



**International covenant
on civil and
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HUMAN RIGHTS COMMITTEE
Eighty-sixth session
13-31 March 2006

VIEWS

Communication No. 1164/2003

Submitted by:

Daniel Abad Castell-Ruiz, Fernando Elcarte Revestido, Jesús Alfaro Baztan, Higinio Ayala Palacios, Javier Casanova Aldave, Juan Bautista Castro Muñoz, Enrique de los Arcos Lage, Gabriel Delgado Bona, Leónides Del Prado Boillos, Manuel García del Moral Payueta, José Iglesias Marchite, José A. Janin Mendia, Jesús López Lasa, Mariano Martínez Vergara, Mirentxu Oyarzabal Irigoyen, Tomás Tinture Eguren (represented by counsel)

Alleged victims:

The authors

State party:

Spain

Date of communication:

21 October 2002 (initial submission)

Document references:

Special Rapporteur's rule 97 decision, transmitted to the State party on 21 February 2003 (not issued in document form)

Date of adoption of Views:

17 March 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Difference in remuneration, in the form of a special allowance, for doctors under exclusive contract to the Navarra Health Service and for doctors who, in addition to providing services in the public sector, also have private practices

Procedural issues: Abuse of the right to submit communications; incompatibility with the provisions of the Covenant

Substantive issues: Equality before the law; equal protection under the law; non-discrimination

Articles of the Covenant: 26

Articles of the Optional Protocol: 3

On 17 March 2006, the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1164/2003. The text of the Views is appended to the present document.

[ANNEX]

Annex

**VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5,
PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

Eighty-sixth session

concerning

Communication No. 1164/2003*

Submitted by: Daniel Abad Castell-Ruiz, Fernando Elcarte Revestido, Jesús Alfaro Baztan, Higinio Ayala Palacios, Javier Casanova Aldave, Juan Bautista Castro Muñoz, Enrique de los Arcos Lage, Gabriel Delgado Bona, Leónides Del Prado Boillos, Manuel García del Moral Payueta, José Iglesias Marchite, José A. Janin Mendia, Jesús López Lasa, Mariano Martínez Vergara, Mirentxu Oyarzabal Irigoyen, Tomás Tinture Eguren (represented by counsel)

Alleged victims: The authors

State party: Spain

Date of communication: 21 October 2002 (initial submission)

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

Meeting on 17 March 2006,

Having concluded its consideration of communication No. 1164/2003, submitted on behalf of Daniel Abad Castell-Ruiz, Fernando Elcarte Revestido, Jesús Alfaro Baztan, Higinio Ayala Palacios, Javier Casanova Aldave, Juan Bautista Castro Muñoz, Enrique de los Arcos Lage, Gabriel Delgado Bona, Leónides Del Prado Boillos, Manuel García del Moral Payueta, José Iglesias Marchite, José A. Janin Mendia, Jesús López Lasa, Mariano Martínez Vergara, Mirentxu Oyarzabal Irigoyen and Tomás Tinture Eguren, under the Optional Protocol to the International Covenant on Civil and Political Rights,

* 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. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 21 October 2002, are Daniel Abad Castell-Ruiz, Fernando Elcarte Revestido, Jesús Alfaro Baztan, Higinio Ayala Palacios, Javier Casanova Aldave, Juan Bautista Castro Muñoz, Enrique de los Arcos Lage, Gabriel Delgado Bona, Leónides Del Prado Boillos, Manuel García del Moral Payueta, José Iglesias Marchite, José A. Janin Mendia, Jesús López Lasa, Mariano Martínez Vergara, Mirentxu Oyarzabal Irigoyen and Tomás Tinture Eguren. All are Spanish nationals and medical doctors who work for the Navarra Health Service and at the same time run private practices. They claim to be victims of a violation of article 26 of the Covenant by Spain. The Optional Protocol entered into force for the State party on 25 April 1985. The authors are represented by counsel.

Factual background

2.1 The authors of the communication work as medical doctors in the Navarra Health Service (Osasunbidea), under the legal regime covering “statute personnel” and administrative and general service staff. In addition to this work in the public sector, they also run private medical practices.

