United Nations CCPR/C/129/D/2890/2016

International Covenant on Civil and Political Rights

Distr.: General
18 December 2020
English
Original: Spanish

Human Rights Committee

Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2890/2016*, **

Communication submitted by:	M.R.S. (represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	26 April 2016
Document references:	Special Rapporteur's rule 92 decision, transmitted to the State party on 7 December 2016 (not issued in document form)
Date of adoption of decision:	23 July 2020
Subject matter:	Right to be presumed innocent; right to due process; right to review by a higher tribunal
Procedural issues:	Exhaustion of domestic remedies; non-substantiation of claims
Substantive issues:	Right to review by a higher tribunal; right to be presumed innocent; right to due process; right to a hearing by a competent, independent and impartial tribunal
Articles of the Covenant:	14 (1), (3) (b) and (5)
Articles of the Optional Protocol:	2 and 3

1. The author of the communication is M.R.S., a Moroccan national born on 10 August 1983. He claims to be the victim of violations of his rights under article 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel. The Optional Protocol entered into force for the State party on 25 April 1985.

The facts as submitted by the author

2.1 On 8 January 2014, the author was forcefully arrested by the police and brought before Court of Investigation No. 1 of Jaén on seven counts of theft with force and intimidation relating to acts committed between December 2013 and January 2014 (incidents involving

* Adopted by the Committee at its 129th session (29 June–24 July 2020).

** The following members of the Committee participated in the examination of the communication: Tania Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Furuya Shuichi, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

the theft, with the use of force, of small sums of money of between 22 and 40 euros, and mobile telephones, with the victim in one incident sustaining a knife wound).

2.2 On 11 January 2014, a local newspaper published a front-page story about the incidents, together with a photograph of the author in handcuffs being escorted by a police officer.

2.3 On 15 January 2014, during the pretrial proceedings instituted against him on the basis of the theft victims' complaints, the author asked Court of Investigation No. 1 to order five measures to be taken: that the fingerprints on the bags of three of the victims be examined, that a video recording from a bank automatic teller machine be requested, that an in-person line-up be conducted, that a voice line-up be conducted with the involvement of the alleged victims and that J.M.[1] be located. According to the author, J.M. bears a strong physical resemblance to him and was the actual perpetrator. The Court refused to order four of the measures requested but agreed to order the in-person line-up. The requests for fingerprint examination and a voice line-up were refused because of the amount of time that had elapsed; the request for video recordings from the automatic teller machine was refused because it related to incidents being investigated as part of another case; and the request to locate J.M. was refused so as to avoid infringing the individual's right of defence, as there was no evidence to support such an accusation against him. According to the author, J.M. "fled to Belgium after having committed the offences".

2.4 On 19 and 22 January 2014, Y.R. went to the police station and stated that he had knowingly purchased three stolen mobile telephones from J.M. in late 2013 and in early 2014.[2]

2.5 On 6 February 2014, Court of Investigation No. 1 ordered the commencement of summary proceedings against the author for his involvement in committing seven counts of theft with force and intimidation, including one count of attempted theft, one count of bodily harm and four counts of assault. The author filed, with Court of Investigation No. 1, an application for reconsideration or, in the alternative, leave to appeal the decision. The author claimed that his right of defence had been violated when the pretrial proceedings were concluded after only 16 days and that he had not been able to mount a proper defence because the measures that he had requested during the pretrial phase had been refused. In addition, the author requested that these measures be granted. On 24 February 2014, Court of Investigation No. 1 dismissed the author's application for reconsideration on the grounds that the conclusion of the pretrial phase had not deprived him of a defence, as the purpose of that phase was to determine whether or not there was a prima facie case, not to establish innocence or guilt, and that the measures requested and refused during the pretrial phase could be sought again at trial. In the same judgment, the Court granted the author leave to appeal the decision before Jaén Provincial High Court. On 19 March 2014, the Provincial High Court dismissed the author's appeal against the decisions handed down by Court of Investigation No. 1 on 6 and 24 February 2014.

2.6 On 5 March 2014, the author submitted a defence brief requesting that the testimony of his spouse, who maintained that the author was at home when the incidents occurred, be heard. In the same brief, the author also requested the following measures: that the leak of his police record on social networks be investigated, that the video recording from the bank automatic teller machine and security footage from various banking institutions be requested,

[1] According to the enclosed request for measures, the author claims that a third person has been convicted for purchasing two mobile telephones from J.M. in the knowledge that they were stolen and that those telephones had been stolen in the incidents of theft under investigation (para. 2.4).

