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

DECISION

Communication No. 1097/2002

Submitted by:	Juan Martínez Mercader, Esteban Fajardo Monreal and Jesús Nicolás Orenes (represented by counsel, José Luis Mazón Costa)
Alleged victim:	The authors
State party:	Spain
Date of communication:	13 August 1999 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 16 July 2002 (not issued in document form)
Date of decision:	21 July 2005

* Made public by decision of the Human Rights Committee

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Subject matter:	Discrimination in the remuneration of local government employees
Procedural issues:	Failure to substantiate the complaint
Substantive issues:	Assessment of the facts and evidence by the domestic courts
Articles of the Covenant:	14, paragraph 1, and 26
Articles 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-third session

concerning

Communication No. 1097/2002*

Submitted by:	Juan Martínez Mercader, Esteban Fajardo Monreal and Jesús Nicolás Orenes (represented by counsel)
Alleged victim:	The authors
State party:	Spain
Date of communication:	13 August 1999 (initial submission)

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

Meeting on 21 July 2005,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Juan Martínez Mercader, Esteban Fajardo Monreal and Jesús Nicolás Orenes, Spanish nationals, who allege that they are victims of violation by Spain of article 14, paragraph 1, and article 26 of the Covenant. They are represented by counsel, José Luis Mazón Costa.

Factual information

2.1 The authors worked as a plumber, bus driver and locksmith, respectively, for the municipal authority in Alcantarilla, Murcia. In addition to their full workday, they also served in the municipal authority's fire department, which required them to be physically present in the fire station to wait for emergencies. The authors received a monthly bonus for these services. In December 1994 they filed a complaint against the municipal authority with Employment

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Sir. Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Ms. Ruth Wedgwood.

Tribunal No. 3 in Murcia, claiming that they had been inadequately paid for services provided during the period from 1 February 1993 to 31 January 1994. The pay received did not correspond to the level of remuneration for overtime hours set by collective agreement, or even to the level for regular hours.

2.2 On 29 December 1995 the employment tribunal rejected the claim, maintaining that, in the light of previous decisions, including a decision issued by the Supreme Court on 5 June 1982, hours spent on call could not be considered to constitute overtime. Only hours in excess of normal working hours that were actually spent fighting fires or carrying out other specific duties of firemen could be considered to constitute overtime.

2.3 This decision was appealed through a request for reversal of the tribunal's decision, which was rejected on 13 May 1997 by the Superior Court of Justice in Murcia. That court ruled that time spent in the fire station while on call could not be considered to constitute actual working time, and thus was not payable as overtime, particularly when no hours of actual work had been proved.

2.4 The authors filed an appeal for unification of doctrine with the Supreme Court, which was rejected on 13 January 1998 on the grounds that the decision in question was not identical to the one with which it was being contrasted under the appeal. Lastly, the authors filed an application for *amparo* with the Constitutional Court, which was rejected in October 1998 as being devoid of substance.

The complaint

3.1 The authors allege a violation of their right to due process under article 14, paragraph 1, of the Covenant for the following reasons:

- Although Employment Tribunal No. 3 recognized the time spent on call in the fire station as constituting part of the workday, it rejected the request on the grounds that the authors had not provided any proof of hours actually spent fighting fires or carrying out other duties of a fireman. According to the authors, that issue had never been raised;

- The decision of the Superior Court of Justice was inconsistent. The same court rejected the request to have the periods spent on call paid at the regular hourly rate, if not as overtime, because it maintained that that subsidiary request had not been made in the court of first instance;

- The Supreme Court's decision in the appeal for unification of doctrine was arbitrary, since the circumstances, points of law and claims were identical in the two decisions being contrasted. The only difference was the applicable collective agreement.

3.2 The authors also allege discrimination under article 26 of the Covenant. The decisions cited establish that the authors were not entitled to any remuneration for hours spent on call at the fire station, during which time the situation could change from one of utter tranquillity to one of imminent danger and they could not enjoy family life or take part in any leisure activities. Yet any other fireman or worker who spent periods of time on call was entitled to be remunerated for

those periods, independently of whether or not he had actually worked. Specifically, any fireman was entitled to payment for any hours spent on call in excess of regular working hours, and that entitlement had been denied the authors.

