



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Ninety-fourth session
13-31 October 2008

VIEWS

Communication No. 1122/2002

Submitted by: María Cristina Lagunas Castedo (represented by counsel,
Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 23 October 2001 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the
State party on 26 September 2002 (not issued in document
form)

Date of decision: 20 October 2008

Subject matter: Author's disagreement with marks awarded in a public
competition to obtain a university lectureship

* Made public by decision of the Human Rights Committee.

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|------------------------------------------|-----------------------------------------------------------|
| <i>Procedural issues:</i> | Insufficient substantiation of the alleged violations |
| <i>Substantive issues:</i> | Right to a fair trial; equal access to the public service |
| <i>Articles of the Covenant:</i> | 14, paragraph 1, and 25 (c) |
| <i>Article of the Optional Protocol:</i> | 2 |

On 20 October 2008 the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1122/2002.

[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**

Ninety-fourth session

concerning

Communication No. 1122/2002*

Submitted by: María Cristina Lagunas Castedo (represented by counsel,
Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 23 October 2001 (initial submission)

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

Meeting on 20 October 2008,

Having concluded its consideration of communication No. 1122/2002, submitted to the Human Rights Committee by Ms. María Cristina Lagunas Castedo 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:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Ms. Christine Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The dissenting opinion signed by Committee members Mr. Edwin Johnson López and Mr. Rafael Rivas Posada is appended to the present document.

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

1.1 The author of this communication of 23 October 2001, María Cristina Lagunas Castedo, a Spanish national, claims to be a victim of a violation by Spain of article 14, paragraph 1, and article 25 (c) of the International Covenant on Civil and Political Rights. She is represented by counsel, Mr. José Luis Mazón Costa. The Optional Protocol entered into force for Spain on 25 April 1985.

Factual background

2.1 In 1994, the author applied for a post of assistant lecturer in inorganic chemistry, which was to be awarded on the basis of qualifications, at the University of Murcia, a public university. The selection process was based on clearly defined criteria, involving a strict scoring procedure, which meant that the only point of discussion was whether the duly certified qualifications had been awarded the correct score. The University's Recruitment Commission awarded 60.49 points to the author and 61.22 points to the other candidate, who was given the post. The author submitted a complaint to the University's Appeals Commission, arguing that the system for awarding points had not been applied correctly. On 6 February 1995, the Commission dismissed the complaint.

2.2 The author instituted judicial administrative proceedings before the High Court of Justice, alleging that the University's Recruitment Commission had acted in error or in an arbitrary manner in applying the system for awarding points. In its judgement of 11 October 1997, the Court dismissed the application. However, the Court amended the original scores by awarding 60.74 to the author and 60.82 to the other candidate. The author requested the Court to clarify and amend its judgement, complaining of clear arithmetical errors. The Court responded in a decision of 31 October 1997, in which it recalculated the candidates' points, on this occasion awarding 60.66 to the author and 60.67 to the other candidate. The author appealed against that decision; her appeal was denied in a decision of 9 December 1997, in which it was stated that the judgement contested was not subject to any appeal, since the issue was a personnel matter. The author alleges that when the scores were recalculated for the decision of 31 October 1997 the candidates were not given equal treatment, since her rival's decimal points were rounded up, thereby giving her a higher score, while her own were not. This had serious consequences since it meant that the post was given to the other candidate.¹

2.3 The author alleges that, after having been informed of the Court's judgement, she found out that the reporting judge was an associate lecturer of the Faculty of Law at the university to which she had applied. This should have been brought to the attention of the parties, and the judge in question should not have taken part in the consideration of the appeal.

2.4 The author lodged an *amparo* application with the Constitutional Court, alleging a violation of the right to consistent and reasonable grounds for the judgement, the right to equal

¹ The author affirms that, if the calculation had been performed using the same criteria, she would have scored 60.6775 and her rival 60.6692 points.

access to the public service and the right of access to ordinary courts, as guaranteed by the law. In its judgement of 1 June 1998, the Constitutional Court dismissed the appeal as being devoid of substance.

2.5 The author petitioned the full session of the Constitutional Court to dismiss the judges who had been responsible for the inadmissibility decision, on the grounds that they had violated the principles of impartiality and dignity. On 29 September 1998, the Court rejected the application on the grounds that it was inadmissible.