[2] According to a police report dated 23 January 2014, on 19 January 2014, Y.R. went to the police station and stated that he was a childhood friend of the author and that he knew that someone else, namely, J.M., was guilty of the crimes for which the author had been arrested. On 20 January 2014, the police once again questioned the witnesses/victims that had not recognized J.M., only for them to repeat that they recognized the author. On 23 January 2014, Y.R. went to the police station a second time and stated that he had bought three stolen mobile telephones from J.M. The victims identified these mobile telephones as theirs, but did not identify J.M. as their attacker. On 20 November 2014, Y.R. received a fine of 3 euros per day for a period of six months.

and that the proceedings be joined with those ongoing in another case.[3] The oral proceedings took place on 19 June 2014. On 20 June 2014, Court of Investigation No. 1 found the author guilty of one count of theft with force and intimidation, five counts of theft with force and the use of a weapon, one count of attempted theft with force and intimidation, one count of bodily harm and four counts of assault, and imposed different penalties amounting to 25 years' imprisonment, with the actual time served not to exceed 12 years. The author appealed the judgment before Jaén Provincial High Court.

2.7 On 8 September 2014, the Provincial High Court dismissed the author's appeal.

2.8 On 21 October 2014, the author filed an application for *amparo* with the Constitutional Court, alleging violations of his right to an effective judicial remedy, his right to use means relevant for his defence and his right to be presumed innocent, which are recognized under article 24 of the Constitution. On 11 March 2015, the Constitutional Court refused the author's application on the grounds that he had not demonstrated its special constitutional significance, in accordance with article 49 (1) of the Organic Act on the Constitutional Court.

2.9 On 20 August 2015, the author filed an application with the European Court of Human Rights. On 7 September 2015, the Registry of the Court returned the application to the author and informed him that the Court could not examine his complaints because the summary of the facts contained in his application exceeded the page limit (of three pages) set under article 47 (2) (b) of the Rules of Court.

The complaint

3.1 The author claims to be the victim of a violation by the State party of article 14 of the Covenant, as the swiftness of the pretrial proceedings, which lasted only 16 days, impaired his right to mount a proper defence.

3.2 The author also claims that the criminal proceedings against him were arbitrary. His conviction was based primarily on photographic identification procedures conducted by the police in an irregular manner. The author submits that he was mistakenly arrested and charged with crimes actually committed by J.M., who bears a strong physical resemblance to him. The mistake is said to have arisen because the alleged victims identified the author as the perpetrator based on a police photograph taken in 2007 and not on a recent photograph. The author also claims that the police leaked that photograph, together with his police record, on social networks so that the victims would identify him as the perpetrator. The victims also stated that there was "no doubt" that the police photograph taken in 2007 and the photograph taken two days after the author's arrest in January 2014 were of the same person. The author claims that his physical appearance is noticeably different in the two photographs and that the resoluteness with which the victims stated that the photographs were of the same person, notwithstanding the significant differences between them, indicates that the police had influenced or swayed the victims' testimonies.[4] In addition, during the trial, the author was hidden from the victims behind a screen, the use of which was unwarranted, as the proceedings involved no protected witnesses. Furthermore, two of the counts of theft imputed to the author were committed 15 minutes apart in two different locations. The author asserted that the second location could not be reached on foot in 15 minutes. According to the judgment of the court of first instance, that argument could not hold, as Google Maps indicated that it was in fact possible to cover the distance on foot in that time.

3.3 The courts arbitrarily refused his request for measures that would have provided decisive exculpatory evidence. Moreover, they did not duly investigate J.M., the true perpetrator. The author asserts that the police refused to investigate any theory that was not geared towards demonstrating that he had committed the offences. He claims that other incidents of theft that had taken place during the same period were not included in the case

[3] The author does not indicate which of these requests were granted or refused at this stage of the proceedings.

[4] According to the judgment issued by Court of Investigation No. 1 of Jaén, one witness was unable to identify the author when shown the 2007 photograph; he was only able to do so when allowed to consult the 2014 photograph and during the in-person line-up.

because he had not been identified by the victims; however, according to the author, they had all been committed by the same person, J.M. The author claims that, if he had been given more time to prepare his defence, he could have called these victims as witnesses on his behalf. In the author's view, this arbitrariness stems from the fact that he is being discriminated against because he is of Arab origin.