2.2 The authors state that the law governing the personnel of the Navarra Health Service (hereinafter “the Service”) sets the levels of remuneration to which the Service’s doctors are entitled. In addition to their basic salary, Service staff are entitled to additional allowances, one of which is known as the “special allowance”. The law provides that staff in receipt of a special allowance equivalent to 45 per cent or more of their basic salary must provide their services on an exclusive basis, i.e. they must be fully available and totally committed, and may not engage in any other paid work in either the public or the private sector, with certain exceptions. Staff who, like the authors, receive a special allowance of less than 45 per cent of the basic salary are not under exclusive contract and may practise medicine privately.

2.3 The authors consider that they have suffered discrimination because the special allowance they receive is less than that received by staff under exclusive contract even though, they allege, they do the same work as the doctors under exclusive contract, with the same working hours (8 a.m. to 3 p.m.) and the same responsibilities and obligations.

2.4 In order to show that they have the same working conditions as the doctors under exclusive contract, the authors provide two certificates from the heads of personnel of two Navarra Health Service hospitals. According to these certificates, the authors have the same working hours and schedule and the same responsibilities as doctors under exclusive contract. They also provide a copy of a judgement handed down by Pamplona employment tribunal No. 3 on 2 January 1999, which declared proven in the proceedings brought by the authors in the domestic courts of the State party that “the complainants’ working year and schedule are the

same as those of the other doctors ... working under exclusive contract ... and, in the performance of their duties, they have the same responsibility as doctors in the same occupational group, position and workplace who work under exclusive contract”.

2.5 Two of the authors lodged a complaint with the Managing Director of the Navarra Health Service, but this was rejected in decision No. 565/98 of 13 May 1998. They appealed this decision in Pamplona employment tribunal No. 3, which rejected it in a ruling of 2 January 1999. The tribunal held that to accept the authors’ contention would be to grant equal treatment in dissimilar situations, since the authors had not chosen to practise medicine exclusively in the public sector.

2.6 The authors filed an appeal against that ruling in the Navarra High Court of Justice. The High Court rejected the appeal on 14 May 1999, finding, as the tribunal had, that the authors themselves had voluntarily placed themselves in a situation of inequality vis-à-vis the doctors under exclusive contract. The authors filed an appeal in cassation for unification of doctrine before the Supreme Court, whose Employment Division dismissed it on 25 October 2000. They then filed an application for *amparo* against the ruling in question with the Constitutional Court, which rejected it on 8 April 2002. The other authors filed a complaint with the Director of Administration and Human Resources of the Navarra Health Service, but this was rejected in decision No. 949/97 of 29 December 1997. They filed an ordinary appeal against that decision, which was rejected in a Navarrese Government decision of 15 June 1998. That decision was appealed in the Navarra High Court of Justice and rejected by the Administrative Division in a ruling of 22 March 2001. That ruling was appealed in the First Division of the Constitutional Court and rejected in a judgement dated 8 April 2002.

The complaint

3.1 The authors allege a violation of article 26 of the Covenant. Referring to the Committee’s general comment No. 18, they point out that when legislation is adopted by a State party it must comply with the requirement of article 26 that its content should not be discriminatory. They add that the principle of non-discrimination is not limited to the rights provided for in the Covenant. They argue that not all differential treatment constitutes discrimination, only such differential treatment as cannot be justified on reasonable and objective grounds, and they point out that, as stated in their communication, the Navarra Health Service has created two distinct categories of doctor that are paid different salaries despite the fact that there is no difference in the work done by the two groups.

3.2 The authors maintain that there are no objective and reasonable grounds for the difference in the way the two categories of doctor are treated, and they examine the arguments advanced by the domestic courts to justify this differential treatment.

(a) Origin of the exclusive contract

The authors explain that the legal regime governing the right to receive remuneration in the form of a special allowance has its origins in the 1987 doctors’ strike. The Government offered the doctors’ unions a pay rise for those doctors who worked solely for the Government and not in private clinics or consultancies. This offer was accepted and enshrined in a National Health Institute decision dated 25 April 1988, containing a Council of Ministers decision

stipulating that the special allowance would be paid for not working in the private sector and for providing the services associated with a single post in government service. According to the authors, this rule resulted in discrimination against doctors working in certain areas of the private sector and that, to head off any challenge on grounds of unconstitutionality for violating the principle of non-discrimination, a Royal Decree was also passed (No. 3/87 of 12 September 1987) regulating the special allowance in more general terms. According to this decree, the allowance was intended as compensation for specific characteristics of certain posts, such as special technical difficulty, commitment, responsibility, or dangerous or heavy work. However, the authors claim that the special allowance from the beginning was linked to the fact that the doctors who received it worked exclusively in government service.

