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

DECISION

Communication No. 1093/2002

Submitted by:	José Manuel Rodríguez Alvarez (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	15 July 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 adoption of decision:	25 July 2006

* Made public by decision of the Human Rights Committee.

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Subject matter:	Non-extension of the author in his post as counsellor to the Supreme Court
Procedural issues:	Lack of substantiation; case submitted under another procedure of international investigation or settlement; non-exhaustion of domestic remedies
Substantive issues:	Right to a hearing with all due guarantees by an independent and impartial tribunal; access, in general conditions of equality, to public office
Articles of the Covenant:	14, paragraph 1; 25 (c) and 26
Articles of the Optional Protocol:	2; 5, paragraphs 2 (a) and (b)

[ANNEX]

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. 1093/2002∗

Submitted by:	Mr. José Manuel Rodríguez Alvarez (not represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	15 July 1999 (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 of 15 July 1999, Mr. José Rodríguez Alvarez, a Spanish national, claims to be a victim of a violation by Spain of articles 14, paragraph 1; 25 (c) and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

Factual background

2.1 The author was appointed counsellor to the Supreme Court by decision of the General Council of the Judiciary (CGPJ) of 24 July 1991, following a competitive examination held for the purpose. He took up his position on 1 October 1991. Under the law, the appointment was for a period of three years renewable for a further three, and the post was governed by public service statute.[1]

∗ 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 Ahanhanso, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

2.2 On the written proposal of his superior, the Chief Magistrate of the Technical Office of the Supreme Court, on 31 May 1994 the author applied for a three-year extension. On 26 July 1994, the same superior submitted a report on his work in which he spoke of "outstanding professional competence, efficiency and a spirit of service". On 5 October 1994 the CGPJ agreed to extend the appointment of certain counsellors but not of others. The author was among the latter. No reason was given for that decision, which was based on a proposal of the Administrative Division of 21 July 1994, which in turn put forward no reason for the difference in treatment and had not been preceded by any report justifying the proposal not to extend certain counsellors, precisely all those attached at the time to the Chamber for Contentious Administrative Affairs. The Council's decision made no reference to the main evidence supplied by the author, namely the positive report of his superior.

2.3 The author contends that the decision of the CGPJ attempts to justify the failure to extend by presumed discretionary powers enjoyed by the decision-making body, founded on the temporary nature of the employment relationship. Those posts, although temporary, are not discretionary posts; rather, they are filled by open competition among public officials. Even allowing that the Administration did enjoy the discretionary power to grant or not grant extensions, the law provides that grounds for the decision must be stated.

2.4 In response to the decision of the CGPJ, on 22 October 1994 the author filed a contentious-administrative application under Law 62/1978 on jurisdictional protection of fundamental rights before the Chamber for Contentious Administrative Affairs of the Supreme Court. On 1 March 1995, the Court dismissed the application on the ground that the Constitution had not been violated and that the issues raised had to be resolved via the administrative litigation procedure. The author filed an appeal before the same Court, which was dismissed on 24 April 1995. The Court deemed that the issue raised by the author did not affect his fundamental rights, but concerned a problem of ordinary legality, which could not be settled through the procedure in Law 62/1978.

2.5 On 5 July 1995 the author appealed to the Constitutional Court, alleging a violation of the principle of equality, of the right to access to public posts and functions on an equal footing and of the right to effective judicial protection. The latter was based on the alleged procedural irregularities that occurred in the Supreme Court, which had admitted the written statements of the State Public Prosecutor and the Office of the Attorney-General outside the deadline. The Court declared the appeal inadmissible on 28 October 1996, on the ground that it did not refer to an infringement of fundamental rights. The Court found that, given the temporary nature of the author's links to the Supreme Court, the CGPJ had a broad margin in which to award the extension and that the author had no unconditional right to it. The author claims that the Constitutional Court did not take into account the main evidence submitted, that of his superior's positive report on his work. Moreover, the Court based its decision on the discretionary power to extend the author's services. However, the author contends that Spanish law requires that grounds for discretionary acts should be stated.[2]

2.6 On 16 March 1997 the author lodged a complaint with the European Commission of Human Rights. In a letter dated 24 March 1997, the Secretariat of the Commission wrote to the author as follows:

"Pursuant to the general instructions received from the Commission, I hereby inform you of certain obstacles that your application may encounter. The purpose of these remarks is not to anticipate the content of an eventual decision, which may only be adopted by the Commission itself, but rather to inform you, in the light of its case law and praxis, of the admissibility requirements and the possibilities for success of your appeal.

"I must inform you that, according to constant case law of the Commission, in principle, lawsuits relating to access to the public service, promotion and dismissals do not fall under the category of civil obligations, except in those cases having an unequivocal patrimonial content.

