United Nations CCPR/C/127/D/3085/2017

International Covenant on Civil and Political Rights

Distr.: General
20 March 2020
English
Original: Spanish

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3085/2017*, **

Communication submitted by:	Z.B.E. (represented by counsel, José Luís Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	29 May 2017 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 22 December 2017 (not issued in document form)
Date of adoption of Views:	8 November 2019
Subject matter:	Use of religious symbols in court
Procedural issues:	Exhaustion of domestic remedies, matter examined under another procedure of international settlement
Substantive issues:	Freedom of religion; right to private life
Articles of the Covenant:	14 (1), 17 and 18
Articles of the Optional Protocol:	3 and 5 (2) (b)

1. The author is Z.B.E., a Spanish citizen and practising lawyer. She claims that Spain has violated her rights under articles 14 (1), 17 and 18 of the Covenant. The State party acceded to the Optional Protocol on 25 January 1985, and it entered into force for it on 25 April 1985. The author is represented by counsel.

The facts as submitted by the author

2.1 On 22 October 2009, the author attended a trial in the Criminal Chamber of the National High Court to provide support to one of the defence lawyers. At one point, the presiding judge ordered her to remove her hijab or leave the lawyers' table in the well of

* Adopted by the Committee at its 127th session (14 October–8 November 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany and Hélène Tigroudja.

the court. The author left the table and continued to follow the trial from the public seating area.

2.2 On 10 November 2009, an association reported the incident to the Inspection Service of the General Council of the Judiciary, arguing that the judge should face disciplinary action. The Disciplinary Commission opened Preliminary Inquiry No. 1647/09 and eventually closed the case on 8 February 2010.[1]

2.3 Concurrently, the author filed an appeal with the Administrative Division of the National High Court on 11 November 2009 and provided additional information on 20 November 2009. The author argued that the judge's oral decision constituted a violation of her fundamental rights and asked that it be declared invalid. On 14 December 2009, the Administrative Division referred the matter to the General Council of the Judiciary, which it considered to be the competent body. The Council did not issue a decision on the matter or examine the question of the violation of fundamental rights; it simply attached a copy of the appeal to the case file pertaining to Preliminary Inquiry No. 1647/09.

2.4 On 21 December 2009, the author filed a special administrative appeal for protection of fundamental rights at the Supreme Court. In that appeal she challenged the Council's alleged rejection of the issues raised in the appeal submitted to the Administrative Division. The Supreme Court dismissed the administrative appeal on 2 November 2010. In its judgment, the Supreme Court held that the National High Court was the competent body to deal with the issues raised by the author's appeal challenging the judge's oral decision; that the General Council of the Judiciary was not competent to review the judge's decision, which was of a jurisdictional rather than an administrative nature; that, consequently, the Council should have expressly declared the National High Court's referral of the case to it to be inadmissible; and that, although the referral was wrongful, it was not challenged by the author. The Supreme Court concluded by dismissing the appeal without examining the merits, stating that the Council could not be blamed for not having done something that it was not legally able to do. That decision was appealed before the Supreme Court itself; the challenge was dismissed on 31 January 2011 and the author was ordered to pay the related costs.

2.5 After the Supreme Court handed down its final decision, on 8 March 2011 the author filed an application for *amparo* before the Constitutional Court, citing an infringement of her fundamental rights as protected by the Constitution, namely freedom of religion, non-discrimination and the right to privacy. In a decision issued on 17 December 2012, her application was denied on the basis that there had been no manifest infringement of a fundamental right, which is a requirement for the exercise of the remedy of *amparo*.

2.6 In parallel, on 16 March 2011 the author submitted a brief to the Administrative Division of the National High Court requesting a reasoned justification of its decision of 14 December 2009 in the light of the arguments used in the Supreme Court's ruling. In its decision of 18 July 2011, the National High Court declared itself competent to examine the facts. However, it found that the original appeal filed on 11 November 2009 had been submitted out of time. In that regard, it stressed that the appeal had challenged a special admonishment pronounced by the judge who was maintaining order in the lawyers' section of the courtroom and that it should therefore have been presented within five days of the date of the incident, which occurred at the end of October 2009, under the provisions of article 556 of Organic Act No. 6/1985 on the Judiciary.

2.7 The case was submitted to the European Court of Human Rights on 12 March 2013, citing alleged violations of the rights to due process, religious freedom and respect for private and family life, as well as discrimination. On 26 April 2016, the Court declared the case inadmissible.[2] It considered that it was for the domestic courts to interpret the legislation governing which body was competent to examine the allegations and the time limits for lodging appeals, and found that the interpretation that had been applied could not be considered arbitrary. Consequently, the Court considered that domestic remedies had not been fully exhausted because the appeal had been lodged after the deadline, thereby

[1] That decision was not the subject of a judicial review.

[2] Application No. 21780/13.

depriving the domestic courts of the possibility of ruling on the merits of the claims. For the same reasons, the author's claims relating to the right to due process were also deemed inadmissible owing to a lack of substantiation.

The complaint

3.1 The author considers that her expulsion from the lawyers' section of the courtroom for wearing a hijab violated her rights to privacy and freedom of religion under articles 17 and 18 of the Covenant.

