



Economic and Social Council

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Committee on Economic, Social and Cultural Rights

Views adopted by the Committee under the Optional Protocol to the Covenant concerning communication No. 19/2016*

<i>Communication submitted by:</i>	Baltasar Salvador Martínez Fernández (represented by counsel, José Ángel Gallegos Gómez)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	16 November 2016
<i>Date of adoption of decision:</i>	8 October 2018
<i>Subject matter:</i>	Eviction from a dwelling occupied without legal title
<i>Procedural issues:</i>	Victim status; exhaustion of domestic remedies; failure to sufficiently substantiate allegation
<i>Substantive issues:</i>	Right to adequate housing
<i>Article of the Covenant:</i>	11
<i>Articles of the Optional Protocol:</i>	2 and 3 (1) and (2) (a), (b) and (e)

1.1 The author of the communication is Baltasar Salvador Martínez Fernández,¹ of Spanish nationality. The author claims that he is a victim of a violation by the State party of his rights under article 11 of the Covenant. The Optional Protocol entered into force for Spain on 5 May 2013. The author is represented by counsel.

1.2 In the present decision, the Committee first provides a summary of the information and arguments presented by the parties without reflecting the Committee's opinions, and subsequently considers the questions related to admissibility.

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

Facts as submitted by the author

2.1 G.G. took out a mortgage with a private bank (Banco Popular Español SA) to purchase a property that would serve as her residence.

* Approved by the Committee at its sixty-fourth session (24 September to 12 October 2018)

¹ The initial communication was submitted on behalf of the author and G.G., former mother-in-law of the author. The authors subsequently requested the withdrawal of all allegations involving G.G, which had become irrelevant when her application for review was accepted.



2.2 On 8 October 2007, the real estate company *Proyectos de Desarrollos Activos SL*, which had merged with the bank, initiated foreclosure proceedings before Court of First Instance No. 43 of Barcelona. On 11 October 2007, the Court admitted the application for foreclosure and the procedures for the order for payment were carried out. By decree of 1 October 2013, the Court granted ownership of the property to the company *Proyectos de Desarrollos Activos SL* for the price of 178,500 euros.

2.3 On 1 July 2014, following a failed attempt to evict the occupants of the property, Court No. 43 ordered that steps again be taken to evict the persons occupying the property. On 24 July 2014, following another two failed attempts, security forces evicted G.G. and her daughter.

2.4 On 1 August 2014, the author, without legal title or authorization, occupied the dwelling from which his former mother-in-law, G.G., had been evicted for defaulting on her mortgage payments.

2.5 On 19 April 2016, the Court of First Instance No. 20 of Barcelona imposed a three-month fine of 3 euros a day on the author for the misdemeanour of unlawful appropriation and ordered him to leave the dwelling within not more than 15 days, failing which he would be evicted by the security forces. The author appealed this decision before the Barcelona Provincial High Court, which rejected his appeal on 11 July 2016.

2.6 Once the decision was final, the real estate company *Proyectos de Desarrollos Activos, S.L.*, which owned the property, asked Court No. 20 to order the eviction of the author. In reply to the Court's request, the police reported that the property was being occupied at that time by G.G. On 24 October 2016, *Proyectos de Desarrollos Activos, S.L.* requested that the eviction of the author and G.G. take place without further delay with the assistance of the Catalan autonomous police force riot squad. In its request, the company contended that the authors were flouting Court No. 20's ruling by taking it in turns to occupy the dwelling.

2.7 On 7 November 2016, Court No. 20 granted the company's request on the basis of the finding that, although there was initially not enough evidence to charge G.G. with the misdemeanour of unlawful appropriation, she and the author were taking it in turns to occupy the dwelling. The Court therefore ordered that the persons occupying the dwelling be evicted unless they could produce due legal title to the property.

2.8 On 15 November 2016, the author and G.G. filed an application for reconsideration of Court No. 20's order. That application did not have suspensive effect. By the date of submission of the communication, the eviction had not yet taken place.

2.9 On 13 January 2017, Court No. 20 granted the application for reconsideration and amended the order of 7 November 2016 on the grounds that it could not order G.G.'s eviction if she was not a party to the proceedings.

2.10 The author maintains that he has exhausted all available domestic remedies. In that respect he argues that lodging an *amparo* appeal with the Constitutional Court does not constitute an effective remedy for protecting the right to adequate housing, since that right is not a fundamental right protected by the State party's Constitution.