(b) Optional nature of the exclusive contract

The domestic courts which ruled on the authors' case argued that the situations of the two categories of doctor were different because the authors had not opted to practise medicine exclusively within the public sector. In the authors' view, this argument does not amount to objective and reasonable grounds, for if the special allowance is paid on grounds of exclusivity there is no reason why the law should view work such as university teaching, but not work in a private medical practice, as compatible with the full-time regime. The authors submit that the argument used by the domestic courts to justify differential treatment was not so much the notion of exclusivity as the assumption that the doctors who work in the private sector earn more than those employed on an exclusive basis.

(c) Voluntary nature of the contract

Another argument put forward by the domestic courts to justify the differential treatment was that the authors themselves opted for an unequal and, for them, more advantageous position in relation to the doctors under exclusive contract, in that they are able to practise private medicine. The authors maintain that the fact that they freely chose to practise private medicine does not mean there was no discrimination. In their view, this freedom of choice is only relative, since doctors who opt to work in the private sector will be paid less than medical colleagues who work exclusively for the Government, simply because they have chosen to spend their free time on an activity that the Government does not consider compatible with the exclusive regime, whereas a doctor who decides to work as a university teacher is entitled to the same salary as a doctor under exclusive contract.

(d) Availability

According to the Constitutional Court, the differential treatment is not discriminatory because the doctors under exclusive contract must be available whenever they are needed by the Service, and because this kind of working relationship is the most appropriate for health-care institutions. The authors do not see this argument as objective or reasonable either, having demonstrated to the domestic courts - and the courts having concurred - that both categories of doctor do the same work. The doctors under exclusive contract are not required to work longer hours than their standard working day. If the Service so requires, it may call on any of its doctors, whether or not they are under exclusive contract, to serve special duty, i.e. to extend their working day to meet the needs of the Service. The authors cite the judgement handed down by Pamplona employment tribunal No. 3, which acknowledges that doctors under exclusive

contract are not required to work any overtime that is not considered as special duty. The theoretical possibility that the Service might assign certain duties to doctors under exclusive contract cannot, in the authors' view, constitute reasonable grounds for differential treatment.

(e) The exclusive contract is the most appropriate for public health-care institutions

The authors do not agree with this argument, which was advanced by the Constitutional Court to justify differential treatment for doctors under exclusive contract. The authors argue that this would make sense if such doctors did nothing else apart from their work with the Service, but in fact they are allowed to do other work such as teaching. The authors further argue that, if the Government believes the exclusive contract to be the most appropriate for health-care institutions, it should not impose it at the expense of a particular category of doctors who are paid less for doing the same work as other doctors.

3.3 The authors submit that, in admitting certain kinds of work as compatible with the exclusive regime, the Service is recognizing that that regime is based on the activities performed by doctors after working hours, and not on their availability for work in the Service.

State party's observations on admissibility and on the merits

4.1 By note verbale dated 22 April 2003, the State party argues that the communication is inadmissible under article 3 of the Optional Protocol on the grounds that accepting the authors' claim would be tantamount to discriminating against the doctors under exclusive contract, who would be paid the same as the authors despite their different - and more demanding - working conditions and regime. As such an outcome would lead to inequality, it would be unreasonable and incompatible with the provisions of the Covenant.

4.2 In the State party's view, the difference in treatment is established in Navarrese Autonomous Community Act No. 11/92, of 20 October 1992, by which the special allowance is reserved for doctors under exclusive contract, in accordance with a voluntary regime which the law seeks to promote because full availability and total commitment are deemed beneficial to Navarra's public health system. The authors of the communication preferred not to opt for an exclusive contract and to continue with their private practices instead. It is not only the Navarra Health Service which views private professional activities as incompatible with public service; this rule applies across the board in government service in Spain, except in respect of part-time teaching, which is exempt. Incompatibility is a well-established concept enshrined notably in the 1984 law on incompatibility, whose own rationale is indisputable, aiming as it does to ensure the greatest commitment in the performance of public service. In the State party's view, it is perfectly legitimate for the law to attempt to ensure that public services are performed under optimum conditions by establishing pay differentials to reflect exclusivity.

