HUMAN RIGHTS COMMITTEE

Torregrosa Lafuente et al. v. Spain

Communication No. 866/1999

16 July 2001

CCPR/C/72/D/866/1999

ADMISSIBILITY

Submitted by: Mrs. Marina Torregrosa Lafuente et al. (represented by Mr. José Luis Mazón Costa)

Alleged victims: The authors

State party: Spain

Date of communication: 13 June 1997 (initial submission)

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

Meeting on 16 July 2001,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Mrs. Maria Torregrosa Lafuente and 21 other persons, all of them Spanish citizens residing in Spain. They claim to have been victims of violations by Spain of their rights under article 2, paragraph 3, article 14, paragraph 1, article 25 (c) and article 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

The facts as presented by the authors

2.1 In 1991, the Ministry of Justice announced a competitive examination to fill vacancies in the Justice Administration Officers' Corps. The rules of the announcement established that, once the written tests had been held, the first court of Madrid would publish a provisional list of the applicants who had passed the examination. The court would make this list final once any possible

factual errors that it might contain had been corrected, allowing a period of 10 calendar days for the submission of claims. The court understood the term "factual errors" to mean errors in the personal data of the applicants or in the calculation of the scores.

2.2 On 21 September 1992, the final list was published, from which 131 competitors who had been listed in the provisional list were dropped, among them the authors. The persons concerned asked for explanations from the Ministry of Justice, which replied that changes had been made because a first computerized correction of the examination papers had counted as not valid any answers with double entries or badly erased entries, while, in a second correction, the court had decided to count them as valid.

2.3 The authors allege that the correction of the examination papers was done improperly in the following respects:

(a) The first court of Madrid carried out an official review, wrongly assuming that "factual error" could cover questions such as the following: (i) whether double-entry answers were valid; (ii) whether or not the use of an eraser was legitimate; (iii) whether or not badly erased entries should be counted as valid.

(b) The court used photocopies, not originals, to deal with complaints about the provisional list, thus making it difficult to determine how thoroughly an entry had been erased;

(c) The authors had had no opportunity to challenge the court's change of rules;

(d) The rules of the official announcement of the competition were violated when the final list excluded 131 applicants who had appeared in the provisional list;

(e) The first court lacked jurisdiction to review the examination results because it was authorized only to correct mere factual errors;

(f) Question 47 on the written examination should have been disregarded because any of the proposed answers was valid. Question 54 was phrased in such a way that did not make sense;

(g) The court decided to select an applicant who had not followed the instructions on how to answer the questions. That decision entails a violation of the right to equality of opportunity for access to public posts and constituted a clear procedural irregularity that was contrary to the basic right provided for in article 23, paragraph 2, of the Constitution.

2.4 The authors allege that the provisional list contained no factual errors and that the court corrected the examination a second time without observing the rules as announced, without hearing the persons concerned and in violation of its own decision that the provisional list would be made final unless the overseeing courts discovered some error. The repeated jurisprudence of the Supreme Court stipulates that a factual error has to be obvious, clear and indisputable, and not a matter of opinion or of the interpretation of the applicable legal rules. The Supreme Court has also stated that the official announcement of a competitive examination setting out the conditions under which it will be held is the binding rule governing that examination.

2.5 The authors filed an application for reconsideration, which was not ruled on until 11 March 1993. In the meantime, they applied for an administrative remedy before the National High Court. In a judgement of 8 February 1996, a copy of which is attached to the communication, the High Court rejected the authors' allegations, basing its decision on the jurisdiction that the official announcement gave to the first court and drawing attention to earlier decisions along the same lines.

2.6 Lastly, the authors applied for a remedy of amparo to the Constitutional Court, which decided on 16 December 1996 that it was inadmissible because, contrary to the authors' allegations, there had been no violation of article 23, paragraph 2, of the Constitution or of the right to effective legal protection under article 24 of the Constitution.

The complaint

3.1 Counsel alleges that the facts described are contrary to the following provisions of the Covenant:

- Article 25 (c), which recognizes the right of all citizens to have access, on general terms of equality, to public service in their country, since the selection process in which they took part was clearly arbitrary.

