June 2007, the State party challenged the admissibility of the communication. It argued that the author confined himself to making references of a general nature without specifying which acts or claims were not considered and reviewed on appeal. It contended that the case in question constitutes an abuse of the right to submit a communication, which is a right to a review of specific cases of alleged violations, rather than of a given legal system as a whole.

4.2 The State party also argued that the author had not exhausted domestic remedies and had then attempted to reinstate them after the fact by filing an inadmissible review remedy once it was no longer possible to appeal the judgement upholding the conviction before the Constitutional Court. It contended that the communication was therefore inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

Author's comments on the State party's submission

5. On 4 October 2007 the author reiterated that the Spanish judicial system is not in accordance with article 14, paragraph 5, of the Covenant. He stated that the decision in cassation regarding the present case, dated 2 December 2003, pre-dates Act No. 19/2003, which expands the right to appeal to a higher court in Spain, and was therefore handed

down at a time when the appeal in cassation did not allow a full review of the evidence and the facts of a case.

Consideration of admissibility

6.1 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 or not the communication is admissible under the Optional Protocol to the International Covenant on Civil and Political Rights.

6.2 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.

6.3 The Committee takes note of the State party's argument that domestic remedies were not exhausted because the author did not observe the time limit established by law for the submission of an application for amparo to the Constitutional Court. The Committee recalls its settled jurisprudence, which indicates that only those remedies that have a reasonable prospect of success must be exhausted.[1] The application for amparo had no chance of succeeding with regard to the alleged violation of article 5, paragraph 14, of the Covenant; the Committee therefore considers that domestic remedies have been exhausted.

6.4 The author claims that he was deprived of his right under article 14, paragraph 5, of the Covenant to have his conviction reviewed by a higher court because in Spain an appeal in cassation does not allow for a full review of evidence and the facts of a case. The Committee observes, however, that the author has lodged his complaint in general terms, without specifying the particular points that he believes were not reviewed by the Supreme Court. In addition, the Supreme Court's judgement indicates that it undertook a detailed examination of all the grounds for cassation adduced by the author, including the reasons for the sentence, the assessment of the facts, the possible delay in the proceedings, the assessment of evidence and the refusal to admit certain items into evidence. The Committee therefore considers that the complaint relating to article 14, paragraph 5, of the Covenant has not been sufficiently substantiated in terms of its admissibility and thus finds it inadmissible under article 2 of the Optional Protocol.[2]

7. The Human Rights Committee therefore decides:

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

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

[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.]

[1] See, for example, communications Nos. 1095/2002, *Gomaritz v. Spain*, decision of 26 August 2005, para. 6.4; 1101/2002, *Alba Cabriada v. Spain*, decision of 3 November 2004, para. 6.5; and 1293/2004, *Dios Prieto v. Spain*, decision of 17 June 2002, para. 6.3.

[2] See communications No. 1490/2006, *Pindado Martínez v. Spain*, decision of 30 October 2008, para. 6.5, and No. 1489/2006, *Rodríguez v. Spain*, decision of 30 October 2008, para. 6.4.