2.6 The author lodged a complaint with the Criminal Division of the Supreme Court against the judges of the Constitutional Court responsible for the decision on grounds of alleged breach of public trust. On 28 December 1998, the Criminal Division rejected the complaint, holding that the judgement of the Constitutional Court was well founded.

2.7 On 18 January 1999, the author submitted an appeal to the Criminal Division, which was rejected. At the same time, she submitted to the same court an application for reconsideration requesting that the judges who had been responsible for the contested decision should not take part in the examination of the appeal on the grounds of suspected bias. On 25 March 1999, the Criminal Division dismissed the application and agreed to impose a disciplinary sanction on the author's counsel for lack of respect to the Supreme Court.

2.8 The author filed a complaint against the judges who had issued the decision of 25 March 1999 with the Disciplinary Commission of the General Council of the Judiciary. On 9 February 1999, it was agreed to shelve the complaint on the grounds that it involved an issue of jurisdiction which did not come under the Commission's competence.

2.9 The author filed an application for *amparo* with the First Chamber of the Constitutional Court for violation of the right to an impartial tribunal, and for failing to grant her appeal. The application was dismissed on 21 September 2000 on the grounds that it was clearly unfounded.²

2.10 The author claims that all domestic remedies have been exhausted and that the matter is not being examined under another procedure of international settlement.

The complaint

3.1 The author claims that the State party violated article 14, paragraph 1: whereas in a similar case³ the Constitutional Court granted *amparo*, her appeal was not subject to an examination on the merits. She claims that her right to a reasoned decision was violated, since the decision by which the appeal was dismissed was arbitrary.

² The author also reported the matter to the Attorney General, the Prime Minister, the Ombudsman, the President of the Senate, the President of Congress, the President of the Spanish Bar Association and the President of the General Council of the Judiciary.

³ Second Chamber of the Constitutional Court, judgement 5/95 of 10 January 1995.

3.2 The author claims a further violation of article 14 because, in addition to a defence lawyer, she had to use a *procurador* to represent her in the Constitutional Court, which is not required under article 81.1 of the Constitutional Court Act for a person applying for *amparo* who is a law graduate. This difference in treatment has no objective and reasonable justification, since the function of the *procurador* is not connected in any way with the appellant's legal knowledge.

3.3 The author claims another violation of article 14, paragraph 1, on the grounds that she did not benefit from a fair trial, since the judge of the High Court of Justice who had been the reporting judge for the case was also a lecturer at the university to which she had applied. She claims that this circumstance should have been brought to the attention of the parties or should have prompted the judge to disqualify himself.

3.4 The author likewise claims that her right to a hearing by a competent and impartial tribunal was violated in the proceedings before the Supreme Court in respect of the complaint she had lodged against the judges of the Constitutional Court who had rejected her application for *amparo*. She contends that the Court did not duly investigate the facts and arguments of the application for *amparo*, that those facts and arguments were misrepresented and that her application for reconsideration was dismissed.

3.5 The author alleges a violation of article 25 (c) of the Covenant. She contends that close scrutiny of the scores attributed to the candidates by the High Court of Justice of Murcia reveals that the post was allocated to the candidate with fewer points, thereby infringing the author's right to equal access to the Spanish public service.

State party's observations on admissibility

4.1 In its comments of 15 January 2003, the State party argues that the communication should be declared inadmissible on the grounds that it is not well founded, since there is no real similarity between judgement 5/95 of the Constitutional Court, cited by the author as a precedent, and her case. In the present case, the author did not obtain the highest score in the selection process. In the case that gave rise to judgement 5/95, there was an inherent contradiction in the judgement of the court because, after reviewing the scores and establishing which qualifications should have been allocated points, the final score awarded by the court was wrong and did not tally with the qualifications the court itself had decided should be allocated points. In the present case, the author raises the question of arithmetical errors, to wit multiplication errors when rounding up the decimals. There are considerable differences between the two cases, and the distinction between the two decisions of the Constitutional Court was based on objectively different assumptions; there was thus no discrimination.

4.2 The fact that a lawyer disagrees with court decisions is no justification for qualifying the courts as incompetent, biased and discriminatory, if the allegations are not substantiated. In this case, no violation of article 25 (c) of the Covenant was found.

