



**International covenant
on civil and
political rights**

Distr.
RESTRICTED*

CCPR/C/87/D/1313/2004
9 August 2006

ENGLISH
Original: SPANISH

HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10-28 July 2006

DECISION

Communication No. 1313/2004

Submitted by: Amalia Castaño López (represented by counsel,
Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 24 June 2002 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to
the State party on 21 September 2004 (not issued in
document form)

Date of adoption of decision: 25 July 2006

Subject matter: Refusal of authorization to open a pharmacy

Procedural issues: Lack of substantiation; non-exhaustion of domestic
remedies

Substantive issues: Right to equality before the law

Article of the Covenant: 26

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**

Eighty-seventh session

concerning

Communication No. 1313/2004*

Submitted by: Amalia Castaño López (represented by counsel,
Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 24 June 2002 (initial submission)

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

Meeting on 25 July 2006,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 19 June 2002, is Ms. Amalia Castaño López, who claims to be the victim of a violation by Spain of article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel.

Factual background

2.1 On 28 May 1992, the Minister of Health of the Autonomous Community of the Region of Murcia authorized the opening of a pharmacy in the San Juan district of the town of Jumilla, at the request of the author. The owners of eight pharmacies applied for a review of this decision on the grounds that the pharmacy in question did not have a catchment area of 2,000 inhabitants

* 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. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

as required for the opening of a pharmacy. Their application was rejected on 28 July 1993. They then submitted an application for judicial review to the High Court of Murcia, which was rejected on 30 March 1994. They subsequently submitted an appeal in cassation to the Supreme Court, which by judgement of 16 May 2000 annulled the decision of the High Court and revoked the authorization granted for the author's business.

2.2 The Supreme Court based the revocation on the fact that article 3.1 (b) of Royal Decree No. 909/78 stipulates that one of the requirements for opening a pharmacy is that there should be a catchment area of at least 2,000 inhabitants; since at the time of application, 24 October 1990, there were only 1,511 inhabitants, the authorization should not have been granted. The Court indicated that the number of inhabitants in houses constructed after the date of the author's application could not be taken into account in the calculation.

2.3 The author submitted an application for *amparo* to the Constitutional Court on 16 June 2000, in which she claimed that the revocation of her pharmacy licence by the Supreme Court was the result of a manifest error and arbitrary decision by that Court, which had overstepped its mandate as a court of cassation, thereby violating her right to a fair hearing. The author acknowledges that she did not invoke the argument of discrimination in her application, since the Court itself, in a judgement of 24 July 1984, had declared that there was nothing in the Constitution to rule out the possibility of regulating and restricting the establishment of pharmacies. Specifically, the restriction on the establishment of pharmacies did not imply any violation of the right to equality before the law as set out in article 14 of the Constitution.

2.4 The application for *amparo* was rejected on 13 November 2000. The Constitutional Court considered that the Supreme Court had not overstepped its mandate as a court of cassation, since the Supreme Court had not re-evaluated the evidence but had simply considered that the criteria used to calculate the number of inhabitants for the purposes of the judgement were not in compliance with its jurisprudence.

The complaint

3.1 The author considers that the decision of the Supreme Court violates article 26 of the Covenant, since it applies discriminatory legislation which has no equivalent with respect to other commercial activities. No other business is subject to a restriction that requires the establishment of a new population centre or a certain number of inhabitants in such a centre. This legislation owes its existence to the influence of the powerful pharmacists' trade association in Spain. According to the author, there are no objective or reasonable grounds for the difference. The author maintains that she has the right to an effective remedy of *amparo* under article 2, paragraph 3 (a) of the Covenant, which should include permission to reopen her pharmacy and compensation for the damage resulting from its closure.

3.2 The author points out that the Government is authorized to restrict the number of pharmacies under the 1944 National Health Act, and later under Royal Decree No. 909/78. Under this legislation, there must be a population centre of a specific size before authorization to open a new pharmacy can be granted. According to the author, this legislation is discriminatory because: (i) the only commercial activity which has restrictions on its free exercise is pharmaceutical activity - no other commercial activity is subject to this type of restriction; and (ii) the restriction is only explained by historical reasons which are no longer justifiable.

The author cites a decision of the German Constitutional Court which, in 1958, declared that the law on pharmacies which restricted their establishment to areas with a certain population violated the Constitution because it was arbitrary and disproportionate.