3.4 The author claims that the victims were influenced by the article published in the local newspaper on 11 January 2014, as it served to reinforce the belief of those who had identified him.[5]

3.5 The author claims that there was no opportunity for a higher tribunal to review the conviction and the sentence handed down by Court of Investigation No. 1. Even the prosecutor, who opposed his filing an appeal with the Provincial High Court, stated that a request to have the credibility of witnesses reviewed may not be made on appeal, except in cases that are clearly arbitrary. This, according to the author, demonstrates that the higher tribunal cannot be considered to have reviewed the conviction or the sentence.

3.6 The author claims that the penalties imposed (25 years' imprisonment, with an actual term of 12 years) are disproportionate, inhuman and discriminatory with respect to the offences committed, since there are homicide-related offences that, when mitigating circumstances are found to apply, can carry only 6 years' imprisonment.

State party's observations on admissibility and the merits

4.1 The State party submitted its observations on the admissibility of the communication in a note verbale dated 7 June 2017. It maintains that the communication is inadmissible under article 3 of the Optional Protocol owing to the author's failure to substantiate his claims, which refer to article 14 in the abstract, without specifying how its provisions have been violated.

4.2 The State party notes that the author merely points out that the pretrial proceedings were brief without elaborating on this claim. The State party asserts that, by acting quickly, it was fulfilling its obligation under article 14 (3) (c).

4.3 As for the claims that the photographic identifications made were invalid, the State party refers to the judgments issued at first instance and on appeal, both of which examined the validity of the photographic identifications and the identifications made during in-person line-ups. In addition, the judgment issued at first instance confirmed that only one of the victims had seen the photo from the author's police record that was leaked to the press and on social networks.

4.4 The State party explains that the request to obtain camera footage from an automatic teller machine was rejected because it related to an offence being investigated in connection with another trial whose purpose was different to that of the communication at hand. Furthermore, during the oral proceedings and in his opening statement, the author reiterated only the request to have the testimony of his wife heard, which was granted by the Court, but not the requests relating to the other evidence.

4.5 Regarding the use of Google Maps to calculate the time needed to travel between two locations where the author was accused of having committed theft on the same night, the State party asserts that a reading of the judgment reveals this information to be merely supplementary, as there are seven victims who identified the author beyond any doubt.

4.6 The State party asserts that the individual identified as J.M. was not investigated because there was no evidence to link him to the offences; specifically, the mobile telephones allegedly sold by J.M. were not identified by the theft victims as theirs and did not therefore relate to the offences under investigation.[6]

[5] According to the judgment issued by Jaén Provincial High Court on 8 September 2014, all the victims except one stated that they had not seen the author's photograph in the press or on social networks prior to identifying him (para. 4.3).

[6] According to a police report dated 23 January 2014, the victims identified their mobile telephones but did not identify J.M. as their attacker.

4.7 The State party indicates that, under article 707 of the Criminal Procedure Act, victims are entitled to measures that allow them to avoid eye contact with the alleged perpetrator. In the present case, a partition was used at the request of the victims themselves. Furthermore, the defence did not request the victims to identify the accused during the oral proceedings or file a complaint with respect to the use of the partition.

4.8 The State party asserts that the author's right to be presumed innocent was respected at all times and that he was found guilty by a judgment that was duly reasoned, was reviewed by a higher tribunal and in which his identification by seven victims was documented. As for the sentence of 25 years' imprisonment, with the time served not to exceed 12 years, the State party is of the view that the author has not explained why he considers this sentence to be disproportionate to two counts of theft with force and intimidation, one of them involving the use of a weapon, five counts of theft with intimidation, one count of bodily harm and four counts of assault.

4.9 The State party is of the view that the author has not substantiated any of his claims, which amount to mere criticism that even the supporting documentation provided fails to justify; the claims should therefore be declared inadmissible under article 3 of the Optional Protocol. The State party is also of the view that the communication does not disclose any violation of article 14 of the Covenant, for the reasons set out.

Author's comments on the State party's observations

5.1 The author's comments on the admissibility and merits of the communication were received on 5 September 2017. In his comments, he expresses the view that his case is a paradigmatic example of the complete dysfunction of the State party's judicial system.

