HUMAN RIGHTS COMMITTEE

Marín Gómez v. Spain

Communication No. 865/1999

22 October 2001

CCPR/C/73/D/865/1999

VIEWS

Submitted by: Mr. Alejandro Marín Gómez (represented by counsel, Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 20 July 1998 (initial submission)

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

Meeting on 22 October 2001,

Having concluded its consideration of communication No. 865/1999 submitted to the Human Rights Committee by Mr. Alejandro Marín Gómez under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The author of the communication dated 20 July 1998 is Mr. Alejandro Marín Gómez, a Spanish citizen who claims to be the victim of violations by Spain of articles 14, paragraph 1, 25 (c) and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author joined the Guardia Civil on 1 March 1981, when he was 19, (1) and remained on active duty until 15 November 1990, when he went on "active reserve" status owing to the loss of psychological and physical fitness. (2) On 15 November 1994, when he had been in the active reserve for four years, the District Military Medical Court handed down a ruling unanimously recognizing him as fit for active duty. (3)

2.2 In a decision dated 28 April 1995, the Ministry of Defence rejected the application the author made to return to active duty in February 1995. The decision was based on the fact that "the transitional provision in question, which allows a return to active duty, does not apply to the person in question because the reason for his change to active reserve status was not that referred to in article 4, paragraph 1 (a), of Act No. 20/1981, (4) but, rather, psychological and physical unfitness, as referred to in article 4, paragraph 1 (d)".

2.3 The author applied for judicial review against the decision by the Ministry of Defence dated 28 April 1995; the application was ruled on by the Fifth Administrative Law Division of the National High Court on 28 February 1997, which upheld the decision by the Ministry of Defence. That Division based its decision on the fact that, unlike the acceptance of the return to active duty of persons who were on reserve status for reasons of age, the rejection of the return to active duty by persons who were on active reserve status owing to the loss of psychological and physical fitness, which was later recovered, does not involve a violation of the right to equal access to public service. The National High Court concluded that the two situations are different and that there is thus no discrimination.

2.4 The author filed a remedy of *amparo*, which was rejected by the Constitutional Court on 3 November 1997 on the grounds that the ruling in question is not contrary to the principle of equality, since it deals with different problems on the basis of different criteria.

The complaint

3.1 The author considers that the rights provided for in articles 25 (c) and 26 of the Covenant were violated when he was prevented from returning to active duty in the Guardia Civil after being declared fit by a Medical Court following the illness which had led to his change to reserve status, since reincorporation is allowed for civil guards who were on active reserve status for reasons of age. In this regard, the author maintains that the second transitional provision of Act No. 28/1994 (5) creates discrimination. It is also contrary to the right to access to public service in the Guardia Civil, which must be performed in conditions of equality.

3.2 The author considers it contrary to articles 14, paragraph 1, and 26 of the Covenant that, in the *amparo* proceedings in the Constitutional Court, he was denied the possibility of appearing without being represented by counsel, (6) since article 81.1 of the Court's Organizational Act enables persons who hold law degrees to appear in *amparo* proceedings without counsel, whereas persons who do not hold law degrees must be assisted by counsel.

Observations by the State party on admissibility

4. In its observations of 19 June 1999, the State party contests the admissibility of the communication on the grounds that the author was always assisted by a lawyer and a counsel and never complained of being a victim of any violation. Consequently, the author cannot claim that he is a victim of a violation, since he never made such an allegation before the Constitutional Court.

Comments by the author on admissibility

5.1 In his comments of 1 September 1999, the author replies to the observations by the State party on admissibility and makes it clear that, on 3 April 1997, he requested the Constitutional Court to exempt him from using counsel, in accordance with article 2, paragraph 3, of the Covenant and article 14 of the Spanish Constitution.

5.2 The Constitutional Court rejected that request on 21 April 1997, warning the author that, if he did not appear with counsel within 10 days, the application would be declared inadmissible and dismissed.

