



Economic and Social Council

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Committee on Economic, Social and Cultural Rights

Decision adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 39/2018*, **

<i>Communication submitted by:</i>	Leonardo Fabio Muñoz García (represented by counsel, Juan Carlos Rois Alonso)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	21 June 2018 (initial submission)
<i>Date of adoption of decision:</i>	28 February 2022
<i>Subject matter:</i>	Eviction on foreclosure
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; insufficient substantiation of claims
<i>Substantive issue:</i>	Right to adequate housing
<i>Article of the Covenant:</i>	11 (1)
<i>Article of the Optional Protocol:</i>	3 (1) and (2) (e)

1.1 The author of the communication is Leonardo Fabio Muñoz García, a national of Spain born on 11 May 1975 in Pereira, Colombia. He claims that the State party has violated his rights under article 11 (1) of the Covenant. The Optional Protocol entered into force for the State party on 5 May 2013. The author is represented by counsel.

1.2 On 25 June 2018, the Working Group on Communications, acting on behalf of the Committee, registered the communication and decided not to request that the State party take interim measures, as the claims of possible irreparable damage had not been sufficiently substantiated.

1.3 In the present decision, the Committee first summarizes the information and the arguments submitted by the parties. It then considers the admissibility of the communication and, lastly, draws its conclusions.

* Adopted by the Committee at its seventy-first session (14 February–4 March 2022).

** The following members of the Committee participated in the examination of the communication: Aslan Abashidze, Mohamed Ezzeldin Abdel-Moneim, Nadir Adilov, Mohammed Amarti, Asraf Ally Caunhye, Laura-Maria Crăciunean-Tatu, Peters Sunday Omologbe Emuze, Ludovic Hennebel, Karla Vanessa Lemus de Vásquez, Seree Nonthasoot, Lydia Ravenberg, Preeti Saran, Shen Yongxiang, Heisoo Shin, Rodrigo Uprimny and Michael Windfuhr. Pursuant to rule 23 of the rules of procedure under the Optional Protocol, Committee member Mikel Mancisidor de la Fuente did not take part in the examination of the communication.



A. Summary of the information and arguments submitted by the parties

Factual background¹

2.1 The author and his family lived in a dwelling that he owned subject to a mortgage that was contracted on 7 July 2004 and increased on 6 April 2009. On an unspecified date, foreclosure was initiated by the bank holding the mortgage. On 2 October 2012, Leganés Trial and Investigating Court No. 8 approved the foreclosure and ordered the author and his spouse to pay €184,327 to cover the principal and the ordinary and default interest due, plus a further €31,876 in estimated interest. After the author and his spouse lodged an objection to the foreclosure, the fifth financial clause of the mortgage contract, regarding the payment of legal costs relating to foreclosure, and the sixth financial clause, regarding the compounding of default interest, were found to be abusive in an order handed down on 19 January 2015. Consequently, the foreclosure went ahead but the amount to be paid was adjusted to €184,277 for the principal and the ordinary and default interest due, plus €31,876 in estimated interest and costs.

2.2 On 15 December 2017, Leganés Trial and Investigating Court No. 8 granted a stay of eviction to the author and his family pursuant to Act No. 1/2013 of 14 May, which establishes a freeze on evictions in cases of foreclosure where the persons concerned are in a situation of economic vulnerability. The bank appealed against this decision on the grounds that the author's son had found temporary employment, thus increasing the family's income. On 19 February 2018, the author countered the bank's claim, arguing that his son's employment contract had been temporary and had ended in January 2018. His family therefore had a monthly income of €1,175, not €1,775, as the bank was claiming.

2.3 On 23 April 2018, Leganés Trial and Investigating Court No. 8 ruled that the family had been shown to have a monthly income of €1,775. Noting that article 1 (3) (c) of Act No. 1/2013 states that the freeze is applicable when "the monthly repayment exceeds 50 per cent of the net income of the family unit as a whole" and that the monthly repayment in this case was €787, the Court upheld the appeal and revoked the decision to suspend the foreclosure. The date of the eviction was set as 15 June 2018.

2.4 On 14 May 2018, the author applied for a stay of eviction on account of unforeseen circumstances, namely that his son had lost his job in January 2018. On 15 June 2018, the Court issued an order stating that the application could not be accepted because it did not refer to circumstances that had arisen after the contested decision of 23 April 2018 had been handed down. By the same order, the Court postponed the eviction to 26 June 2018 for lack of personnel to execute the eviction order. On 18 June 2018, the author applied for a stay of eviction on the grounds that he did not have alternative housing and stated that he was contacting the social services to request assistance.

2.5 On 20 June 2018, the author sent letters to the Leganés city council and the Madrid Social Housing Agency in which he requested assistance in finding a housing solution.

Complaint

3. The author claims that his family's monthly income is limited to his own salary of approximately €1,100, because his spouse and son are both unemployed. With this income, he does not have access to adequate alternative housing. He therefore considers that his eviction from the property in which he has been living since 2014 constitutes a violation of his right to adequate housing.

State party's observations on admissibility and the merits

4.1 On 27 February 2019, the State party submitted its observations on the admissibility and merits of the communication.