5.2 The author reiterates the claims already set forth in the initial communication and states that he has in fact explained the reasoning behind each of them. The author reiterates his complaint that the police photographic identification procedure was manipulated, as those victims who did not identify the author were excluded from that procedure and taken to participate in others. The author encloses an expert opinion issued on 3 November 2015 that concludes that a comparison between the photograph of the author taken in 2007 and that taken in 2014 shows that there are obvious differences in his facial features and that a comparison between the photograph of the author and that of J.M. reveals quite a few similarities in that respect.

5.3 The author reiterates that the speed with which the pretrial phase was concluded deprived him of a defence and shows that he had been prejudged as guilty, thus leading to the swift conclusion of the investigation so that no incriminating evidence would be found. According to the author, the vast majority of the State party's judges, who perform their duties in an arbitrary manner, do not respect the principle of the presumption of innocence.

5.4 The author claims that the leak of his police record not only infringed his right to be presumed innocent, but also infringed his rights under article 17 (1) of the Covenant.

5.5 With respect to the refusal of the request to obtain video footage from an automatic teller machine, the author asserts that the matter has been taken up as part of another case precisely because, in that case, J.M. could be identified as the perpetrator of the offence in question and, consequently, of all the others. Moreover, the author explains that he did not request this measure again during the oral proceedings because a measure that has already been refused by a higher court – that is, the Provincial High Court – may not then be requested during oral proceedings.[7]

5.6 The author states that, contrary to the State party's assertion, the victims did in fact identify the mobile telephones sold by J.M. as theirs but that, in spite of this, J.M. was not investigated.

[7] In its judgment of 19 March 2014, Jaén Provincial High Court had upheld the refusal to grant this and other measures during the pretrial phase because the latter's purpose was to determine the nature and circumstances of the incident, the individuals involved and the court competent to prosecute them. According to the enclosed documentation, the author requests the recording from the bank automatic teller machine in his defence brief of 5 March 2014.

5.7 On 26 April 2019, the author submitted an opinion of the Judicial Ethics Commission[8] concerning the use of information obtained out of court. The opinion indicates, inter alia, that judges should not seek information about the parties, their counsel or the matter in dispute on the Internet.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author filed an application regarding the same facts with the European Court of Human Rights and recalls that, when Spain ratified the Optional Protocol, it entered a reservation excluding the Committee's competence in matters that had been or were being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that, by letter of 7 September 2015, the author was informed that his complaint could not be examined because his application failed to meet the requirements with respect to form. The Committee recalls its jurisprudence[9] relating to article 5 (2) (a) of the Optional Protocol, according to which, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on grounds arising from some degree of consideration of the substance of the case, then the matter should be deemed to have been examined within the meaning of the respective reservations to article 5.[10] In the present case, the Committee notes that the decision of the European Court simply indicates that the application fails to meet the requirements with respect to form. Accordingly, the Committee considers that the author's case has not been examined, even in a limited manner, on its merits[11] and concludes that article 5 (2) (a) of the Optional Protocol does not constitute an obstacle to the admissibility of the present communication.

6.4 The Committee notes that the author claims to be the victim of a violation by the State party of article 14 of the Covenant in that the swiftness of the pretrial proceedings, which lasted only 16 days, impaired his right to mount a proper defence and that the criminal proceedings against him were arbitrary. The Committee also notes the State party's argument that the author has not sufficiently substantiated his claims as required under article 3 of the Optional Protocol. The Committee notes the author's claim that the speed with which the pretrial phase was concluded deprived him of a defence, as he was unable to adequately prepare one. In this regard, the State party notes that the swiftness of the pretrial proceedings safeguarded the author's rights under article 14 (3) (c). The Committee also notes that, according to the judgment of Jaén Provincial High Court, the purpose of the pretrial phase is to determine whether or not there is a prima facie case, not to establish innocence or guilt, and that the author was able to present exculpatory evidence during the oral proceedings on 19 June 2014. The Committee notes that: on 8 January 2014, the author was arrested; on 6 February, Court of Investigation No. 1 ordered the commencement of summary proceedings against the author for his involvement in various offences; on 19 March, the Provincial High Court dismissed the author's appeal against the decisions of Court of Investigation No. 1; on 5 March, the author submitted his defence brief; on 19 June, the oral proceedings took place; and, on 20 June, the Court found the author criminally liable. The author thus had six months to prepare his defence. On the basis of the information before it, the Committee is of the view that the author has not sufficiently substantiated, for purposes of admissibility, his claim that a pretrial phase lasting 16 days had deprived him of a defence and declares it inadmissible under article 3 of the Optional Protocol.

