UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/84/D/1329-1330/2004**
27 September 2005

ENGLISH
Original: SPANISH

HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11-29 July 2005

DECISION

Communications Nos. 1329/2004 and 1330/2004

Submitted by:	José Pérez Munuera and Antonio Hernández Mateo (represented by counsel, José Luis Mazón Costa)
Alleged victim:	The authors
State party:	Spain
Date of communication:	7 October 2002 and 7 April 2003 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 25 and 26 November 2004 (not issued in document form)
Date of decision:	25 July 2005

* Made public by decision of the Human Rights Committee.
** Reissued for technical reasons.

Subject matter:	Equality of arms in connection with opportunities to question defence experts in criminal proceedings
Procedural issues:	Failure to substantiate the alleged violation
Substantive issues:	---
Articles of the Covenant:	14, paragraphs 1 and 3 (e)
Article of the Optional Protocol:	2

[ANNEX]

Annex

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

Eighty-fourth session

concerning

Communications Nos. 1329/2004 and 1330/2004*

Submitted by: José Pérez Munuera and Antonio Hernández Mateo (represented by counsel, José Luis Mazón Costa)

Alleged victim: The authors

State party: Spain

Date of communication: 7 October 2002 and 7 April 2003

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

Meeting on 25 July 2005,

Adopts the following:

Decision on admissibility

1.1 The present case refers to two communications against Spain in connection with the same events. The author of communication No. 1329/2004 (first communication), dated 7 October 2002, is José Pérez Munuera, a Spanish national, born in 1957. The author of communication No. 1330/2004 (second communication), dated 7 April 2003, is Antonio Hernández Mateo, a Spanish national, born in 1940. The authors claim a violation by Spain of article 14 of the Covenant. The Optional Protocol to the Covenant entered into force for the State party on 25 April 1985. The authors are represented by counsel, José Luis Mazón Costa.

* 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. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

1.2 On 31 January 2005 the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, acceded to the State party's request that the admissibility of the communication should be considered separately from the merits.

1.3 Under rule 94 of its rules of procedure, the Committee has decided to consider the two communications together.

Factual background

2.1 Mr. Hernández was the owner of a construction company that engaged in the building and refurbishment of dwellings. In January 1998 he instructed his employee, Mr. Pérez Munuera, to fill out two forms, which were later used to terminate the contract of employment of an Algerian citizen, Abdelkader Boudjefna, while he was on vacation in Algeria. Mr. Hernández relied on these documents in subsequent proceedings for unfair dismissal brought against him by Mr. Boudjefna. Mr. Boudjefna subsequently brought a criminal action against the authors for forgery.

2.2 On 10 February 2000 the authors were convicted by Murcia Criminal Court for involvement in the preparation of two documents terminating Mr. Boudjefna's current employment, without his consent, and, in the case of Mr. Hernández, for having made use of them subsequently in a trial. In the first document Mr. Boudjefna said that he had received 100,000 pesetas in compensation, and in the second document supposedly conveyed his desire to terminate his contract. The judgement stated that the signatures on the documents, forgeries of Mr. Boudjefna's signature, had been written by one of the two accused or by another individual at their instigation. Mr. Hernández was convicted for submission of forged documents in the proceedings together with an ongoing offence of misrepresentation, and was sentenced to 22 months' imprisonment. Mr. Pérez Munuera was convicted, as the author of the forgery of a private document, to 16 months' imprisonment. Mr. Hernández maintained throughout that he bore no responsibility whatsoever for the forgery of the signature. Mr. Pérez Munuera volunteered that he had drafted the documents on the order of his employer but stated that he had not forged Mr. Boudjefna's signature. The experts for the prosecution stated in their report that the complainant, Mr. Boudjefna, was not the author of the signature on the two documents, and that it was not possible for them to determine who was the author of the signatures on the documents; they concluded that the signatures had been written by one of the accused or by another individual at their instigation. The experts who appeared in the proceedings at the request of the authors found that the signature appearing on the documents was indeed that of Mr. Boudjefna.