The State party's observations on admissibility and on the merits, and the author's comments

4.1 In its observations of 25 November 2004, the State party indicates that the only violation alleged by the author is a violation of the right to equality before the law as set out in article 26 of the Covenant. However, this alleged violation was not mentioned in the application for *amparo* submitted to the Constitutional Court. That application referred to the alleged violation of the right to effective judicial protection from the Supreme Court in relation to the evaluation of the evidence. The State party consequently concludes that domestic remedies have not been exhausted.

4.2 The State party also points out that the decision of the Supreme Court simply applies the principle of equality, in finding that the contested judgement contravened its consistently upheld jurisprudence whereby the population must be calculated on the basis of the number of inhabitants at the time of the application to open the pharmacy, not when the case is being decided or judgement passed. Any other decision by the Supreme Court would have been a departure from precedent and would have involved applying different rules to the author than to other applicants for pharmacy licences, and would therefore have been in violation of the principle of equality. The State party also disagrees with the author's claim that the Supreme Court could not evaluate the evidence examined by the lower court because that would have involved overstepping its mandate, and points out that the scope of the cassation function covers the evaluation of the legality or illegality of the evidence produced in the lower court.

4.3 The State party concludes that the communication should be considered inadmissible as domestic remedies have not been exhausted, in accordance with article 2 of the Optional Protocol, and because it constitutes an abuse of the purpose of the Covenant, in accordance with article 3 of the Protocol.

4.4 As for the merits, the State party, in its observations of 13 April 2005, maintains that there has been no violation of the Covenant. It points out that a close inspection of all the decisions of the domestic administrative and judicial authorities reveals not the slightest trace of any invocation of the principle of equality or discriminatory treatment with regard to other professional activities. The purpose of the litigation has always been confined to fulfilment of the regulatory requirements.

4.5 The issue of granting pharmacy licences has given rise to numerous lawsuits in Spain. Some cases have been brought to the European Court of Human Rights, which has invariably declared them inadmissible.

4.6 The communication does not give a single reason why the rules on the exercise of different professions should be the same. There are obvious differences between opening a pharmacy and other professional activities. The author's case refers not only, or even mainly, to the exercise of a professional activity, but to the establishment of a commercial business in a

country such as Spain, in which the majority of a pharmacy's activities consist of selling prescription drugs financed by the public health system. It cannot be claimed that this activity, which has much in common with a public service and an ordinary commercial retail activity, is equivalent to the exercise of another professional activity. In addition, the communication fails to mention or offer any proof that the author has been discriminated against on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

5.1 In her comments of 22 June 2005, the author reiterates that it was pointless invoking the violation of the principle of equality in the regulations on opening a pharmacy, since the Constitutional Court had ruled negatively on that issue in a judgement of 24 July 1984. In that judgement, the Court examined the question of constitutionality raised by the Regional High Court of Valencia with regard to the contradiction between the restrictions on opening a pharmacy based on population and distance criteria and the right to equality before the law as set out in article 14 of the Constitution.

5.2 In subsequent decisions, the Supreme Court rejected similar allegations and recognized the validity of the rules on opening pharmacies as set out in Royal Decree No. 909/78. In conclusion, there was no possibility of the allegation of discrimination being upheld, and therefore the exhaustion of domestic remedies that were bound to be unsuccessful cannot be required.

5.3 The author maintains that the requirements under Spanish legislation for opening a pharmacy are illogical and that the State party has not explained their purpose. The only reason these requirements are in place is because of the power of the lobby established by owners of authorized pharmacies, which violates the principle of equality before the law.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 In accordance with article 5, paragraph 2 (a), the Committee has ascertained that the matter has not been examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's affirmation that the communication is inadmissible because domestic remedies have not been exhausted, as the author did not invoke the violation of the right to equality before the Constitutional Court. The Committee notes, however, that the Court had already ruled negatively on that issue in a similar case. The Committee reiterates its jurisprudence that when the highest domestic court has ruled on the subject of a dispute, thereby eliminating any prospect of a successful appeal to the domestic courts, the author is not required to exhaust domestic remedies for the purposes of the Optional Protocol. The Committee therefore concludes that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met in the case of the present communication.

6.4 Nonetheless, the Committee considers that the author, for the purposes of admissibility, has failed to substantiate her complaint under article 26 of the Covenant. There is no evidence in the author's allegations to suggest that there has been any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Accordingly, the Committee considers that the author's claim of discrimination under article 26 has not been substantiated for the purposes of article 2 of the Optional Protocol.

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 author of the communication and the State party.

[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.]