4.3 The State party believes it is obvious - and indeed the authors acknowledge - that the regime of those doctors who receive a higher special allowance is different from that of the authors, since they accept a greater degree of commitment and availability than the authors do. While the doctors under exclusive contract may not earn income from similar private occupations and may be obliged to work any additional hours required by the Service, the

authors cannot be held to the exclusive employment rule or compelled to work overtime even if required by the Service. Since the two situations are not the same, it would violate the equal treatment principle for the remuneration to be the same in both cases.

4.4 In the State party's view, the equal treatment principle is not applicable to dissimilar situations if there is good reason for different treatment. The State party cites the ruling by the Spanish Constitutional Court, which holds that no violation of the equal pay principle can be found in the authors' case on the grounds that: (a) the situations of the two categories of doctor are different, given that the authors' income derives from both public and private sources while the doctors under exclusive contract are paid solely from public funds; (b) the higher special allowance is intended as compensation not only for work actually done but also for certain other factors of undoubted economic value, such as full availability and total commitment, which mean that the Navarra Health Service may if necessary require the doctors under exclusive contract to work overtime; (c) the provision of a special allowance for their exclusive commitment is reasonably justified inasmuch as that commitment is most likely to stimulate the staff's interest in, identification with and involvement in health-care institutions; (d) the authors were free to opt for an exclusive or non-exclusive contract and were aware of the consequences of their choice; (e) the authors are at liberty to opt for the alternative regime; and (f) what is not compatible with the equal-treatment principle is that doctors who are not under exclusive contract should seek the advantages enjoyed by those who are, but without suffering the same disadvantages.

4.5 The State party submitted its arguments on the merits by note verbale dated 2 August 2004. It argues that, for discrimination to exist, those affected must be in similar situations and yet be treated differently. The State party reiterates that the authors' situation is different from that of the doctors under exclusive contract. It recalls that the difference stems from an individual act of free will on the part of each doctor, a decision that may be taken either when the doctor joins the Navarra Health Service or in the course of his or her employment there. In the State party's view, the fact that it was an act of free will that gave rise to the different situation rules out any possibility of discrimination. In that regard it cites the Navarra High Court of Justice ruling, according to which: "The authors themselves have voluntarily opted for a different situation from that of the doctors they compare themselves with, a situation which, in the Court's view, is more advantageous since in addition to their work in the public sector they may also practise private medicine."

4.6 The State party rejects the authors' assertion that their situation is the same as that of the doctors under exclusive contract, arguing that they are confusing the different legal situations of the two categories of doctor with their effects in practice. The normal working day of either group of doctors is one thing, but the fact that one group of doctors has opted to practise medicine exclusively for the Navarra Health Service and is entirely at its disposition and totally committed to it is another. These doctors may be required to work additional hours to meet the exigencies of the Service, which does not mean that they actually work such hours in practice. De jure and de facto availability is the key to the difference in remuneration.

4.7 According to the State party, the legal regime applicable to the doctors under exclusive contract to the Navarra Health Service is no different from the legal regime applicable to Spanish government employees in general. According to Spanish law, public servants under exclusive contract may not engage in any other paid work, with the exception on a limited basis of certain

kinds of teaching or research work, which are not considered prejudicial to availability for or commitment to full-time work in the public sector. In the State party's view, therefore, there is no merit to the authors' allegation that their situation is comparable to whatever teaching or research activity may be undertaken by doctors under exclusive contract.

4.8 In conclusion, the State party considers that, far from giving rise to discrimination, its legislation has protected the principle of equal treatment, and that to accept the authors' contention would be to give rise to discrimination against the doctors under exclusive contract to the Navarra Health Service, who, despite the more demanding nature of their conditions of work and legal regime, would receive the same remuneration as the authors, in violation of the principle of equal treatment established in article 26 of the Covenant.

Comments by the authors on the State party's observations

5.1 In a letter dated 8 November 2004, the authors reiterate that both categories of doctor do the same work and have the same working hours and the same responsibilities. In the authors' view, the fact that the exclusive regime is voluntary does not change the discriminatory nature of the differential treatment. They argue that, while it is true that doctors may choose which regime to work under, the basis for that choice is discriminatory since those doctors who practise private medicine can never be admitted to the exclusive regime, whereas those who work as university teachers, even in private institutions, can. As to availability, the authors repeat that it is a criterion devoid of substance either in law or in practice. The doctors under exclusive contract are not obliged to work additional hours unless they are considered as special duty. Although it is true that the Navarra Health Service may require overtime to be worked, in practice all doctors are offered overtime, which is voluntary and subject to a supplementary productivity allowance for both categories of doctor.