4.2 The State party notes that the present case concerns a situation of eviction on foreclosure. The State party reports that it has taken various measures to alleviate the impact

¹ The facts have been reconstructed on the basis of the individual communication and the information subsequently provided by the parties.

of financial crises on the most vulnerable mortgagors. The State party draws attention to Royal Decree-Law No. 6/2012 of 9 March on urgent measures for the protection of mortgagors without resources; Royal Decree-Law No. 27/2012 of 15 November on urgent measures to strengthen the protection of mortgagors; and Act No. 1/2013 of 14 May on measures to strengthen the protection of mortgagors, debt restructuring and social rental housing. These regulations protect the most vulnerable groups in the event that they cannot keep up with their mortgage repayments, through measures such as the possibility of debt restructuring and the application of a code of good practices, the suspension of evictions, the promotion of access to affordable rental housing through the establishment of the Social Housing Fund and the possibility that the mortgagor and the financial institution may agree on a transfer of ownership in lieu of payment, with the mortgagor continuing to occupy the dwelling as a tenant with reduced rent for two years.

4.3 Under Royal Decree-Law No. 1/2015 of 27 February and Act No. 25/2015 of 28 July on the second-chance system, the reduction of financial burdens and other social measures, the criteria established in the existing legislation were broadened to cover a larger sector of the population. These regulations set out measures that are designed to give a second chance to people in debt. These measures include the possibility of reaching out-of-court agreements on the restructuring or waiving of debt, including any debt remaining after foreclosure, in the case of mortgage loans secured on housing. In addition, the regulations strengthen the role of mediators, re-establish simplified rules of procedure, provide for a reduction in notary and registration fees and require that foreclosures be suspended during the negotiation period. They also prohibit the application of “floor clauses” in respect of debtors in situations of vulnerability and extend the freeze on evictions provided for in Act No. 1/2013 of 14 May.

4.4 Under Royal Decree-Law No. 5/2017 of 17 May, the criteria that must be met in order to be considered vulnerable were further broadened and the eviction of vulnerable persons was prohibited until 2020. This regulation also contains a set of measures designed to help those benefiting from the freeze on evictions to recover their homes, as it establishes a social rental plan whereby the rent paid will be deductible from the future purchase price. People who have been evicted and are considered to be at risk of exclusion will be able to apply to rent their home for a maximum annual rent of 3 per cent of its value. The social rental contract will be a one-year contract that can be extended by the tenant for up to a total of five years, with the possibility of extension on an annual basis for another five years by mutual agreement between the parties.

4.5 The State party notes that housing and social assistance are the responsibility of the autonomous communities. In the present case, the author was living in the Autonomous Community of Madrid, where social housing is managed by the Madrid Social Housing Agency. Housing is granted in situations of particular need in accordance with the provisions of Decree No. 52/2016 of 31 May. In almost all cases, it is allocated on the basis of a scale designed to ensure that priority is given to those in situations of particular social vulnerability. There is also a social support quota reserved for families with a high potential for recovery and social reintegration, a system for the allocation of unassigned housing by draw and a particular need quota. Situations of particular need that are taken into consideration include facing imminent eviction; being a victim of violence based on gender, race, sexual orientation or identity, religion, belief or disability; living in poor housing conditions or in substandard housing; living in a space that is too small or for which the rent is equivalent to more than 30 per cent of the total family income; and living in precarious housing with the consent of the owner of the property.

4.6 The Community of Madrid has established a stock of emergency social housing, through Decree No. 52/2016 of 31 May, so as to be able to offer an immediate solution to individuals and families who, because of their current circumstances, are experiencing serious difficulties in meeting their housing needs. This stock was established in view of the need to pay special attention to the urgent housing support needs of people facing imminent eviction from the dwelling that is their habitual and permanent residence. It can also be used to address the needs of persons living in substandard housing.

4.7 The State party notes that there is no record of the author having submitted a housing application to the Social Housing Agency. He did, however, request assistance from the city council in a letter addressed to the Mayor of Leganés, which was forwarded to the social

services of the city council on 21 June 2018. The social services tried to contact the author by telephone but were unable to reach him because the telephone numbers provided were out of service. Faced with this situation, the social services sent a letter to the only address the author had provided, his home address, offering him an appointment at the offices of the social services on 21 September 2018, but the author did not turn up, no doubt because he had not received the letter as he was no longer living at that address. The State party concludes that the author did not seek assistance from the Social Housing Agency and only requested assistance from the city council belatedly and without subsequently following up on his request. With that in mind, the State party submits that the communication is inadmissible under article 3 (1) (a) of the Optional Protocol because domestic remedies have not been exhausted.

4.8 Furthermore, the State party submits that, as determined by the domestic judicial authorities, the present case does not involve the eviction of a person without resources, since the monthly mortgage repayment does not exceed 50 per cent of the income of the family unit and the family's net income is more than twice the interprofessional minimum wage in Spain, which was set at €900 in 2019.