"Consequently, the Commission would probably be obliged to declare your appeal inadmissible. Hence, failing new information from you, your appeal will not be registered or submitted to the Commission."

The complaint

3.1 The author states that the systematic concealment of the essential evidence submitted by him is presumptive evidence of a violation of his right to a public hearing by a competent, independent and impartial tribunal, as set out in article 14, paragraph 1, of the Covenant, all the more so when the decision of the Council lacked any grounds.

3.2 The author also pleads violation of articles 25 (c) and 26 of the Covenant, considering the fact that certain public servants were extended and not others, without any reasons being given, to be discriminatory. The situation was made worse by the fact that the author was the only one of them to fulfil all the necessary merit and competence requirements, since the fact that he had discharged his duties with outstanding technical competence, efficiency and spirit of service had been documented.

State party's observations on admissibility and on the author's comments

4.1 In comments of 2 December 2002, the State party states that the author had two types of remedy at his disposal for challenging the decision of the CGPJ: a special preferential and summary procedure, governed by Law 62/78 for securing protection of fundamental rights, and an ordinary remedy designed for securing nullity of an act owing to legal irregularities. They may both be sought simultaneously. This averts the risk of invoking a special remedy, which may be declared inadmissible if it does not concern violation of fundamental rights but of legality, whereupon it is too late to invoke the ordinary remedy.

4.2 The author invoked only a special remedy, which was declared inadmissible because the competent bodies did not deem it to be the appropriate avenue for settling that dispute. The State party concludes that the author did not duly exhaust domestic remedies, and that consequently the communication must be considered inadmissible under article 5, paragraph 2 (b), of the Protocol. In addition, the decisions whereby the remedies were declared inadmissible were not arbitrary, nor did they constitute a denial of justice.

5.1 In his comments of 7 March 2003, the author asserts that his complaint had an indisputable content of fundamental rights, these being access to a public post in conditions of equality. However, the Supreme Court and the Constitutional Court did not address the case from that perspective, merely pointing out that the matter was one of ordinary legality that needed to be tried via an ordinary remedy. This does not mean that the complaint does not have to contain a fundamental aspect or that the courts have not also violated procedural rights, since the issues raised were not addressed when the remedy was processed.

5.2 Contrary to the claims of the State party, the author contends that he also exhausted the ordinary remedy, since he submitted three contentious administrative remedies, on 10 December 1994, 11 February 1995 and 4 March 1995 respectively. They had been combined and ruled on together by the Supreme Court on 27 October 1999. The ruling was communicated to him on 29 November 1999, several months after his communication had been submitted to the Committee and five years after the decision of the CGPJ. This delay was entirely unjustified, since the issue was one which concerned a single application to the Supreme Court itself. Those remedies were also unsuccessful. The ruling claimed that the CGPJ possessed discretionary powers for ruling on the extension of the author and that the term "renewable" in article 23 of the Law on Classification and Functions of Employees of the Judiciary referred precisely to the possibility that such an extension was not necessary, but that it could be awarded or not depending on discretionary criteria of timeliness, convenience and usefulness. Regarding the allegation of lack of grounds, the ruling claimed that it was unfounded since there was in existence a report stating that the author and other counsellors had experienced problems in integrating and that this report could be considered one of the grounds for the ruling being contested.

5.3 The author maintains that, during the processing of the remedies, a series of procedural irregularities occurred, violating his right to a public hearing with due guarantees by a competent, independent and impartial tribunal. He states that, by decision of 16 July 1996, the Chamber for Contentious Administrative Affairs decided to combine the three cases and to appoint a reporting judge. On 29 January 1997, more than two years after they had been lodged and without any proceedings being instituted, the case was assigned to the Seventh Section of the same Chamber. Only on 7 April 1997 had a new reporting judge been appointed.

5.4 On 16 June 1997, the hearing of evidence began. The author claimed, among other issues, that five counsellors - including the wife of a magistrate who was coordinator of the counsellors assigned to that Chamber - had been selected and assigned to it. That counsellor and her husband displayed open hostility towards the other counsellors and, of the five, she alone had been extended. The author provides detailed information on an incident that substantiates the existence of that hostility and has supplied copies of the records of witness statements corroborating the existence of that hostility.

5.5 On 6 September 1999, a new reporting judge was appointed on the retirement of the previous one. The author also contends that during the processing of the case the aforementioned coordinator of counsellors had been promoted to Judge of the Supreme Court and assigned, in the run-up to the end of the probationary period, to the same section of the Chamber for Contentious Administrative Affairs that was to rule on the appeal. The author

challenged the appointment before the Chamber and lodged a complaint with the CGPJ and the Administration Division of the Supreme Court. The Administration Division informed the author that it would not process his challenge because the vote on remedy had already taken place and the judge in question had abstained. The CGPJ dismissed the complaint on the ground, among others, that the magistrate in question had not been involved in the processing of the contentious administrative remedy.