4.3 According to the State party, the fact that a judge who taught at the University of Murcia sat in the High Court of Justice should have been raised with the competent judicial body and should have been substantiated. In accordance with article 44.1 (a) and (c) of the Constitutional Court Act, the matter cannot be raised *ex novo* in the Constitutional Court.

4.4 The State party claims that the author's complaint concerning the rejection of her appeal was not filed with the domestic courts and, as a result, there was no decision of the domestic courts that could be reviewed by the Committee.

4.5 The State party claims that the alleged violation of the right to equality arising from the participation of the *procurador* in the application for *amparo* is a matter on which the Committee has repeatedly stated its views, holding that the allegation has "not been satisfactorily substantiated for the purposes of admissibility".⁴

Author's comments on the State party's observations

5. In her letter of 25 March 2003, the author reiterates her allegations, insisting that, by failing to resolve her case in accordance with a precedent, the Constitutional Court left her without legal protection. On reviewing the arithmetical calculations performed by the court of first instance, it can be seen that crucial errors were made: without rounding up, the author scored 60.6775 points, and the other candidate 60.6692. By rounding up the second decimal where the third decimal was greater than five, as the court did for the other candidate only, the final scores were 60.68 (the author) and 60.67 (the accepted candidate).

Consideration of admissibility

6.1 On 8 March 2006, during its eighty-sixth session, the Committee decided that the complaints relating to article 14 of the Covenant, concerning the alleged violation of the author's right to an independent and impartial tribunal with regard to the proceedings before the Constitutional Court and the Supreme Court (paras. 3.1 and 3.4) and concerning the obligation to make use of a *procurador* to represent her before the Constitutional Court (para. 3.2), were inadmissible under article 2 of the Optional Protocol because they were not sufficiently substantiated.

6.2 The Committee declared the communication admissible with regard to the complaints relating to article 25 (c) and article 14, paragraph 1, of the Covenant, the latter article relating to the alleged lack of a fair trial, given the fact that the reporting judge in the decision of the Administrative Chamber of the High Court of Justice was also a lecturer at the University of Murcia. The Committee therefore requested the State party to provide information on (a) whether the assistant lectureship to be filled was a post in the public service; (b) the possibility of an error in the calculation of the score obtained by the author; and (c) the author's allegations relating to the lack of impartiality of the reporting judge in the decision of the High Court of Justice of Murcia.

⁴ It is referring to communication No. 866/1999, *Torregrosa Lafuente, Marina et al. v. Spain*, Views of 16 July 2001, and communication No. 1005/2001, *Concepción Sánchez González v. Spain*, Views of 21 March 2002.

State party's observations on the merits

7.1 On 25 September 2006, the State party submitted its observations on the merits of the communication. The State party points out that, in accordance with the provisions of Act 11/83 (University Reform Act), assistant lecturers do not have the status of public servants, being simply personnel under contract. The State party adds that assistant lecturers do not have tenure or protection against removal - which public servants do have - and that they are recruited for the purpose of training and introduction to university research and teaching.

7.2 With regard to the existence of a possible calculation error in the judgement of the Administrative Chamber of the High Court of Justice of Murcia, the State party contends that a clear distinction must be drawn between the parts of the decisions of the court that are nothing more than *obiter dicta* and those which constitute the *ratio decidendi*. In this regard, the State party points out that the author uses the clarifying decision of 31 October 1997, which makes a hypothetical calculation, as the basis for modifying the sense of the decision. The alleged arithmetical error on the basis of which the author seeks to make her case was introduced in the course of explaining a hypothesis, which the judgement ultimately does not incorporate. However, the Chamber at all times confirms the proposal of the assessment commission which, in a well-reasoned manner, it does not consider to be arbitrary at all. To reconsider the decision adopted on the basis of arithmetical errors made in a hypothesis and for the purpose of clarification, would be inappropriate.

7.3 The State party also contends that, even if there had been an error which was significant to the decision, that would not have entailed a violation of provisions of the Covenant. Judgements may contain human errors without resulting in any infringement of the Covenant. The State party recalls that the assessment of the facts is primarily the task of the domestic courts, even if they are capable of error, provided that their conclusions are not manifestly arbitrary. The judgement contested cannot be considered manifestly arbitrary or unreasonable simply because it contained an arithmetical error.