- Article 2, paragraph 3 (a), which recognizes the right of any person whose rights or freedoms as recognized in the Covenant are violated to have an effective remedy. As a result of the existing system for reviewing the legality of examinations and competitions and the lengthy intervals between the initiation of the challenge to the decision and the ruling of the court, the right to a remedy against improperly conducted competitions and examinations becomes a dead letter because any court takes account of the practical significance of its decision and of the value of an administrative remedy when the incidents occurred several years previously (more than three and one-half years in this case) and a large number of candidates who obtained posts through the examination have already established *de facto* personal and family situations.

- Article 14, paragraph 1, because the judgement of the National High Court uses the argument that the conditions laid down in the announcement are not compulsory, and this is unacceptable from the point of view of the normal application of legal rules and thus contrary to the right to reasonable grounds for the judgement. Moreover, the judgement fails to answer the complaint concerning the correction of the test papers of the candidate referred to in paragraph 2.3 (g) above. As to the complaint that the test papers included a meaningless question that was not subsequently deleted, the judgement asserts that the Supreme Court's doctrine affirms that the overseeing court evaluates questions and answers. This argument is a denial of justice.

- The authors regard the fact that, in the amparo proceedings before the Constitutional Court, they were denied the opportunity to appear without being represented by counsel (1) to be contrary to article 14, paragraph 1, and article 26 of the Covenant, since article 81, paragraph 1, of the Constitutional Court Organization Act allows a lawyer, but not a lay person, to represent himself or herself or to appear without counsel, thus exonerating the lawyer from

expensive private correspondence. This difference in treatment creates an unacceptable lack of equality from the standpoint of the Covenant.

3.2 The authors request recognition of their right to obtain redress because of the irregularities which occurred both in the selection process and in the subsequent judicial proceedings.

The State party's submission

4.1 In its submission dated 22 June 1999, the State party contests the admissibility of this communication on the basis of article 3 and article 5, paragraph 2 (b), of the Optional Protocol. With regard to the alleged violation of article 25 (c), it states that the authors have not experienced any lack of equality in access to public service. Their complaint is aimed at proceedings which they characterize as "arbitrary and unfair". However, the characteristics of judicial proceedings have nothing to do with article 25 (c) of the Covenant.

4.2 With regard to the alleged violation of article 2, paragraph 3 (a), of the Covenant, the State party characterizes the argument that there was "psychological pressure" on the court as unserious. In addition, it maintains that there can be no allegation of the non-existence of a remedy following a violation when the competent body, i.e. the Human Rights Committee, has not yet recognized the existence of such violation.

4.3 With regard to the alleged violation of article 14, paragraph 1, of the Covenant, the State party notes that the court ruled according to law and provided extensive and well-reasoned grounds for its decision. Disagreement with the judgement is not sufficient cause to allege a violation. If all unfavourable judgements could be criticized as being based on non-serious grounds, the conclusion is that the only serious and reasonable grounds would be those that support a party's claim.

4.4 As to the requirement of an attorney in proceedings before the Constitutional Court, article 81, paragraph 1, of the Court's Organization Act provides that "natural or legal persons whose interest qualifies them to appear in constitutional proceedings as plaintiffs or additional parties shall entrust their representation to counsel and shall act under the guidance of an attorney. Persons holding a law degree may appear on their own behalf in order to defend their own rights and interests, even if they do not exercise the profession of attorney or lawyer". In the judicial proceedings, the authors were assisted by counsel and represented by an attorney without any complaint. The alleged violation reflects abstract disagreement with a legal principle on the part of the authors' lawyer that is absolutely uncharacteristic of a person who is the victim of a violation of a right guaranteed by the Covenant. Moreover, the authors abandoned that complaint before the Constitutional Court. If an allegation is abandoned in local proceedings, it cannot now be revived before the Committee.