2.3 The judge based his conviction on the report of the experts for the prosecution but did not hear the experts for the defence, citing lack of time. The prosecutors were allowed to put questions to the prosecution experts, but the defence was not allowed to question the defence experts, who were merely permitted to confirm their reports. In the record of the proceedings, which was not verbatim, there is no mention of the judge's refusal. The lack of opportunity to question the defence experts was noted in the appeal, but the Murcia Provincial Court, in its judgement of 26 April 2000, found that the alleged limitations on the questioning had not in any way impaired the defence presented by the defendants since the experts had submitted their reports in writing and had confirmed them during the proceedings. The court found that counsel for the defence had not formulated in writing the questions to be put to the experts, and that the

decisive factor was that the experts had confirmed their reports during the proceedings, clarifications being "quite superfluous". The authors filed an appeal before the Constitutional Court for *amparo*, claiming a violation of the principle of equality of arms. On 16 October 2000 the Constitutional Court rejected the appeal. The Court found that the authors had not sufficiently demonstrated that questioning the experts was essential to their defence, since defence counsel had not prepared in writing the clarifications and observations sought.

2.4 The authors claim that they did not enjoy the basic guarantees of a criminal trial, such as the preparation of a verbatim record, which impaired the effectiveness of their right of appeal. The record failed to reflect the judge's refusal to allow the defence to question the defence experts.

2.5 The Criminal Procedure Act, in its article 790.1, grants prosecutors advantages in terms of investigation that are not granted to the defence. Making use of this privilege, the prosecutor asked one of the authors to give a statement as a defendant. This article of the Act was found to be in accordance with the Constitution by the Constitutional Court on 15 November 1990.

The complaint

3.1 The authors claim that they were convicted without there being any proof of their involvement in the forgery of Mr. Boudjefna's signature, in a violation of their right to the presumption of innocence, set forth in article 14, paragraph 2, of the Covenant. There being no proof of who had written the signatures, the element of doubt favoured the authors. The burden of proof lay with the prosecution, and it was not for the defendants to prove their innocence. In the case of Mr. Pérez Munuera, the only evidence against him was his own statement as a defendant, in which he acknowledged that on the orders of Mr. Hernández he had prepared two documents, one relating to termination of the contract of employment and the other to a financial settlement. As a subsidiary point, the authors also consider that the State party violated article 14, paragraph 1, in that their conviction on the basis of insufficient evidence also infringes the principle of due process.

3.2 The authors allege a violation of article 14, paragraph 3 (e), of the Covenant, given that there was unequal treatment in the questioning of the experts for the prosecution and the experts for the defence. The judge listened to the prosecution experts for more than an hour, but, when the turn of the defence experts came, he merely allowed them to endorse their reports, and denied the defendants' counsel the right to freely question the defence experts. Both the provincial court and the Constitutional Court restricted the right of the defence to question the experts to the submission by the defence in writing of the questions that it was proposed to put and to the questions being relevant. Such restriction lacks any legal basis. According to the authors, the fact that the provincial court concluded that the questions which their defence counsel proposed to put to the defence experts were superfluous means that the court acknowledged that there had been no equality in the questioning of the defence experts.

3.3 The authors also allege a violation of article 14, paragraph 1, since there was no verbatim record of the proceedings reflecting the constraints placed on the questioning of the defence experts. This is a general practice supported by the law, and, as such, was not raised before the Constitutional Court, given that there was no prospect of a successful outcome.

3.4 The authors also claim a violation of article 14, paragraph 1, of the Covenant, since there is a regulation in the Criminal Procedure Act which discriminates between prosecutors and defendants, permitting the prosecutor to request additional investigation proceedings at the conclusion of the investigation phase, a right which defendants are denied. This peculiarity arises in summary criminal proceedings. The prosecutor made use of this privilege to request, as an additional proceeding, the taking of a statement from one of the authors as a defendant.

State party's observations on admissibility

4.1 The State party claims that the communication is inadmissible as it is incompatible with the provisions of the Covenant and constitutes an abuse of the right to submit communications. The State party indicates that the authors' principal complaint relates to the supposed inability of the defence to question its experts during the oral proceedings, the remainder of the complaints being subsidiary, and adds that the authors' assertions are flatly contradicted by the record of the oral proceedings. The record of the oral proceedings is a document indicating what took place during the hearings and is validated by the signature and seal of the secretary of the court, who certifies the record of the oral proceedings.

4.2 Under article 788.6 of the Criminal Procedure Act, the records must reflect the essential content of the evidence examined, its impact and the claims to which it gives rise, and the decisions adopted. The State party indicates that the record was signed by counsel for the defence, without his raising any objection. This contradicts the assertion by the authors that the court supposedly acknowledged the lack of equality in the questioning of the defence experts. The State party adds that the expert reports submitted by the authors were incorporated into the proceedings and endorsed in the oral hearings, without the authors having indicated, either before the domestic courts or before the Committee, what additional clarifications they sought. The State party indicates that the appeal court noted in its judgement that the authors had not specified what observations or clarifications were of interest to them, and that the experts selected by the authors attended the trial and were able to confirm their reports in person. The court also indicated that the record reflected "the various and extensive questions put by the defence, and, as a result, the full opportunities available to make arguments".

