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HUMAN RIGHTS COMMITTEE
Eighty-second session
18 October-5 November 2004

DECISION

Communication No. 988/2001

Submitted by:	Mariano Gallego Díaz (represented by counsel)
Alleged victim:	The author
State party:	Spain
Date of communication:	28 October 1999 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 16 July 2001 (not issued in document form)
Date of decision:	3 November 2004

[ANNEX]

* Made public by decision of the Human Rights Committee.

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Annex

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-second session

concerning

Communication No. 988/2001*

Submitted by: Mariano Gallego Díaz (represented by counsel)

Alleged victim: The author

State party: Spain

Date of communication: 28 October 1999 (initial submission)

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

Meeting on 3 November 2004,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mariano Gallego Díaz, a Spanish citizen resident in Switzerland, born on 22 June 1930. He is represented by counsel, Emilio Ginés Santidrián.

The facts as submitted by the author

2.1 The author, a trained engineer, worked in Spain from 1 March 1958 until 10 September 1982, when he emigrated to Switzerland. Throughout that period, the author paid contributions to the Spanish social security scheme on the maximum contribution basis for his occupational group. During his residence in Switzerland, the author paid contributions to the Swiss social security scheme until he retired in 1995. On retirement the author, pursuant to the

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Agreement between Spain and Switzerland on social security of 1969 and the Additional Agreement thereto of 1982, was entitled to retirement pensions under the Spanish and Swiss social security schemes respectively. By application of the pro rata temporis rule, 70 per cent of the pension is payable by the Spanish system and the rest by the Swiss system.[1]

2.2 In order to determine the amount of the Spanish pension, the Spanish authorities, pursuant to article 14 of the bilateral Additional Agreement cited,[2] used the minimum contribution basis applicable in Spain to workers in the same profession. The author, who disputed the calculation, decided to initiate legal proceedings, since he considered that the basis applied to him should not correspond to the minimum contributions for his group. Other factors should also be taken into account, in particular the fact that until the year in which he emigrated he had paid contributions in Spain on the maximum contribution basis for his group.

2.3 On 26 May 1997 Madrid Social Court No. 3 rejected his application. The judgement was appealed before the Social Chamber of the Madrid High Court, which confirmed the judgement at first instance on 7 April 1998. The author filed an appeal with the Constitutional Court, which was rejected on 25 January 1999.

The complaint

3. The author alleges a violation of article 26 of the Covenant, since in the case of Spanish workers who emigrated to other countries, for example Germany, their pension was not calculated on the minimum contribution basis, and thus was bigger. The bilateral agreements between Spain and Switzerland and between Spain and Germany respectively gave rise to unfair and unequal treatment, since persons who had contributed to the Spanish social security system for the same time and in the same amount were treated differently, depending on whether they had emigrated to Switzerland or to Germany.

Observations by the State party

Observations on admissibility

4.1 On 17 September 2001 the State party submitted its observations on the admissibility of the communication, considering that it should be declared inadmissible.

4.2 The State party maintains that if the author wishes to raise before the Committee his disagreement with the Agreement between Spain and Switzerland, he should direct the communication against the two States parties. As the communication is directed against Spain only, the Committee should find it inadmissible under article 3 of the Optional Protocol.

4.3 The State party also maintains that the basis of the discrimination alleged by the author is incorrect, since he does not compare two treaties but non-separable parts of two treaties, in this instance the part relating to the determination of the pension by Spain. Further, Germany and Switzerland are two separate States, with their specific legal regimes. It follows that the distinctive characteristics of the contracting States are taken into account whenever a treaty is concluded. Moreover, Spain has signed bilateral social security agreements with various other States, and each has its own regulations on social security coverage of those who have worked in

each of the countries. Without any justification whatsoever the author differentiates between the Agreement with Germany and all others. There can be no allegation of discrimination when a distinction is objective and reasonable, since the agreements to be compared may not be separated out into arbitrary elements, and are not comparable between themselves, since the signatory States are different, and, thus, so are the bases for application. Neither is there any justification for choosing one agreement, rather than others, for comparative purposes.

Observations on the merits

4.4 On 15 January 2002 the State party submitted its observations on the merits of the communication.

4.5 The State party notes that the author has not indicated the exact amount of his Spanish and Swiss retirement pensions, or the amount of the Spanish and German retirement pensions that would accrue to him should the Agreement between Spain and Germany be applied. These figures are necessary for an appropriate comparison to be made. Moreover, it reiterates that citizens of a State may not demand the separate application of provisions in bilateral or multilateral instruments without regard to the rest of the instrument and the other contracting States. The differentiated treatment alleged by the author has an objective and reasonable justification in the sovereign authority of States to conclude bilateral agreements with other States in accordance with the considerations preferred by them. Consequently, the State party considers that the communication should be found inadmissible, in that it does not demonstrate the existence of discrimination.