Complaint

3.1 The author contends that the State party violated his rights under article 11 of the Covenant, on the grounds that Court No. 20's ruling convicting him of unlawful appropriation under article 245.2 of the Criminal Code was accompanied by an eviction order which he considers forced, unlawful and arbitrary, because it does not meet the procedural protection requirements set forth in general comment No. 4 (1991) on the right to adequate housing and in paragraph 15 of general comment No. 7 (1997) on the right to adequate housing: forced evictions.²

² Paragraph 15 of general comment No. 7 (1997) states as follows:

“Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large

3.2 In this regard, the author asserts that, in order to be found liable for unlawful appropriation under article 245.2 of the Criminal Code, a person must have “occupied, without due authorization, another person’s property, dwelling or other building used other than as a place of residence or remained in them against the owner’s wishes”. In his case, however, according to the author, the property constituted his dwelling or place of residence. The author is of the view that his interpretation is the only one compatible with the basic rights protected by the Constitution of Spain and article 11 of the Covenant, while acknowledging that according to the hegemonic interpretation of the State party the term “place of residence” (*morada*) refers to the use attributed to the property by its lawful owner.

State party’s observations on admissibility and the merits

4.1 On 2 June 2017, the State party submitted its observations on the admissibility and the merits of the communication. It is of the view that the communication is inadmissible because the author has failed to exhaust domestic remedies and because the communication is manifestly unfounded. According to the State party, the author alleges that his right to effective judicial protection has been violated, as well as the principle of the definition of the offence, owing to the fact that Court No. 20’s arguments were arbitrary. Both the right to effective judicial protection³ and the principle of the definition of the offence⁴ are protected by articles 24 and 25 of the Constitution. Violations of those rights can give rise to an application for annulment of proceedings before the court in question (the Barcelona Provincial High Court in this case) and subsequently an application for *amparo* lodged before the Constitutional Court.

4.2 The State party also points out that the author’s arguments regarding the arbitrariness of Court No. 20’s ruling amount in essence merely to an expression of his belief that what constitutes unlawful appropriation had been misinterpreted. In this regard, the State party notes that in paragraph 15 of general comment No. 7 the Committee lists the procedural protections which, under the Covenant, should accompany evictions, and that the author has not alleged that he has been denied any of those protections by the Spanish administrative authorities.

4.3 Subsidiarily, the State party considers the communication should be dismissed on the merits in that it fails to show any violation of article 11 of the Covenant. The State party recalls that of the protections stipulated in paragraph 15 of the Committee’s general comment No. 7, only the obligation to provide legal remedies could be said to have been raised by the author. However, both the appeals filed by the author and the existence of other remedies that he did not avail himself of (such as a motion for annulment or an application for *amparo*) show that he was not denied such protection in the present case.

4.4 Lastly, the State party is of the view that the author’s assumption that the term “place of residence” (*morada*) as it is used in article 245.2 of the Criminal Code refers to the person occupying the property is illogical. In reality, the term refers to the nature of the property with respect to the victim, not the offender. Thus the Criminal Code differentiates the offence of unlawful appropriation, in which a property that is not the victim’s dwelling is occupied, from illegal entry, which carries a stiffer penalty and arises whenever the occupied dwelling constitutes the victim’s place of residence.

number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.”

³ Constitutional Court Decision 30/2017 of 27 February 2017, legal basis No. 4.

⁴ Constitutional Court Decision 150/2015 of 6 July 2015, legal basis No. 2.

Author's comments on the State party's observations on admissibility and merits

5.1 In a letter dated 22 June 2017, the author submitted his comments on the State party's observations.

5.2 With regard to the non-exhaustion of domestic remedies, the author notes that the Constitutional Court can receive complaints of violations of fundamental rights, including the right to effective judicial protection. It is not, however, an appellate court responsible for supervising the legality of the decisions made by the courts. The Constitutional Court's concern with regard to the right to effective judicial protection is whether the country's courts, regardless of whether they are right or wrong in their interpretation and application of the law, fulfil their function of administering justice, so that their decisions are substantiated rather than arbitrary. An application for *amparo* in the case of violations of the right to effective judicial protection must be preceded by an application for annulment of proceedings under article 238 of the Organic Act on the Judiciary. According to that article, for a judicial act to be considered invalid, it is not enough for the rule to have been misapplied or breached, it must not have been applied at all. The author explains that in his communication it was contended not that the Court's decision was illogical but that his interpretation was as valid as the State party's, which was incompatible with the Covenant and the Constitution.

5.3 The author acknowledges that it is not the responsibility of the Constitutional Court or the Committee to determine the proper interpretation of the Spanish Criminal Code. The question he raises before the Committee is therefore to know whether, of the two possible interpretations of article 245.2 of the Criminal Code, that chosen and acted on by the justice system is compatible with article 11 of the Covenant.

5.4 With regard to the State party's claim that none of the rights protected by paragraph 15 of general comment No. 7 has been breached, the author contends that the list of procedural protections in that paragraph is not exhaustive and that his communication refers to a violation not only of general comment No. 7 but also of article 11 of the Covenant.