5.6 The author states that abstention is subject to a process regulated by articles 221 et seq. of the Organic Act on the Judiciary, which requires it to be communicated to the parties, which did not occur in this case, since the only communication was made a posteriori, after the decision had been voted on and when the judge in question was challenged.

5.7 The author states that the ruling of 27 October 1999, which dismissed his contentious administrative appeal, makes no reference to the evidence submitted on his initiative. Instead, it cites a performance report from the Chief Magistrate of the Technical Office, who had expressed a favourable opinion on the quality of his services. That report, dated 15 September 1994, after praising the training of all the non-renewed counsellors, continues as follows: "Nevertheless, they have all had problems in integrating into the work of the Technical Office, whose main purpose is to collaborate with the various Chambers of the Supreme Court in the preparation and elaboration of draft decisions; these adaptation difficulties have had an effect, without prejudice to their professional skill, on their productivity and output." This report was issued long after the proposal of the Administration Division of the Supreme Court of 21 July 1994 not to award the extension. The author claims that it is obvious that the aim was to produce an a posteriori justification of an unfounded decision. He also points to a contradiction between this report and the report in which his performance was praised by the Chief Magistrate.

Additional observations of the State party on admissibility and on the comments of the author

6.1 On 31 May 2005 the State party stated that the author had submitted his communication to the Committee before exhausting all domestic remedies, since the contentious administrative remedies were still pending. Furthermore, the ruling on them had not been admitted as the subject of *amparo* before the Constitutional Court because the author had not fulfilled the requirement laid down in article 5, paragraph 2 (b), of the Protocol.

6.2 The State party also claims inadmissibility, under article 5, paragraph 2 (a), of the Protocol, on the ground that the author submitted the same case to the European Commission of Human Rights, which had duly apprised him of the reasons it could not succeed. In addition, the State party reiterates inadmissibility under article 2 of the Protocol.

7.1 On 12 August 2005 the author stated, regarding the first observation of the State party, that when he had submitted his communication to the Committee he had already filed the administrative contentious remedies (1994 and 1995), but that the Supreme Court had taken nearly five years to settle them. Moreover, the ruling of 27 October 1999 dismissing them had been the subject of *amparo* before the Constitutional Court. That *amparo* was declared inadmissible on 3 May 2000.

7.2 Regarding the observations of the State party on article 5, paragraph 2 (a), of the Protocol, the author maintains that his application was neither registered nor processed by the European Commission of Human Rights, since, in view of the letter of 24 March 1997 from the secretariat, he had decided not to pursue it. The grounds for inadmissibility adduced by the State party were therefore not applicable.

Observations of the State party on the merits and the comments of the author

8.1 In its note verbale of 31 May 2005 the State party states that there had been no violation of article 14, paragraph 1, of the Covenant. The author had been the subject of numerous well-founded and perfectly consistent decisions; hence, the alleged violation of this provision would appear to be founded solely on the author's extremely partial and self-interested assertions.

8.2 Regarding the alleged violation of articles 25 (c) and 26 of the Covenant, the State party refers to the decision of the Constitutional Court whereby it dismissed the author's *amparo* application. The Court claims that the author's employment relationship was temporary and extinguishable by mere effluxion, and that the author had no subjective right to be awarded an extension. The decision-making body enjoys all discretion to award an extension or not.

8.3 The State party further claims that the Supreme Court ruling of 27 October 1999 also refers to the discretionary powers of the decision-making body, which does not consist of a single person but is collegiate. The dossier contained reports that the counsellors whose contracts were not renewed had experienced integration problems, which had affected their productivity and output. These reports could be considered part and parcel of the grounds for the impugned decision. It may be argued that, thanks to its composition, no one is in a better position than the Administration Division of the Supreme Court to judge the ability and suitability of the counsellors. It must also be understood that the judges made oral reports - not explicitly noted down - in order to reach the decision. Where discretionary powers are concerned, it is possible that some of the counsellors with temporary appointments should be granted extensions and others not without any breach of the principle of equality. This principle does not impose equal treatment of unequal assumptions.

8.4 The objectivity of the decision not to extend the author's contract is assured by the evaluation of a collegiate body whose members are directly acquainted with the persons in question, by the other legal guarantees established for selection and dismissal, and by the file on the counsellors in question containing the report of the Chief of the Technical Office.

8.5 The author provides no evidence of unfounded discrimination based on race, gender, religion, social background, and so forth.