Comments by the author

5.1 On 9 April 2002 the author responded to the State party's observations.

5.2 The author explains that, under Spanish legislation, a worker must have contributed to the social security scheme for at least 15 years to have the right to a retirement pension. Further, he or she must have contributed for at least two years during the eight years preceding the official retirement age. The amount of the pension is based on contributions in the years prior to the retirement date. For persons who retired in the year in which the author retired the period was the previous eight years.

5.3 When a person who has worked in Spain emigrates and ceases to contribute before beginning this final period of working life used for the calculation of the pension, his or her previous contributions in Spain, for the purposes of this calculation, are void and have no relevance. If the person emigrates to a country with which there is a social security agreement, pursuant to such an agreement the contribution period in that country is deemed valid for the purposes of calculating pension entitlement in Spain. In such cases the retirement pension is calculated on the basis of each agreement and varies from one country to another. Spain has concluded bilateral social security agreements with 29 countries. Ten are member countries of the European Union, and these agreements are no longer in force having been superseded by European Union regulations.

5.4 According to the author, the fact that Spanish social security legislation does not establish the same rules for the calculation of the pension that Spain must pay to all those who leave the country and cease to contribute to the Spanish social security scheme is the cause of the discrimination of which he is victim. The legislation does not cover the situation of emigrants. It establishes conditions for obtaining a pension. If these conditions are not met, and in general emigrants cannot meet them, there is no right to a pension. The social security agreements rectify this situation, but only in part.

5.5 The pensions granted by Spain to its emigrants are its exclusive concern, with funding that is exclusively Spanish, and in accordance with Spanish legislation. This does not concern the State with which Spain signs a social security agreement. Accordingly, there is no reason for the part dealing with determination of the Spanish retirement pension to differ from one agreement to another. It is not a subject of discussion with the other country in drafting the agreement in question. It would be more logical for all agreements to embody a specific national norm for calculating pensions, a norm which does not exist with regard to emigrants.

5.6 For the determination of the pension in Spain of a non-emigrant, the contribution history of the worker in the final years is used. However, in most bilateral agreements, this is not done, and this aspect is left open, or is the subject of clauses that provide for minimum calculations, rather than taking into account the actual contributions by the worker. With the entry of Spain into the European Union, the following criterion was introduced with regard to retirement benefits for Spanish emigrants to other countries in the Union: "The amount of the Spanish benefit payable in theory shall be calculated on the actual contribution basis for the contributor immediately prior to the final contribution to the Spanish social security system."[3]
The 1994 Agreement on social security between Spain and Mexico employs an analogous concept, in concordance with the criteria used for calculating the pensions of retired workers in Spain.

5.7 The author states that the discrimination arising from the bilateral social security agreements generally has less impact on retirement pensions than in his case, for the following reasons:

(a) Because emigrants applying for a pension contributed for a shorter period in Spain than he did, since they were much younger when they emigrated, which reduces the impact on their pensions;

(b) Because these emigrants left Spain before the author did, and at that time contributions were lower;

(c) Because these emigrants paid contributions for lower professional categories, so that they were much lower.

5.8 The outcome is that the author receives a much lower pension than he would have had he not emigrated, equivalent to a pension generated by only 32 per cent of his actual contributions. This is not offset by the Swiss pension, as application of the pro rata temporis rule means that the amount of the pension is very small since he contributed only for the final years of his working

life. If the actual contribution basis applicable to the author in Spain had, for example, been in the 1960s, application of the current minimum basis would redound to his benefit. In his case, in view of the closeness of his emigration date to his retirement date, the minimum basis redounded to his detriment.

5.9 According to the author, the literal application of article 14 of the bilateral Agreement seems to disregard or nullify his acquired rights or those being acquired as a migrant worker, which contravenes various national and international norms proclaiming the principle of the protection of such rights.[4]

5.10 The author rejects the State party's assertion that he has not indicated the amount of his Swiss pension, noting that it was stated in the appeal filed with the Constitutional Court. He also maintains that the Swiss pension was not calculated in accordance with the bilateral Agreement but in accordance with Swiss domestic legislation, and, since it is correct, is not disputed. With regard to the State party's assertion that the communication should be directed against both States parties to the Agreement, the author maintains the opposite, bearing in mind that:

(a) Switzerland is not a State party to the Optional Protocol;

(b) The Swiss pension he receives has been calculated independently, in accordance with article 7, paragraph 1, of the 1969 Agreement, and is equivalent to that received by a Swiss citizen or other foreign citizens working in Switzerland in the same circumstances. The Agreement makes no special provision for payment of the Swiss element of the pension, unlike the Spanish element;

(c) Switzerland has no competence in the determination or payment of, or in disputes relating to, the Spanish pension. It is the Spanish State that affords different treatment by proposing the incorporation without any reason, in drafting a social security agreement, of differing treatment that has no objective or rational justification.