[8] Opinion (consultation 1/19) of 8 April 2019.

[9] See, inter alia, *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010), para. 7.3; and *A.G.S. v. Spain* (CCPR/C/115/D/2626/2015), para. 4.2.

[10] In this regard, see *Mahabir v. Austria* (CCPR/C/82/D/944/2000), para. 8.3; *Linderholm v. Croatia* (CCPR/C/66/D/744/1997), para. 4.2; and *A.M. v. Denmark* (CCPR/C/16/D/121/1982), para. 6.

[11] *Mahabir v. Austria*, para. 8.3.

6.5 The Committee notes the author's claim that police officers leaked his file to the press and on social networks in order to implicate him in the alleged offences and that this was motivated by discrimination based on his ethnic origin. The Committee notes that, although the State party has an obligation to ensure that the author's right to be presumed innocent is respected, the author does not point to any specific facts that would suggest that the State party's police force carried out acts intended to incriminate him, or that the same police force has handled similar cases differently. Moreover, the Committee notes that the author has not filed any complaints with the national authorities relating to such claims. The Committee therefore declares these claims inadmissible under article 2 of the Optional Protocol for failure to exhaust domestic remedies.

6.6 The Committee notes that the author makes numerous claims that the courts acted arbitrarily in his case, basing his conviction on photographic identifications carried out in an irregular manner, excluding certain exculpatory elements from the case, allowing testimonies that had been manipulated or were biased, refusing exculpatory evidence, making use of online tools without corroboration, handing down a disproportionate penalty and using a partition to separate the author from the victims during the oral proceedings, all of which he claims was arbitrary. The Committee recalls that, according to its well-established jurisprudence, the assessment of facts and evidence and the application of domestic laws are, in principle, matters for domestic courts, unless such assessment or application is manifestly arbitrary or amounts to a denial of justice.[12] The Committee has examined the material submitted by the author, including the decision of Jaén Provincial High Court, which examined the relevant claims, except that concerning the use of the partition, which was not challenged, and examined in detail the validity of the evidence against the author. Specifically, the Provincial High Court explained that the photographic identifications had subsequently been confirmed during in-person line-ups, in which all guarantees had been observed, and provided detailed reasoning for its decision to allow that evidence, as all the victims but one claimed to have had no knowledge of the press reports or of the information on social networks. The Provincial High Court concluded that there was sufficient evidence against the author, obtained in observance of legal guarantees, to set aside the presumption of innocence, find the author guilty of the offences and sentence him to 25 years' imprisonment, with the actual time served not to exceed 12 years. The Committee considers that the information provided by the parties throughout the process does not allow it to conclude that the national courts have acted arbitrarily in the evaluation of evidence or in the interpretation of national legislation, and it is therefore not for the Committee to intervene in this respect, once it has verified the detailed reasoning of the courts and the consistency of the line of argument used.[13] The Committee is therefore of the view that the author has not sufficiently substantiated his claims and concludes that the claims that the courts acted arbitrarily are inadmissible under article 3 of the Optional Protocol. Furthermore, the Committee notes that the author did not challenge the use of the partition during the oral proceedings and is of the view that the author has not exhausted domestic remedies in respect of this claim; this part of the complaint is inadmissible under article 2 of the Optional Protocol.

6.7 The Committee notes the author's claim that he was unable to have his conviction and sentence reviewed by a higher tribunal, with the prosecutor's office itself stating that the validity of the testimonies could not be re-examined. The Committee also notes that the author appealed the judgment issued by Court of Investigation No. 1 of Jaén before Jaén Provincial High Court, which examined both the evidentiary value of the victims' identifications and all the claims made by the author in his appeal. The Committee is therefore of the view that the author has not sufficiently substantiated, for purposes of admissibility, his claim that he was unable to have his conviction and sentence reviewed and declares it inadmissible under article 3 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

[12] See *Cañada Mora v. Spain* (CCPR/C/112/D/2070/2011), para. 4.3; *Manzano et al. v. Colombia* (CCPR/C/98/D/1616/2007), para. 6.4; and *L.D.L.P. v. Spain* (CCPR/C/102/D/1622/2007), para. 6.3.

[13] See *Y. v. Spain* (CCPR/C/93/D/1456/2006), para. 8.3.

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the author.