



## International Covenant on Civil and Political Rights

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### Human Rights Committee

### Communication No. 1923/2009

#### Decision adopted by the Committee at its 109th session (14 October–1 November 2013)

<i>Submitted by:</i>	R.C. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	4 August and 9 October 2009 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 29 December 2009 (not issued in document form)
<i>Date of decision:</i>	28 October 2013
<i>Subject matter:</i>	Legality of the proceedings in which the Conseil d'Etat considered the author's appeal
<i>Procedural issues:</i>	Exhaustion of domestic remedies, incompatibility <i>ratione materiae</i>
<i>Substantive issue:</i>	Procedural rights
<i>Article of the Covenant:</i>	14 (para. 1)
<i>Article of the Optional Protocol:</i>	2



## Annex

### **Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (109th session)**

concerning

#### **Communication No. 1923/2009\***

<i>Submitted by:</i>	R.C. (not represented by counsel)
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<i>Date of communication:</i>	4 August and 9 October 2009 (initial submission)

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

*Meeting* on 28 October 2013,

*Adopts* the following:

#### **Decision on admissibility**

1.1 The author of the communication, dated 4 August and 9 October 2009, is R.C., a French national. He claims that he is a victim of violations by France of article 14, paragraph 1, of the International Covenant on Civil and Political Rights. He is not represented by counsel. The Covenant and its Optional Protocol entered into force for France on 4 February 1981 and 17 May 1984 respectively.

1.2 On 22 April 2010, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided that the admissibility of the communication should be considered separately from the merits.

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\* The following members of the Committee took part in the consideration of the communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Keshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanet did not participate in the consideration of the communication.

**The facts as submitted by the author**

2.1 The author is a civil servant who is an associate university professor. His tax records for the years 2004, 2005 and 2006 were audited by the tax authority of the Pyrénées-Orientales department.

2.2 During the audit process, the author requested various documents from the tax authorities, including what is known as a “3609” file. In a letter dated 25 February 2008, the director of the Pyrénées-Orientales tax authority stated that access to the file could not be granted, as the authorities’ investigation of tax and customs offences within the meaning of the law of 17 July 1978 would be jeopardized.

2.3 On 19 March 2008, the author appealed to the Commission on Access to Administrative Documents. The Commission issued an opinion, in a decision of 18 April 2008 that was taken based on information provided by the director of the Pyrénées-Orientales tax authority, stating that access to the “3609” file should not be granted. On 19 May 2008, the director of the Pyrénées-Orientales tax authority implicitly confirmed that the author’s request had been denied. The author therefore filed an application for judicial review with the Montpellier administrative court and requested an annulment of the decision implicitly taken by the director of the Pyrénées-Orientales tax authority. On 23 April 2009, the Montpellier administrative court ruled in favour of the author, stating that the tax authority had been wrong to refuse to provide the “3609” file, annulling the implicit decision of the director of the Pyrénées-Orientales tax authority, and ordering the director to transmit the document to the author within 15 days.

2.4 On 7 July 2009, the litigation section of the Conseil d’Etat informed the author that the tax authority had filed an appeal on points of law and a motion to stay execution of the Montpellier administrative court judgement. The motion was to be considered as a matter of extreme urgency and the author had five days to comply with the obligation to have a defence brief submitted by a lawyer who was accredited by the Conseil d’Etat and the Court of Cassation.

2.5 With only five days in the middle of summer vacation to find a lawyer who would accept the case and prepare his defence brief, the author decided to draft the brief himself, which he then submitted to the Conseil d’Etat, as a matter of urgency, without having a lawyer review it. In the document, the author asserted that: the brief was admissible, even though it had not been prepared with the assistance of a lawyer; the requirement to have legal representation in the case ran counter to the principle of equality of arms, since it did not also apply to the authorities; and this breach in turn was a violation of the right to a fair hearing.

2.6 On 24 July 2009, the Conseil d’Etat dismissed the author’s case, as it had been filed without the assistance of a lawyer. It ordered a stay of execution of the Montpellier administrative court judgement of 23 April 2009 and it dismissed the author’s arguments concerning a violation of the principle of equality of arms and of the right to a fair hearing.

**The complaint**

3.1 The author claims that French law (the Code of Administrative Justice) does not uphold the principle of equality before the courts, as the State is not required to have legal representation before the Conseil d’Etat when the latter is sitting as a court of cassation, whereas private parties are obliged to have their defence brief submitted by a lawyer; otherwise, their claims will be declared inadmissible. Given that, in its decision of 24 July 2009, the Conseil d’Etat dismissed the author’s case solely on the ground that he had not been represented by a lawyer who was accredited by the Conseil d’Etat and the Court of Cassation, the author considers that the State party has violated article 14, paragraph 1, of the Covenant with regard to him.

3.2 The author also alleges that French law is in breach of article 14, paragraph 1, of the Covenant, in that the French Conseil d'Etat does not meet the commonly accepted standards of independence and impartiality. The author cites the fact that the members of the Conseil d'Etat concurrently exercise judicial powers and act as advisers to the Government, that its judges can be removed from office and are civil servants, not magistrates, and that decisions on their career development and promotion are taken largely at the discretion of the executive branch. He notes that the Conseil d'Etat decision of 24 July 2009 was issued by a section president whose impartiality is questionable, given that he has held several government posts, having served as a member of the Tax Council, a member of the Advisory Committee on Financial Legislation and Regulation, a member and the chairperson of the Advisory Committee on Tax Abuse and a member of the National Accounting Council.

3.3 The decision challenged by the author was issued at last instance by the Conseil d'Etat, which is the highest administrative court in France. It is not subject to appeal.