5.11 The author also denies having sought application of the Agreement between Spain and Germany, as the State party appears to suggest. That Agreement was cited merely as an indication of the discriminatory treatment applied to the author. The State party, in determining retirement pensions differently under various bilateral agreements and in accordance with European Union regulations, discriminates on a random basis against emigrant workers. In his view, the State party should apply to migrants to any country in the world the mode of calculation applied to the pensions of its migrants to European Union countries. The State party should also propose the amendment of its bilateral agreements that do not allow for determination of the pension in the manner proposed.

Additional comments by the author

6.1 On 12 August 2003 the author sent the Committee information concerning new developments since his previous letter.

6.2 According to the author, on 1 June 2002 the bilateral Agreement on the free movement of persons between the European Union and Switzerland entered into force, making it possible for his Spanish pension to be calculated on the basis of Community legislation rather than the

Agreement between Spain and Switzerland. To this end the author submitted appropriate requests to the competent administrative bodies, and filed an appeal before Madrid Social Court No. 4, which, in a judgement of 11 April 2003, awarded the author a pension of 1,363.06 euros a month from 1 June 2002 onwards, that is, three times more than the amount he had been receiving since 1995. The Spanish social security authority has implemented the judgement.

6.3 The author states that he has obtained satisfaction and has no claim against the State party with regard to the amount of his pension since 1 June 2002. However, he still considers that he has suffered discrimination under article 26 of the Covenant with regard to the period between 1 July 1995 and 31 May 2002. He thus reiterates the complaints made previously. The author recalls that the method of calculation applied to him from 1 June 2002 onwards, that is on the basis of his actual contributions, is the method he sought to have applied by the Spanish social security authority, in writing on 30 August 1996 and in his successive appeals.

6.4 The author also seeks a change in Spanish regulations to allow the calculation of the retirement pensions of all emigrants on the same basis as his is now calculated, that is, using the criteria applied to emigrants to European Union countries, irrespective of the country to which they emigrated.

6.5 The State party has not submitted any observations on the author's comments.

Issues and proceedings before the Committee

7.1 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 it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2, of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement, and notes that the author has exhausted all domestic remedies. With regard to the State party's argument that the author should also direct the communication against Switzerland, the Committee notes that the author does not contest the part of his pension that he receives from the Swiss social security system and that, furthermore, Switzerland has not ratified the Optional Protocol. The fact that the communication is directed only against Spain does not constitute an obstacle to its admissibility.

7.3 With regard to the author's claim that the different treatment of Spanish workers who emigrated to Switzerland on the one hand and Spanish migrants who went to other countries constitutes a violation of article 26 of the Covenant, the Committee notes that the author has not shown how this distinction is based on the race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status of these migrant workers. The less advantageous position of the author has its roots in the fact that, regarding the calculation of the Spanish part of the pension of persons who have worked in Spain and abroad, the bilateral treaties negotiated by Spain are not identical. However, the mere fact that different treaties on the same topic with different countries concluded at different times differ in content does not

amount, as such, to a violation of article 26 of the Covenant. The author has not shown any additional elements that would make article 14 of the treaty with Switzerland arbitrary. The Committee, therefore, concludes that the facts submitted by the author do not raise any issue under article 26.

8. 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 author and 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.]

Notes

[1] The amount of the Spanish pension in 1995 was 62,174 pesetas (373.67 euros) and the amount of the Swiss pension was 578 Swiss francs, both per month.

[2] Article 14: "When … all or part of the contribution period elected by the worker for determination of the regulatory basis for calculation of the benefit in question is completed under Swiss legislation, the competent Spanish institution shall determine that basis by taking into account the minimum contribution basis that was applicable in Spain for all or part of the period to workers in the same occupation as that exercised in Spain by the contributor." According to the author this provision was drafted at a time when the regulatory basis for a retirement pension, under Spanish legislation, was two contributory years over a period elected by the worker. With the promulgation of Act No. 26-1985 the regulatory basis became eight contributory years over a fixed period.

[3] Council Regulation (EEC) No. 1248/92, amending Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, annex IV, part D; and regulation (EEC) No. 574/72 fixing the procedure for implementing Regulation (EEC) No. 1408/71.

[4] The author cites the European Code of Social Security of 1964, the European Convention on the Legal Status of Migrant Workers of 1977, and International Labour Organization Conventions Nos. 97 and 157, all ratified by Spain.