Counsel's comments

5.1 Counsel reiterates his arguments regarding the violation of article 2, paragraph 3 (a), article 25 (c) and article 14, paragraph 1, of the Covenant. With regard to the Constitutional Court's requirement that plaintiffs be represented by a lawyer, counsel states that the difference in treatment between lawyers and non-lawyers should be resolved by also giving non-lawyers the possibility of not using a lawyer; that would be consistent with article 14, paragraph 1, of the Covenant, which

guarantees the equality of all persons before the courts and tribunals. If, in the end, the authors appeared with a lawyer, they did so not because they abandoned their claim, as the State party indicates, but because of the negative reply given by the Constitutional Court to the application submitted, in which counsel requested that his clients should be given the benefit of article 81, paragraph 1, of the Organization Act. In its decision of 20 May 1996, the Court rejected the request, arguing that the benefit in question "is based on safeguarding the full fundamental right of defence, as that would be diminished by the parties' lack of technical knowledge, with their chances of success being reduced".

5.2 Counsel states that the Constitutional Court's argument is inconsistent, since using a lawyer has nothing to do with safeguarding the right of defence or with the parties' technical knowledge, for which counsel remains responsible. The only practical significance of not using a lawyer would be that communications would be sent directly to the party concerned and not through the lawyer. The Constitutional Court's argument on this point also violates the right of due process, which includes the obligation to give impartial consideration to the party's arguments and to avoid giving reasons known to be false. Counsel adds that, in connection with this part of the complaint, the Constitutional Court cites article 6, paragraph 3 (c), of the European Convention on Human Rights and article 14, paragraph 3 (d), of the Covenant, attributing the citations to the amparo applicants, who never referred to the rights of the accused in criminal matters, but to the right to a fair trial provided for in article 14, paragraph 1 (not article 14, paragraph 3 (d)). This conduct on the Court's part constitutes a new complaint which counsel has added to the communication.

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 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee considers that the authors' claim of irregularities in the selection process is based on an interpretation of the scope of the jurisdiction of the first court to determine the criteria that should have been taken into account in the preparation of the final list of candidates who passed the competitive examination. In the light of all the available information, the Committee observes that this circumstance was outlined before the local courts and that the National High Court took a decision on it in its judgement of 8 February 1996. The Committee recalls that, in general, it is the responsibility of the appeal courts in States parties, not the Committee, to review the findings of facts in a case and the way in which national courts and authorities have interpreted national laws unless it can be proved that the courts' decisions were clearly arbitrary or constituted a denial of justice. The authors' argument and the material which they provided did not, for the purposes of admissibility, substantiate their claim that the judicial review of the conduct of the first court was arbitrary or constituted a denial of justice. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol with regard to the complaint of the violation of article 25 (c), article 2, paragraph 3 (a), and article 14, paragraph 1, of the Covenant.

6.3 As to the allegations of the violation of article 14, paragraph 1, and article 26 of the Covenant on the ground that the authors were denied the opportunity to appear before the Constitutional Court without being represented by counsel, the Committee believes that the information provided by the

author does not describe a situation that comes within the scope of those articles. The author claims that it is discrimination not to require persons with a law degree to be represented before the Constitutional Court by counsel when persons without a law degree are required to be so represented. The Constitutional Court's decision explains the reason for the requirement in article 81, paragraph 1, of the Constitutional Court Organization Act, viz. to ensure that a person with knowledge of the law is in charge of applying for a remedy before the Court. The Committee does not consider the authors' allegations that such a requirement is not based on objective and reasonable criteria to have been satisfactorily substantiated for the purpose of admissibility. It therefore considers that this part of the communication is inadmissible.

The 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.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Ahmed Tawfik Khalil, Mr. Patrick Vella and Mr. Maxwell Yalden.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be translated intoArabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion by Ms. Christine Chanet (dissenting)

I disagree with the Committee's decision taken on the grounds given in paragraph 6.3. The privilege allowed to law graduates under the Spanish civil procedure, which does not require them to be represented by counsel in court proceedings, in my view raises *prima facie* a question regarding article 2, 14 and 26 of the Covenant.

It is possible that the State party may put forward convincing arguments to justify the reasonableness of the criteria applied, both in principle and in practice.

Only an examination of the case on the merits, however, might have yielded the answers required for any serious consideration of the case.

[Signed] Christine Chanet

Notes

1. Counsel is a person qualified in law and a member of the Bar Association whose function it is to represent [clients] in most judicial proceedings, see to the settlement of lawsuit costs and take an active part in all official decisions and proceedings.