4.3 The State party concludes that the attack (sic) by the authors impugning the authenticity of the record, without offering any evidence, is incompatible with article 14 of the Covenant and with the requirement for proceedings to be public, this having been observed in the case of the authors, bearing in mind that the record of the oral proceedings is signed and sealed by the secretary of the court, who certifies the record. The State party also maintains that the authors' complaint constitutes an abuse of the right to submit communications because: it contradicts a public document which provides an authentic record of the oral proceedings in the trial and which was signed without objection by the authors' defence counsel; it alleges events that were not specified or proven in domestic appeals; and it refers to events that took place almost six years earlier and in respect of which there was a final judgement by the Constitutional Court in October 2000, there being a manifest delay in the submission of the communication.

Authors' comments on the State party's observations

5.1 According to the authors it is inapposite for the State party to have affirmed that the record of the oral proceedings was complete or verbatim and not a summary record. Mere observation of the record suggests that it is in fact a summary. The summary nature of the record is expressly provided for by article 743 of the Criminal Procedure Act. According to the authors, the State party's observations contradict Spanish domestic legislation and reflect a lack of good faith by the State party. They note that in the application to the Constitutional Court for *amparo* they claimed that the lack of a verbatim record resulted in an absence of legal guarantees. They add that it was discriminatory for the State party not to ensure a verbatim record in criminal proceedings while so doing in civil proceedings, as acknowledged in Act No. 1/2000 of 7 January 2000. They consider that the absence of a verbatim record violates the right to due process in accordance with article 14, paragraph 1, of the Covenant.

5.2 The authors add that, when the appeal court stated that the authors' counsel had not formulated the observations or allegations that they wished to put to the experts in the oral proceedings and that such clarifications were quite superfluous, it acknowledged that there were constraints on the right to question the defence experts[1].

5.3 The authors specify that the four handwriting experts, two for the prosecution and two for the defence, were all summoned to attend the hearings by the judge, that is to say, the experts for the defence were present when the experts for the prosecution were questioned. They add that questioning of a prosecution expert by the prosecutor and by the defence counsel began, but the judge allowed the defence experts to comment on the testimony of the prosecution experts although it was not their turn to be questioned. The prosecution experts having testified for approximately an hour, once it was the turn of the defence experts to testify, the judge, immediately after they had confirmed their reports and made short statements, interrupted the questioning, stating that there was no more time. The questions that the defence counsel intended to put were related to the subject matter of the testimony.

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 it is admissible under the Optional Protocol to the Covenant.

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

---

[1] The authors cite the Committee's decision in respect of communication No. 526/1993, *Hill v. Spain*, of 2 April 1997, para. 14.2. They indicate that in this case the Committee found admissible a complaint by one of the authors although the record of the proceedings did not reflect the specific request by Mr. Michael Hill to conduct his own defence through an interpreter.

6.3 The Committee notes the authors' complaint that Spanish criminal procedure legislation allows the prosecutor the option of requesting additional investigation proceedings after the investigation phase has concluded. Nevertheless, the authors have not explained what specific harm was caused to them by the fact that the prosecutor made such a request once the investigation had concluded. Accordingly, the Committee concludes that the authors may not consider themselves victims within the meaning of article 1 of the Optional Protocol in respect of the aforementioned complaint and finds this part of the communications submitted by the authors inadmissible in accordance with article 1 of the Optional Protocol.

6.4 In connection with the authors' complaint that they were convicted on the basis of insufficient evidence against them, the Committee recalls its jurisprudence to the effect that it is in principle for the courts of States parties to evaluate the facts and evidence, unless the evaluation of the facts and evidence was manifestly arbitrary or amounted to a denial of justice, circumstances that do not obtain in the case of the authors. The Committee notes that the copy of the record of the proceedings submitted by the authors contains the following: testimony by one of the defence experts in response to questions from the prosecution; a section on questions by the defence to one of the prosecution experts; a further section on questions from the defence to the expert appointed by the court; and another on questions by the defence to a defence expert and the corresponding reply. The Committee also notes, from the copy of the judgement in first instance submitted by the authors, that the evidence against them did not consist only of expert reports. The Committee considers, accordingly, that the authors have not sufficiently substantiated the other complaints under article 14, paragraph 1, of the Covenant for the purposes of admissibility and finds that the communications are inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communications are inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the authors of the communications and to their counsel.

[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.]