#### **State party's observations on admissibility**

4.1 On 1 March 2010, the State party challenged the admissibility of the communication. It asserted first of all that the stay of execution decision adopted by the Conseil d'Etat on 24 July 2009 was only an interim measure and had no bearing on the merits of the case. The Conseil d'Etat had merely suspended execution of the judgement that had been issued at first instance in favour of the author, pending a decision on the merits. The immediate execution of the judgement would have had irreversible consequences, given the subject of the dispute (access to a tax document). The question of the right of access to the document would only be addressed in the judgement on the merits. Therefore, the State party requested that the Committee should declare this part of the communication inadmissible under article 3 of the Optional Protocol.

4.2 The State party also argued that the author had not exhausted domestic remedies: at no time during his dispute with the tax authorities had he filed a claim with the domestic courts about any violation of the Covenant. Regarding the obligation to have his defence brief submitted by a lawyer who was accredited by the Conseil d'Etat, the author had merely asserted that the principle of equality of arms had been infringed and made a vague reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms. As to the alleged lack of impartiality on the part of the Conseil d'Etat, the author had never raised the issue with that body. While he had claimed to the Committee that the president of the eighth section of the Conseil d'Etat was not impartial, he had never asked for the president to withdraw from the case, even though he knew that the hearing would be held by the eighth section.<sup>1</sup> For those reasons, the State party considered the communication to be inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

#### **Author's comments on the State party's submission**

5.1 On 28 March 2010, the author stated that the fact that the Conseil d'Etat decision was only an interim measure that did not affect the decision on the merits had no bearing on his claims. He argued that the violation of article 14 of the Covenant referred not to a substantive issue on which the Conseil d'Etat had yet to decide, but rather to the unfairness of the proceedings: the State was not required to have legal representation, but other parties

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<sup>1</sup> The State party has attached the notice of hearing, dated 17 July 2009 and addressed to the author, which states that his case is on the list of cases due to be heard by the eighth section at its 22 July 2009 session.

were. That lack of fairness characterized all cases heard by the Conseil d'Etat, whether they involved interim measures ordered in the context of a stay of execution or decisions on the merits. Hence, according to the author, the Conseil d'Etat had not considered his arguments based on a fair and adversarial procedure, solely because they had not been presented to it by a lawyer.

5.2 In response to the State party's argument regarding the exhaustion of domestic remedies, the author contended that the fact that he had not explicitly invoked the Covenant, but rather the European Convention for the Protection of Human Rights and Fundamental Freedoms was of no consequence; the two instruments contained essentially the same provision on procedural rights. As for the argument that he should have filed a complaint with the Conseil d'Etat about lack of impartiality, the author argued that, in its settled case-law, the Conseil d'Etat stated that it would not consider any claim raising a legitimate doubt about the Conseil d'Etat as a whole. Such a claim would be admissible only if a higher court existed. In the case at hand there was no court higher than the Conseil d'Etat, which is the supreme administrative court.

5.3 With regard to the recusal of the president of the eighth section of the Conseil d'Etat, the author claimed he was not aware that the president would be presiding over the bench. It was not until he had been notified about the Conseil d'Etat judgement of 24 July 2009 that he learned of the judge's existence and name and was able to conduct research that threw light on the judge's lack of impartiality, given, in particular, his role with the tax authorities. In conclusion, the author invited the Committee to find that he had exhausted domestic remedies.

#### **Additional submission from the author**

6. On 11 June 2011, the author submitted a copy of Conseil d'Etat judgement No. 328914, which had been issued on 4 May 2011 on the merits of his case. In it, the Conseil d'Etat dismissed the author's claims on the ground that his defence brief had not been submitted by a lawyer, even though the author had been informed of the requirement to have legal representation. The decision rendered by the Montpellier administrative court on 23 April 2009 had also been struck down.

#### **Issues and proceedings before the Committee**

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee takes note of the author's claim that his procedural rights under article 14, paragraph 1, of the Covenant were violated by the Conseil d'Etat, inasmuch as it denied his request for the tax authority to send him a "3609" file, merely on the ground that he had not been represented by a lawyer who was accredited by the Conseil d'Etat. The Committee notes that the author sought access to the document in the context of a tax case in which he was involved. The Pyrénées-Orientales tax authority stated that access to the file could not be granted, because the authorities' investigation into tax and customs offences within the meaning of the law of 17 July 1978 would be jeopardized. In its decision of 4 May 2011, the Conseil d'Etat upheld the tax authority's decision and disregarded the author's arguments on the ground that he had not been represented by a lawyer who was accredited by the Conseil d'Etat. The Committee notes that the author has not demonstrated how the requirement to have representation by an accredited Conseil d'Etat lawyer constituted an infringement of his right to equality before the courts and concludes that he has not sufficiently substantiated his claim regarding a violation under article 14, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.3 The author also argues that the Conseil d'Etat, by virtue of its composition, is not an independent and impartial court. He raises doubts in particular about the impartiality of the president of the Conseil d'Etat section that issued the judgement of 24 July 2009 ordering a stay of execution of the judgement of 23 April 2009. The Committee notes that the author has not demonstrated that the participation of this Conseil d'Etat member undermined the legality of the proceedings within the meaning of article 14, paragraph 1, of the Covenant. The Committee further notes that, in the decision of 4 May 2011 that was issued on the merits of the case, the Conseil d'Etat, whose composition had changed and no longer included the member whom the author had previously called into question, upheld the decision of the director of the Pyrénées-Orientales tax authority not to provide the author with the requested document. Given these circumstances, the Committee finds that the author has not sufficiently substantiated his claim regarding a violation under article 14, paragraph 1, of the Covenant and finds that this part of the communication is also inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the French 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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