Observations by the State party on the merits

6.1 In its observations of 5 October 1999, the State party, referring to the alleged violation of article 25 (c), maintains that, since the author joined the Guardia Civil as an official and receives the salary of a Guardia Civil officer, it is obvious that he has not been denied access to public service. It considers that the author is mixing up "access to public service", a right guaranteed by article 25 (c) of the Covenant, and changes of administrative situation within the public service, which are not covered by the Covenant. What the case brought by the author thus involves is not access to public service, but, rather, a change from one administrative situation to another within the public service.

6.2 With regard to the allegations under article 26 of the Covenant, the State party contests the fact that, according to the author, changing from active duty status is allowed when the change to reserve status took place for reasons of age, not for reasons of illness. According to the State party, the author has mixed up the legal regulations and it explains that active reserve status, as provided for by Act No. 20/1981, disappeared with Act No. 28/1994 of 18 October, whose seventh transitional provision states that "Guardia Civil personnel who are on active reserve status shall be moved to reserve status". It is also not possible to change from reserve status to active duty status. (7)

6.3 Act No. 20/1994 entered into force on 20 January 1995. According to the State party, the author was declared fit for active duty on 15 November 1994 and he was informed of the agreement of the Medical Court on 15 December 1994. Until 20 January 1995, the author was still on active reserve status and could have requested his return to active duty, but he did not do so until 23 February 1995, when he was still on reserve status and the preceding paragraph was applicable to him.

6.4 A temporary exception was made to this prohibition on changing from reserve to active duty

and, according to the State party, the author fails to mention it. In accordance with Act No. 20/1981, the Guardia Civil could change to active reserve status for reasons, inter alia, of age or illness. In accordance with Act No. 28/1994, active reserve status became reserve status and the Guardia Civil could change to reserve status, *inter alia*, for reasons of age or for reasons of illness. However, the author fails to say that, in addition to replacing active reserve status by reserve status, Act No. 28/1994 delays the change to reserve status until age 56. (8) This delay in the age for changing to reserve status affects only those who changed or considered changing to the former active reserve status for reasons of age.

6.5 The State party concludes that the law does not discriminate between civil guards on reserve status for reasons of illness or age, but merely replaces active reserve status by reserve status and raises the age for changing to reserve status. Moreover, this delay, from 50 to 56 years, affects all those who changed or were considering the possibility of changing to reserve status when they reached age 50. For this purpose, the law allows them one month either to request a change to reserve status, even though they have not reached age 56, or to return to active duty from reserve status, which they went on when they reached age 50 and which the law delays until age 56.

Comments by the author on the merits

7.1 In his comments dated 28 January 2000, the author replies to the State party's allegations as to the merits and reaffirms, with regard to article 25 (c) of the Covenant, that, although he was on active reserve status, he was prevented from carrying out the functions of a civil guard. He also emphasizes that the case brought by the Ministry of Defence is clearly discriminatory, since, if he had been on active reserve status for reasons of age, he would be able to return to active duty, but he cannot do so because he went on active reserve status as a result of an illness and even though he was less than 50.

7.2 With regard to article 26, the author states that the decision by the Ministry of Defence refers to the second transitional provision of Act No. 28/1994 and that that provision is not applicable to him because he changed to active reserve status not for reasons of age, but because of psychological and physical unfitness, as already indicated in paragraph 2.2. The author therefore considers that the transitional provision in question is discriminatory, since there is no difference in treatment based on objective and reasonable criteria.

Issues and proceedings before the Committee

8.1 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 the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the State party's observations on admissibility, in which it claims

that the author never objected in the national courts to the need for counsel. The Committee nevertheless considers that the fact that the author requested the Constitutional Court to exempt him from using counsel proves that he did exhaust this remedy.

8.4 With regard to the allegations of the violation of articles 14, paragraph 1, and 26 of the Covenant on the grounds that the author was denied the possibility of appearing before the Constitutional Court without being represented by counsel, the Committee considers that the information provided by the author does not describe a situation which comes within the scope of those articles. The author claims that it is discriminatory not to require persons holding law degrees to appear before the Constitutional Court through counsel when persons who do not hold law degrees must meet this requirement. The Committee refers to its jurisprudence (9) and recalls that, as the Constitutional Court itself argued, the requirement of counsel reflects the need for a person with knowledge of the law to be responsible for handling an application to that Court. As to the author's allegations that such a requirement is not based on objective and reasonable criteria, the Committee considers that the allegations have not been properly substantiated for the purposes of admissibility. Consequently, this aspect of the communication is inadmissible under article 2 of the Optional Protocol.