7.4 With regard to the alleged lack of impartiality of the court owing to the fact that one of its judges was an associate lecturer at the University of Murcia, the State party considers that there are no actual connections with the parties that might imply a lack of impartiality on the part of the judge. The fact that the judge is an associate lecturer does not presuppose that he will a priori take a particular position in a legal dispute, both because of his objective distance from the matter in hand and the large size of the University of Murcia, and because of the nature of his work as associate lecturer, which is a habitual activity that is compatible with the activities of judges. It is very likely that attorneys, in a region such as Murcia, will know which judges also work as university lecturers. However, at no time did the author challenge the judge, as is required by applicable law.⁵ The State party alleges that there is no link between the judge in

⁵ Organization of Justice Act, article 217: A judge or magistrate to whom one of the grounds established by law applies shall disqualify himself or herself without waiting to be challenged; article 219: The following constitute grounds for self-disqualification or challenge: [...] 10. Having a direct or indirect interest in the lawsuit or case; Article 223: 1. The motion challenging a judge shall be filed as soon as the ground on which it is based is known, failing which it shall not be accepted for consideration. Specifically, a motion challenging a judge shall

question and the department or the persons involved in the administrative proceedings, nor with the participants in the competition or the members of the assessment and appeals commissions. The State party considers it unlikely that the judge in question would have had any interest in or prejudice relating to the lawsuit: the awarding of a temporary post in the Department of Inorganic Chemistry. With regard to the author's reference to the *Pescador Valero* case,⁶ the State party considers that that case cannot be compared with the present one, since the former involved the publicly known and controversial dismissal of the head of the administrative staff of a small university campus, whereas the present case concerns the process of selection for a temporary contract in a department distant from the judge's teaching activity.

Author's comments on the State party's observations

8.1 On 16 January 2007, the author submitted her comments on the merits of the communication. She considers that grant-holding research assistants are public servants, since the post was obtained by means of a public competition on the basis of qualifications; it is subject to administrative law and not to labour law; and the case had been taken to the Constitutional Court, before which article 23, paragraph 2, of the Spanish Constitution was invoked; article 23 applies only to public functions and positions.⁷

8.2 The author contends that the State party misrepresents the substance of the decision of the High Court of Justice of Murcia and that the principal issue is that there was an arithmetical error that benefited one of the candidates to the detriment of the other. In this regard, she reiterates her previous arguments concerning the inconsistent rounding of the scores, which infringed the right to equal access to the public service.

8.3 With regard to the alleged lack of independence of the judge who was an associate lecturer at the University of Murcia, a circumstance of which the author became aware after the judgement had been pronounced, she states that the judge should have disqualified himself from hearing her case because he had an interest in the lawsuit. She further contends that the judge favoured the University in a suspicious manner, making repeated errors, always to the detriment of the same party. The author again refers to the decision of the European Court of Human

not be accepted in the following cases: (1) If it is not filed within 10 days after notification of the first decision indicating the identity of the challenged judge or magistrate, if the existence of the ground for the challenge was known before the latter; (2) If the motion is filed when proceedings are already pending, if the ground for the challenge was known before the stage in the proceedings at which the motion is filed.

⁶ European Court of Human Rights, *Pescador Valero v. Spain*, judgment of 17 June 2003. The author attached a copy of this case to her comments of 25 March 2003.

⁷ Article 23: 1. Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage; 2. They also have the right to accede, under conditions of equality, to public functions and positions, in accordance with the requirements established by law.

Rights in the Pescador Valero case,⁸ and also to a judgement of the Constitutional Court of Spain,⁹ which recognizes that the right to an impartial judge has been violated when the court includes a judge who is an associate lecturer at the university involved in the lawsuit.

Consideration of the merits

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

9.2 With respect to the existence of errors in the judgements of the High Court of Justice of Murcia, the Committee takes due note of the author's arguments that the judgements contain an arithmetical error because certain scores were rounded in an inconsistent way, to her disadvantage. The Committee also takes note of the State party's observations that the errors in question are contained in an *obiter dictum* of the decision of the Court and that they do not affect the result of the evaluation made by the assessment commission, which the judgement definitively confirms. The Committee observes that the decision of 31 October 1997 does contain errors in certain calculations which the Court made with a view to clarifying its earlier decision. However, the Committee considers that such calculations were made in supplementary and hypothetical arguments that in no way negate the sense of the judgement, which was to confirm the decision of the assessment commission.