5.5 The author adds that the aim of the housing policy applied in Spain has not been to facilitate the exercise of the right to adequate housing; quite on the contrary, it has contributed to a rise in housing costs. In the circumstances, the appropriation of empty dwellings has become the only way out for people deprived of the right to adequate housing. For that very reason, the State party has made it a criminal offence to appropriate empty dwellings for residential purposes, despite the fact that an interpretation of article 245.2 of the Criminal Code more closely aligned with the Covenant would not consider such appropriation to constitute an offence.

B. Committee's consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide whether the case is admissible under the Optional Protocol.

6.2 The Committee takes note of the State party's argument that the communication is inadmissible under article 3 (1) of the Optional Protocol, on the grounds that the author — while arguing that the breach of his right to effective judicial protection and that of the principle of the definition of the offence are due to the arbitrary reasoning of the court — did not apply to have the procedure annulled, or submit an application for *amparo* to the Constitutional Court. The Committee further takes note of the author's arguments that the Constitutional Court's responsibility is not to supervise the legality of the decisions made by the Spanish courts and that an application for *amparo* for violations of the right to effective judicial protection must be preceded by an application for annulment of proceedings. Similarly, the Committee notes that under article 238 of the Organic Act on the Judiciary, for a judicial act to be considered invalid, it is not enough for the rule to have been misapplied or breached, it must not have been applied at all.

6.3 The Committee also notes that, according to the author, the question is not whether the decision made by Court No. 20 was irrational but whether its interpretation was incompatible with the Covenant and the State party's Constitution. In addition, the

Committee notes that the author's allegations are closely linked to the right to adequate housing, which cannot be appealed under *amparo* proceedings. The Committee is therefore of the view that the author has exhausted all available domestic remedies and that his communication is admissible under article 3 (1) of the Optional Protocol.

6.4 With regard to the author's claims that his conviction for unlawful appropriation was illegal and arbitrary because it was based on an interpretation of article 245.2 of the Criminal Code that is incompatible with the fundamental rights protected by the State party's Constitution and article 11 of the Covenant, the Committee notes the State party's view that such claims are manifestly unfounded and do not show any violation of rights under the Covenant. The Committee further notes that, in essence, the author's claims cast doubt on the interpretation of domestic law given by Court No. 20 and by the Provincial High Court, in particular regarding the question of determining whether unlawful appropriation may exceptionally be defined in such a way as to exempt from prosecution for that offence a person who occupies a property with a view to making it his or her dwelling. In this regard, the Committee refers to its jurisprudence, which establishes that its task, when examining a communication, is limited to analysing whether the facts described, including the application of domestic law, reveal a violation by the State party of the economic, social or cultural rights set forth in the Covenant, and that it falls primarily to the courts of States parties to assess the facts and evidence in each individual case, as well as to interpret the applicable laws.⁵ The Committee is called upon only to decide whether the assessment of evidence or the interpretation of domestic law applied in the case in question would entail a violation of a Covenant right.⁶ Accordingly, it is primarily the responsibility of the author of the communication to provide the Committee with sufficient information and documentation to demonstrate that one of these situations applies in his case. The Committee has examined the author's submissions, including the decisions made by Court No. 20 and Barcelona Provincial High Court on 19 April 2016 and 11 July 2016 respectively, and finds that they do not show that the conviction was subject to such flaws.

6.5 It could be considered that the author is not in fact arguing that the judges of the State party misinterpreted domestic law, which as has been explained above does not fall within the Committee's competence, but that there was a violation of article 11 of the Covenant because the State party convicted him for unlawful appropriation for occupying a dwelling as his residence, irrespective of whether or not the judges correctly interpreted domestic legislation. However, for this claim to be considered by the Committee, the author would have to demonstrate that his conviction for unlawful appropriation in some way affected his right to housing. It is not incumbent on the Committee to interpret the State party's domestic legislation and decide whether the author should have been convicted for unlawful appropriation. The Committee therefore finds that the author has not sufficiently substantiated his claims under article 11 of the Covenant and that they are inadmissible under article 3 (2) (e) of the Optional Protocol.

C. Conclusion

7. Having considered all the information submitted to it, the Committee, acting under the Optional Protocol, finds that the communication is inadmissible under article 3 (2) (e) of the Optional Protocol.

8. The Committee therefore decides that pursuant to article 9 (1) of the Optional Protocol, the present decision shall be transmitted to the author of the communication and to the State party.

⁵ See the communications *López Rodríguez v. Spain* (E/C.12/57/D/1/2013), para. 12, *I.D.G. v. Spain* (E/C.12/55/D/2/2014), para. 13.1, and *Arellano Medina v. Ecuador* (E/C.12/63/D/7/2015), para. 8.10.

⁶ *Ibid.*