State party's observations on admissibility and the merits and authors' comments

4.1 On 9 October 2002 the State party contested the admissibility of the communication. On 23 January 2003 the State party reiterated its view that the complaint was inadmissible and that there had been no violation of the Covenant by the State party.

4.2 The State party maintains that when the authors submitted their application for overtime to the court of first instance, they should have provided material and legal proof that the hours in question were in fact overtime. When they failed to do so, the judge, applying the law correctly, rejected their claim. During the appeal phase the authors formulated a subsidiary request, namely, that the hours in question should be considered as regular hours. However, it was not possible to consider an appeal relating to a matter that had not been raised, even though it could have been, in the court of first instance. In addition, the allegation that the right to a defence had been violated because the Supreme Court had rejected the appeal for unification of doctrine is frivolous in the light of the Court's reasoning. The authors, who held various jobs, received special monthly bonuses for their service with the fire department. The contrasting decision cited in the appeal to the Supreme Court was not an appropriate example, since the workers to whom it applied were professional firemen whose working hours corresponded to their jobs as firemen.

4.3 According to the State party, the communication reflects nothing that might imply a violation of the Covenant, but merely the authors' dissatisfaction at having failed in their domestic remedies. Consequently the communication must be considered inadmissible, in accordance with article 3 of the Optional Protocol, as an abuse of the right of submission of communications.

5.1 On 28 August 2003 the authors transmitted to the Committee their comments on the State party's observations. They insist it can be deduced from the employment tribunal's decision that the more than 1,000 hours each of them had spent on call at the fire station had not been counted, and that only those hours during which they were out fighting fires or conducting rescue operations had been. The rest of the time they were providing free labour. In addition, the Supreme Court decision of 5 June 1982, which the judge had cited as a precedent, had nothing to do with the authors' case. That decision applied to certain employees of a provincial office who, while performing their own regular jobs, also remained on call by means of a two-way radio. Those employees received additional pay for any firefighting or rescue duties they performed, since the rest of the time they were performing their regular jobs.

5.2 According to the authors, the employment tribunal's decision ran counter to the terms of the collective agreement reached with the Alcantarilla municipal authority, by virtue of which they were entitled to payment for any hours worked beyond the regular workday at a rate of 175 per cent, or at least 100 per cent of their regular pay. When their case was heard the representative of the municipal authority neither denied the hours spent nor claimed that they were not payable or payable only if the authors were on active duty, but had indicated that they would be paid at the same rate as regular hours. The Superior Court of Justice also held it

against the authors that they had not requested payment for regular hours, which amounted to a denial of the principle of "*quien pide lo más pide lo menos*" [whereby a request for a higher amount, i.e. overtime pay, is automatically assumed to include a lower amount, in this case pay at the regular hourly rate].

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 97 of its rules of procedure, decide whether the complaint 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.

6.3 With regard to the authors' claim that the situations reported constitute a violation of article 14, paragraph 1, of the Covenant, the Committee considers that the allegations relate in substance to the assessment of facts and evidence made by the Spanish courts. The Committee recalls its jurisprudence[1] and reiterates that it is generally not for itself, but for the courts of States parties, to review or to evaluate facts and evidence, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence was manifestly arbitrary or amounted to a denial of justice. The Committee considers that the authors have not sufficiently substantiated their complaint to be able to state that such arbitrariness or a denial of justice existed in the present case, and consequently believes that this part of the communication must be found inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the authors' claim that the situations reported constitute a violation of article 26 of the Covenant, the Committee considers that the authors have not sufficiently substantiated their complaint to be able to conclude that there was discrimination on one of the grounds specified in that article. Consequently, this part of the communication is also inadmissible under 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 authors and to the State party.

[Done 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.]

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[1] See, for example, communication No. 541/1992, *Errol Simms v. Jamaica*, decision adopted on 3 April 1995, paragraph 6.2, and communication No. 842/1998, *Sergei Romanov v. Ukraine*, decision adopted on 30 October 2003, paragraph 6.4.