Author's comments on the State party's observations

5.1 On 24 June 2019, the author's counsel reported that, after the author and his family had been evicted, they were not contacted by any authority and were thus left in a situation of vulnerability. According to the author's counsel, three months after the eviction, the social services contacted the author to say that all they could offer the family was a one-off grant of €300. Such a grant does not constitute a housing solution by any means. Consequently, the author and his family found themselves in a situation of housing exclusion, with no chance of finding rental housing, since rents have risen disproportionately as a result of the State party's housing policies, which have encouraged the acquisition of housing by vulture funds and speculative investors. The author ended up renting a room, his wife was forced to return to her country of origin and his son moved in with a friend. The author's counsel states that he is unable to provide further information on the author's whereabouts because he has lost contact with him.

5.2 With regard to the housing-related measures taken by the State party, the author's lawyer asserts that, since the 2000s, banks have been signing contracts that contain abusive clauses and the people affected have not found a legal channel through which to have them amended, since Spanish mortgage regulations are designed in such a way as to undermine consumer rights. This has condemned many borrowers, including the author, to the loss of their homes. The author's counsel adds that it has been necessary for the Court of Justice of the European Union to rule on the matter, owing to the State party's failure to transpose into Spanish law the minimum consumer guarantees required. The author's counsel adds that, in the present case, the mortgage contract contained an abusive clause regarding early termination for a single missed repayment. The lawfulness of that clause could not be challenged before a court until the procedural reform of May 2013. According to the case law of the Court of Justice of the European Union, such a clause is sufficient grounds for terminating foreclosure proceedings. Similarly, Constitutional Court Judgment No. 31/2019 of 28 February 2019 requires judges to automatically review clauses challenged by borrowers. Unfortunately, these rulings were handed down after many families had lost their homes.

5.3 The author's counsel considers that the authorities did little more than shuffle papers in this case, thus demonstrating that the housing measures in place are ineffective.

B. Committee's consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 10 (2) of its rules of procedure under the Optional Protocol, whether or not the communication is admissible.

6.2 The Committee notes the State party's submission that the communication should be declared inadmissible for failure to exhaust domestic remedies, since the author never applied for social housing and did not follow up on his request for assistance from social services.

The Committee notes that the author has not put forward any arguments in response to this claim.

6.3 The Committee notes that States parties have a positive obligation under article 2 (1) of the Covenant to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means. The Committee recalls, however, that States parties may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant, as provided for in article 8 (4) of the Optional Protocol. The Committee therefore recognizes that States parties may establish administrative channels to facilitate the protection of the right to housing, including by requiring individuals to undertake certain administrative procedures to notify the authorities of their need for assistance in the protection of their right to housing. These procedures should not impose an excessive or unnecessary burden on individuals and should not have a discriminatory effect.²

6.4 In the present case, the Committee notes that it has not been alleged that the procedures proposed by the State party, namely applying for housing or for assistance from social services, would have placed an excessive or unnecessary burden on the author or would have had a discriminatory effect. Moreover, according to the case file, the only step that the author took was to send out urgent letters requesting assistance a few days before his eviction and in doing so, he did not follow the established procedures, nor did he provide sufficient contact information in these letters for the authorities to be able to follow up on them. The case file also shows that the author himself did not follow up on these letters. The Committee is of the view that the lateness of the author's request for assistance and his failure to make use of the administrative channels established by the State party, such as the procedure for applying for social housing, constitute a lack of due diligence in this case. The Committee considers that any lack of due diligence in requesting assistance from the national administrative authorities with a view to securing access to alternative housing within a reasonable time frame would be an important factor in determining whether domestic remedies have been exhausted, as required under article 3 (1) of the Optional Protocol, and whether the claim that the State party has failed in its obligations under article 11 (1) of the Covenant has been substantiated.³

6.5 In the present case, the Committee is of the view that the author has not shown that he was diligent in seeking assistance from the administrative authorities to secure access to alternative housing, even though he had been aware of the decision to proceed with foreclosure since 2 October 2012 at least. Consequently, since it has not been presented with sufficient evidence that the author acted with due diligence when exhausting domestic remedies, the Committee finds the communication inadmissible under article 3 (1) of the Optional Protocol. In addition, taking into account the considerations set out above (paras. 6.3–6.4) and in the absence of any justification for the author's failure to act with due diligence by making use of the established administrative channels, the Committee finds that the author has not sufficiently substantiated his claim that the State party failed in its obligations under the Covenant, and that the communication is therefore inadmissible under article 3 (2) (e) of the Optional Protocol.

C. Conclusion

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 3 (1) and (2) (e) of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

² *Taghzouti Ezqouihel v. Spain* (E/C.12/69/D/56/2018), paras. 6.3–6.4; *Loor Chila et al. v. Spain* (E/C.12/70/D/102/2019), paras. 6.3–6.4; and *Sariego Rodríguez and Dincă v. Spain* (E/C.12/70/D/92/2019), paras. 7.2 and 7.4.

³ *Taghzouti Ezqouihel v. Spain*, paras. 6.3–6.4; *Loor Chila et al. v. Spain*, paras. 6.3–6.4; and *Sariego Rodríguez and Dincă v. Spain*, paras. 7.2 and 7.4.