3.2 With regard to article 14 (1), the author considers that the courts' refusal to examine the merits of the case was abusive and illegitimate, the appeal having been found to have been lodged out of time because the judge's oral decision of 22 October 2009 was disciplinary and therefore jurisdictional. The author claims that it was an administrative decision and that lodging an administrative appeal before the Administrative Division of the National High Court was the appropriate remedy given that the judge did not provide information on which remedy she should use to challenge his oral decision.

3.3 The author claims that the European Court of Human Rights did not examine the merits of her complaint, which is why she has submitted the case to the Committee.

State party's observations on admissibility

4.1 The State party submitted its observations on the admissibility of the communication in a note verbale dated 1 March 2018.

4.2 The State party considers the communication inadmissible because it has previously been submitted to another procedure of international investigation, namely the European Court of Human Rights.[3] On 26 April 2016, the European Court of Human Rights, in a chamber of seven judges, declared the case inadmissible in a unanimous decision, having concluded that the author had not exhausted domestic remedies.

4.3 The State party also claims that the author has failed to exhaust domestic remedies as required by article 5 (2) (b) of the Optional Protocol. It notes that, according to the decision of 26 April 2016 of the European Court of Human Rights, by lodging her appeal out of time, on 11 November 2009, the author prevented the domestic courts from ruling on the merits of the case.

4.4 Lastly, the State party considers the communication to be wholly without merit. It recalls that the Constitutional Court rejected the application for *amparo* on the grounds that there had been "no manifest infringement of a fundamental right eligible for protection under the remedy of *amparo*".

Author's comments on the State party's observations on admissibility

5.1 On 3 July 2018, the author responded to the State party's observations on the admissibility and merits of the communication.

5.2 The author notes that the Constitutional Court, in its decision of 17 December 2012, rejected the application for *amparo* on the ground that there had been no infringement of a fundamental right. That finding implies that the Constitutional Court first examined the formal requirements, including the exhaustion of prior remedies, and then proceeded to an examination of the merits. Therefore, the Constitutional Court itself attests that the petitioner made use of all available courts and exhausted all domestic remedies.

5.3 With regard to the inadmissibility of the communication because it has already been examined by another mechanism of international investigation, the author submits that the decision of the European Court of Human Rights, which found her complaint inadmissible owing to a failure to exhaust domestic remedies, was manifestly erroneous, as is made clear by the decision of the Constitutional Court. In the author's view, the European Court of

[3] The State party acceded to the Optional Protocol on the understanding that the provisions of article 5 (2) meant that the Committee would not consider any communication that had been or was being examined under another procedure of international investigation or settlement.

Human Rights based its finding of a failure to exhaust domestic remedies mainly on an irrelevant aspect, namely the late submission of an administrative decision (the National High Court decision of 18 July 2011). The author further recalls the Committee's jurisprudence[4] according to which, where the limited reasoning of the European Court of Human Rights does not allow the Committee to assume that the examination included a consideration of the merits, the Committee is not precluded from considering a communication under the reservations to article 5 (2) (a).

5.4 With regard to the inadmissibility of the communication owing to a lack of substantiation, the author recalls that the State party bases this argument on the decision of the Constitutional Court, which contradicts the claim that domestic remedies have not been exhausted.

State party's additional observations on admissibility

6. In its additional observations submitted on 4 June and 31 July 2019, the State party reiterates its allegations as set out above and states that the Constitutional Court's decision of 17 December 2012, in which it found the case inadmissible on the ground that there had been no infringement of a fundamental right, does not imply that the Court had examined whether all remedies had been exhausted prior to the application for *amparo*. In fact, following the Court's prima facie finding that there had been no infringement of a fundamental right, it was not necessary for it to examine whether all prior remedies had been exhausted. The State party notes that the Constitutional Court has rejected *amparo* applications on procedural grounds even after they have been deemed admissible for the consideration of constitutional issues.[5]

Author's comments on the State party's additional observations

7. In comments submitted on 22 June 2019, the author claims that the State party's observations are patently untrue, since in cases where the Constitutional Court finds an application for *amparo* inadmissible on the ground that there has been no manifest infringement of a fundamental right, it has already confirmed that earlier remedies have been exhausted. The author submits that article 44 (1) (a) of the Organic Act on the Constitutional Court establishes the requirement that all earlier remedies must be exhausted in order to file an *amparo* appeal against a judicial decision. The author also recalls that the Constitutional Court's inadmissibility decision was based on article 50 (1) (a)[6] of the Organic Act on the Constitutional Court, given the absence of a manifest infringement of a fundamental right eligible for *amparo* protection under article 44 (1). Since the Constitutional Court found that earlier remedies had been exhausted, the State party cannot reopen that debate before the Committee. The State party's allegations thus reveal a lack of respect for the principle of good faith that informs international treaty law.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 The Committee takes note of the State party's claim that the same matter has been submitted to another procedure of international investigation or settlement, namely the European Court of Human Rights, and that its reservation to article 5 (2) (a) of the Optional Protocol would therefore be applicable. The Committee recalls its jurisprudence relating to article 5 (2) (a) of the Optional Protocol to the effect that, when the European Court of

[4] *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010), para. 7.3.