9.3 The Committee is of the view that, while such errors might have created a degree of dissatisfaction in the author, they are insufficient to qualify as manifestly arbitrary a reasoned judgement that analyses in detail the scores awarded to the participants in the competition. Consequently, bearing in mind that there was no inequality in the selection process for the assistant lectureship, the Committee does not consider it necessary to discuss whether or not that position was a post within the public service and decides that there is no basis, in the present case, for claiming a violation of article 25 (c) of the Covenant.

9.4 With regard to the alleged violation of the right to an impartial tribunal stipulated in article 14, paragraph 1, of the Covenant, the Committee takes note of the State party's arguments concerning the large size of the University of Murcia and the presumed lack of personal interest of the judge in question in the lawsuit.

9.5 The Committee recalls its general comment No. 32, in which it states that the impartiality of the courts has two aspects.¹⁰ First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor

⁸ *Pescador Valero v. Spain*, op. cit.

⁹ First Chamber of the Constitutional Court, judgement 55/2007 of 12 March 2007.

¹⁰ CCPR/C/GC/32 [90] (adopted in July 2007), general comment No. 32, *Article 14. Right to equality before courts and tribunals and to a fair trial*, para. 21. See communication No. 1437/2005, *Jenny v. Austria*, Views of 9 July 2008, para. 9.3.

act in ways that improperly promote the interests of one of the parties to the detriment of the other.¹¹ Secondly, the tribunal must also appear to a reasonable observer to be impartial. These two aspects refer to the subjective and objective elements of impartiality, respectively.

9.6 As regards the subjective element, the judge's impartiality must be presumed in the absence of proof to the contrary. In this regard, the Committee takes note of the author's argument that the judge penalized her by committing errors in the judgement that were to her disadvantage. However, the Committee cannot conclude that those errors point to a subjective lack of impartiality of the judge in this case.

9.7 It should also be determined whether, quite apart from the judge's personal mindset, there are ascertainable objective facts which may raise doubts as to his impartiality. Judges must not only be impartial, they must also be seen to be impartial. When deciding whether there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of those claiming that there is a reason to doubt his impartiality is significant but not decisive. What is decisive is whether the fear can be objectively justified.

9.8 The Committee is of the view that, since the reporting judge was an employee of the University, where he worked as an associate lecturer (one of the parties to the proceedings before the High Court of Justice of Murcia), the author could reasonably have harboured doubts as to the impartiality of the court. The Committee considers that, in the circumstances, the author's apprehensions as to the impartiality of the judge are objectively justified and it therefore cannot be considered that there was an impartial court in the meaning of article 14, paragraph 1, 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 disclose a violation of article 14, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

12. By becoming a party to the Optional Protocol, Spain recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an effective remedy should it be proved that a violation has occurred. The Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

¹¹ See communication No. 387/1989, *Karttunen v. Finland*, Views of 23 October 1992, para. 7.2.

APPENDIX

Dissenting opinion of Mr. Edwin Johnson López and Mr. Rafael Rivas Posada

With regard to the communication concerned, we wish to express our opinion dissenting from that of the majority of the Committee.

The Second Division of the Administrative Chamber of the High Court of Justice of Murcia was composed of three judges, one of whom acted as the reporting judge for the judgement which the author is contesting. In our opinion, it cannot be inferred from the mere fact that the reporting judge was an associate lecturer at the University of Murcia that the Court, which reviewed the score attributed to the author by a commission of the University, showed partiality. It cannot be supposed that the judge, who worked as a lecturer in the Department of Procedural Law at the University, could have harboured prejudice or had any personal interest in awarding an assistant lectureship in the Department of Inorganic Chemistry to one candidate or the other. The connection is so remote and implausible that the judge, who was surely aware of the grounds for challenge established by Spanish law, did not consider standing down because he had no direct or indirect interest in the lawsuit. Moreover, it is common for judges to lecture at universities, where they impart their knowledge and share experience acquired in the exercise of their functions.

In the absence of other factors, the circumstances mentioned by the author do not fully and objectively justify her apprehensions as to the impartiality of the judge. Even acknowledging that, in some circumstances, the appearance of partiality may be such as to violate the right to a fair trial by an independent and impartial tribunal, in the present case the facts do not amount to a violation of article 14, paragraph 1, of the Covenant.

Edwin Johnson López

Rafael Rivas Posada

[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.]