5.2 The authors note that their complaint concerns not the theoretical framework of the special allowance but the way it is applied in practice, which is wrong and discriminatory. They argue that a number of the State party's autonomous communities have begun to question the discriminatory manner in which the special allowance is applied and have decided to extend it to all doctors, regardless of the regime they work under. After remaining in effect for 20 years and having been originally introduced to meet the demands of various doctors' unions and the Government's wish to prioritize public over private medicine, the special allowance has been reduced for certain doctors on account of their private activities. In practice, all the doctors, whether or not they are under exclusive contract, do the same work, have the same duty rota and the same responsibilities, and are equally at the disposal of their institution. The discrimination lies in the fact that those doctors who run private practices are paid less and the special allowance is now used as a method of penalizing them. It has been proved that there is no difference between the two categories of doctor in respect of availability. Moreover, the authors reiterate, the special allowance does not preclude the doctors under exclusive contract from doing other paid work, since it allows university teaching, research and the administration of a family business. Such activities are conducted during the doctor's working hours and thus limit his or her commitment and availability. All the special allowance does is to exclude the practice of private medicine, which unfairly impairs individuals' freedom to dispose of their free time as they wish and discriminates against those doctors who choose to practise private medicine in their free time. The authors also point out that the possibility that the Navarra Health Service

might require the doctors under exclusive contract to work overtime has never materialized in practice, and would in any case constitute a breach of the State party's labour standards, under which working weeks in excess of 48 hours, overtime included, are prohibited.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 In accordance with rule 93 of its rules of procedure, before considering any claims contained in a communication, the Human Rights Committee must decide whether the communication 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. Moreover, the Committee notes that the State party has not adduced any argument to the effect that domestic remedies have not been exhausted and consequently finds that the provisions of article 5, paragraph 2 (b), of the Optional Protocol do not preclude its consideration of the complaint.

6.3 The Committee takes note of the State party's argument to the effect that the communication is inadmissible under article 3 of the Optional Protocol on the grounds that accepting the authors' claim would be tantamount to discriminating against the doctors under exclusive contract, who would be paid the same as the authors despite their different - and more demanding - working conditions and regime, and that, since such an outcome would lead to inequality, it would be unreasonable and incompatible with the provisions of the Covenant. The Committee nevertheless finds that the authors' claims raise issues that warrant consideration on the merits.

6.4 Accordingly, the Committee finds that the communication is admissible and proceeds to a consideration on the merits.

Consideration on the merits

7.1 Turning to the substance of the communication, the Committee refers to its jurisprudence, according to which a difference in treatment under the law that acts to an individual's detriment and is not based on reasonable and objective grounds may constitute a violation of article 26. The Committee takes note of the authors' argument that the law on the special allowance is applied arbitrarily in their case despite the fact that their situation is the same as that of the doctors under exclusive contract, inasmuch as both categories of doctor have the same working hours and the same responsibilities. The Committee further notes that the State party rejects the authors' assertion.

7.2 In the Committee's view, determining whether the situations of the doctors in the two categories are de facto the same or different basically requires assessing the facts, which is a matter for the domestic courts. In this regard, the Committee notes from the documentation submitted by the authors that Navarra-Pamplona employment tribunal No. 3, the Navarra High Court of Justice and the Constitutional Court all found that the situations of the two categories of

doctor are not exactly equivalent. In the Committee's opinion, the dossier does not reveal that the authors are in a situation that is de facto similar to that of the doctors under exclusive contract and that would justify their argument that they are entitled to equal remuneration.

7.3 The Committee further notes that admission to the exclusive regime or the regime the authors belong to depends entirely on the wishes of the individual doctor and is a choice that may be made upon entry to government service or at any time thereafter. Consequently, the Committee finds that the authors have not been subjected to discriminatory treatment in accordance with any of the individual attributes set forth in article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted by the authors do not disclose a violation of article 26 of the Covenant.

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