[5] See Supreme Court Judgment No. 39/2019.

[6] "1. The application for *amparo* must be subject to a decision of admissibility. The Section shall decide unanimously, by issuing an order, whether the appeal shall be admitted, in whole or in part, only when all of the following requirements are met: (a) the application complies with the provisions of articles 41 to 46 and 49."

Human Rights bases a declaration of inadmissibility not solely on procedural grounds, but also on grounds arising to some extent from a consideration of the merits of the case, then the same matter should be deemed to have been "examined" within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol.[7] However, the Committee notes that, with regard to allegations of violations of the rights to privacy and freedom of religion, the European Court did not examine them, but instead based its decision on a strictly procedural issue – the failure to exhaust domestic remedies – and did not consider the merits of the case.[8] On the other hand, the Committee notes that, after a substantial review of the claims, the European Court declared inadmissible the alleged violation of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which corresponds to the allegations relating to article 14 of the Covenant, owing to lack of substantiation. Accordingly, the Committee finds the author's claims under article 14 of the Covenant inadmissible pursuant to article 5 (2) (a) of the Optional Protocol. The allegations under articles 17 and 18 of the Covenant do not give rise to any issues relating to article 5 (2) (a) of the Optional Protocol as modified by the State party's reservation.

8.3 The Committee also notes the State party's claim that domestic remedies have not been exhausted. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[9] In that connection, the author alleges that the fact that the Constitutional Court found her application for *amparo* inadmissible on the ground that there had been no infringement of a fundamental right implies that the Court had examined the formal requirements, including the exhaustion of earlier remedies. The Committee notes that in its decision of inadmissibility the Constitutional Court agreed "not to entertain the appeal, in accordance with the provisions of article 50 (1) (a) of the Organic Act on the Constitutional Court, given the manifest absence of an infringement of a fundamental right eligible for *amparo* protection, such an infringement being a condition, pursuant to article 44 (1) of the same Act, for the Court to be able to exercise such protection". The Committee notes that this finding does not exclude the possibility of other grounds for inadmissibility. The Committee notes the State party's allegations that the late submission of the author's appeal prevented the domestic courts from being able to decide on the merits of the case. The Committee refers to its jurisprudence according to which, in situations where the State party limits the rights of appeal through the application of certain procedural conditions, such as time limits or other formal requirements, the author must comply with those conditions in order to be considered to have exhausted domestic remedies.[10] In the present case, the Committee notes that, according to the State party, the author filed an appeal on 11 November 2009, after the expiry of the deadline of five days from the time of the events, which she alleged had taken place at the end of October.

8.4 The Committee notes that the author considers that the Supreme Court and the National High Court acted in an abusive and illegitimate manner in considering the judge's oral decision of 22 October 2009 to be disciplinary and therefore jurisdictional, and that this reduced the time frame for her to file an appeal, which was the sole reason why her application was deemed inadmissible. The Committee notes that the author's allegations regarding the nature of the judge's oral decision essentially amount to a request for the Committee to re-evaluate the facts and the interpretation of domestic legislation that formed the basis of the decisions of two national courts, namely the Supreme Court and the National High Court. Such a request exceeds the limits of the Committee's mandate. The Committee recalls that, according to its settled jurisprudence, the assessment of facts and evidence and the interpretation of domestic legislation are, in principle, matters for national

[7] *Mahabir v. Austria* (CCPR/C/82/D/944/2000), paras. 8.3 and 8.4.

[8] *Roussev Gueorguiev v. Spain* (CCPR/C/90/D/1386/2005), para. 6.2.

[9] *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5, and *A.P.A. v. Spain* (CCPR/C/50/D/433/1990), para. 6.2.

[10] *A.P.A. v. Spain*; *P.L. v. Germany*; and *Celal v. Greece* (CCPR/C/82/D/1235/2003), para. 6.4.

courts, unless they are manifestly arbitrary or amount to a denial of justice.[11] In reviewing the material before it, the Committee considers that the author has not identified any irregularity in the decision-making process or any factor that the State party's authorities failed to take into account in assessing her claims. While the author disagrees with the view of the State party's authorities regarding the nature of the oral decision, she has not shown that those conclusions were clearly arbitrary or that they amounted to a manifest denial of justice. The Committee notes that the European Court of Human Rights, in its decision of 26 April 2016, reached the same conclusion. In the present case, the Committee considers that the information that it has been provided by the parties does not contain sufficient elements to contradict those findings and thus cannot lead it to the conclusion that the decisions reached by the Spanish authorities were arbitrary or amounted to a manifest denial of justice.

8.5 Having found no arbitrariness or denial of justice in the decision of inadmissibility resulting from the late submission of the author's appeal, the Committee concludes that the author's actions deprived the Administrative Division of the National High Court of the possibility of examining the merits of the appeal. It therefore follows that the author has not exhausted domestic remedies and that her claims under articles 17 and 18 of the Covenant are inadmissible, in accordance with article 5 (2) (b) of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;

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

[11] *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.