9.1 In his reply of 12 August 2005, the author maintains that the Constitutional Court's decision of 28 October 1996 dismissing the first remedy of *amparo* was practically identical to the decision previously handed down on the *amparo* filed by another of the counsellors whose contracts had not been renewed. The Tribunal did not take into consideration the specific characteristic of the case, in which he was the only counsellor who had received a highly laudatory performance report.

9.2 The author also maintains that a judge of the Constitutional Court, who had previously been a member of the CGPJ, had been involved in the *amparo* proceedings of the other counsellor and, in a record vote, had been firmly opposed to the extension. The counsellor in question challenged the judge, who, owing to his earlier involvement in the case, should have abstained completely from the outset. The Court reacted by issuing a simple notice stating that a computer error had occurred when the Court's ruling was being drafted and that the judge in question had in fact abstained and had taken no part in the proceedings. The author criticizes the procedure adopted by the Constitutional Court to rule on the challenge and contends that the abstention had not been in conformity with the provisions of the Organic Law on the Judiciary. The author claims that this incident provides proof of the lack of impartiality with which the Constitutional Court had acted in relation to his own case.

9.3 The author also states that a judge from the Supreme Court, who had been assigned to the Division to settle its contentious administrative remedies, had been involved in the Constitutional Court's decision of 3 May 2000. However, the judge did not abstain from participating in the ruling on the *amparo* application.

9.4 The author reiterates the arguments submitted previously on the lack of grounds for the decision not to renew his contract and the lack of impartiality with which the Supreme Court and the Constitutional Court proceeded, which would constitute a violation of article 14, paragraph 1, of the Covenant.

9.5 Regarding the violation of articles 25 (c) and 26, the author persists in his claim that discretionary powers to decide on an extension must be justified, pursuant to article 54 of the Law on the Legal System governing Public Administrations and the Common Administrative Process.

Issues and proceedings before the Committee

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

10.2 The Committee takes note of the argument adduced by the State party to the effect that the communication must be considered inadmissible under article 5, paragraph 2 (a), since the author, before appealing to the Committee, had filed an application with the European Commission of Human Rights. However, after considering the information supplied by the author, it concludes that the application had never been registered or examined in any way by the Commission. Consequently, the Committee has ascertained that the matter was not examined under another procedure of international investigation or settlement.

10.3 The Committee also takes notes of the arguments adduced by the State party regarding the failure to exhaust domestic remedies. However, in view of the information supplied by the author, the Committee observes that the remedies that the State party claims not to have been exhausted were actually invoked, there being judicial decisions on the subject. The Committee therefore concludes that the author fulfilled the requirement of article 5, paragraph 2 (b), of the Optional Protocol.

10.4 The issue raised before the Committee is whether the decision of the General Council of the Judiciary not to extend the author in his post of counsellor of the Supreme Court violates articles 25 (c) and 26 of the Covenant. The Committee considers that the right to have access, on general terms of equality, to public service is closely linked to the prohibition of discrimination on the grounds set forth in article 2, paragraph 1, of the Covenant. In the present case, the author has not demonstrated, for the purposes of administrability, that the reasons for which it was decided not to extend his contract are related to the grounds set forth in article 2, paragraph 1. Nor has the author adduced arguments demonstrating his claim to be entitled to extension of his contract or the existence of national legislation making such extension obligatory, which would have resulted in a violation of article 26 of the Covenant. Consequently, the Committee considers that this part of the communication has not been sufficiently substantiated and is inadmissible pursuant to article 2 of the Optional Protocol.

10.5 With regard to the author's allegation of violation of article 14, paragraph 1, of the Covenant, the Committee observes that it refers to his attempts to challenge the decision of the General Council of the Judiciary not to grant the extension of his contract to which he aspired. The Committee notes that the various rulings of the courts are consistent in that they dismissed a claim founded not on the author's claim to the right to have his contract renewed, but merely on an expectation, and that the extension was, therefore, discretionary on the part of the authorities. Consequently, the Committee considers that the author has not sufficiently substantiated his claim for the purposes of admissibility and considers this part of the communication inadmissible under article 2 of the Optional Protocol.

11. The 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 version 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.]

Notes

[1] The author attached a copy of Law 38/1988 on Classification and Functions of Employees of the Judiciary, article 23, paragraph 5, of which establishes the following regarding the Technical Information and Documentation Office of the Supreme Court: "Counsellors of the Supreme Court shall be appointed for a term of three years, renewable for a further three, by the General Council of the Judicature."

[2] In this connection, the author cites article 54, paragraph 1 (f), of the Law on the Legal System and General Administrative Procedure, which provides that grounds for administrative acts "performed in the exercise of discretionary powers, in the same way as those that are required to be declared by legal provision or explicit regulations, must be stated, with a brief statement of the facts and the legal basis for the acts".