8.5 The Committee declares the rest of the communication admissible and will consider it as to the merits.

Consideration as to the merits

9.1 The Human Rights Committee has considered the present communication in the light of the information provided by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's allegations that he is a victim of a violation of article 26 of the Covenant, the Committee notes that he was declared fit for active duty on 15 November 1994 and that he was notified of the Medical Court's agreement on 15 December. However, the author did not request a transfer to active duty at that time. The Committee notes that new Act No. 20/1994 entered into force on 20 January 1995 and that it eliminated the "active reserve status" category, leaving only the "reserve status" category, which, according to article 103 of Act No. 17/1989, does not allow military personnel on reserve status to change to active duty. The Committee notes that the author was affected by Act No. 20/1994 only to the extent that, as of 20 January 1995, he could not request a transfer to active duty. The Committee also notes that, since the author did not take the opportunity to request a transfer to active duty prior to 20 January 1995, the situation is of his own making, not that of the State party. The Committee takes note of the author's allegation that Act No. 20/1994 is discriminatory because it allows a return to active duty only for persons who went on reserve status for reasons of age. However, the Committee considers that this Act is not discriminatory, since it merely extends the retirement age to 56 years and allows persons who went on active reserve status at age 50 to apply to return to active duty, as provided for by law, and then base themselves on the new age to change to reserve status. Consequently, the Committee takes the view that the facts as submitted by the author do not disclose a violation of article 26 of the Covenant.

9.3 For the same reasons as those cited in the preceding paragraph, the Committee considers that there has been no violation of the right to equality of access to public service, as provided for in article 25 (c) of the Covenant.

10. 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 before it do not disclose a violation by Spain of any of the provisions of the Covenant.

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

** The text of an individual opinion signed by one Committee member, Ms. Christine Chanet, is appended to this document.

[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.]

Individual opinion by Committee member
Ms. Christine Chanet (dissenting)

I disagree with the Committee's decision taken on the grounds given in paragraph 8.4.

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 articles 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. He was born on 25 July 1961.

2. Article 4, paragraph 1 (d), of Act No. 20/1981 of 6 July establishing active reserve status and setting ages of retirement for professional military personnel.

3. He has not submitted a copy of the ruling to the secretariat.

4. Article 4, paragraph 1 (a), refers to a change to active reserve status upon reaching the ages set in article 5 of Act No. 20/1981.

5. Second transitional provision of Act No. 28/1994 of 18 October supplementing the Guardia Civil Staff Regulations:

> Return to active duty.
>
> If, on the date of the entry into force of the present Act pursuant to the provisions of Act No. 20/1981 of 6 July establishing active reserve status and setting ages of retirement for professional military personnel, members of the Guardia Civil who are younger than the age provided for in the present Act are on active reserve status, they may request a return to active duty within one month as from the entry into force of the present Act and must remain on active duty status continuously for at least two years. Those who, at the time of the request, cannot complete the minimum period of active duty required before reaching the age for changing to reserve status provided for in article 11 of this Act may not return to active duty.
>
> The return option provided for in the preceding paragraph may be exercised only by those members of the Guardia Civil who are on active reserve status in accordance with article 4, paragraph 1 (a), of Act No. 20/1981.

6. A counsel has a law degree and belongs to the Bar Association. His functions are to act as representative in most court cases, to be held liable for costs and to participate actively in all proceedings.

7. Article 103, paragraph 7, of Act No. 17/1989 of 19 July:

> "A member of the military on reserve status may change only to special service status, unpaid leave, suspended employment and suspension from functions."

8. Act No. 20/1981 allowed that move until age 50 only.

9. Marina Torregruesa Lafuente et al. v. Spain, decision of 16 July 2001.