



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2558/2015*, **, ***

<i>Communication submitted by:</i>	M.I.A.P. (represented by counsel, Diego Fernández Fernández)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	18 December 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 30 January 2015 (not issued in document form)
<i>Date of adoption of decision:</i>	15 March 2021
<i>Subject matter:</i>	Discrimination on account of employment category
<i>Substantive issues:</i>	Right to due process; right to a reasoned decision; right to equality
<i>Procedural issues:</i>	Matter being examined under another procedure of international investigation or settlement; exhaustion of domestic remedies; abuse of the right of submission
<i>Articles of the Covenant:</i>	14 (1) and 26
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (a) and (b)

1.1 The author of the communication is M.I.A.P., a national of Spain born on 22 May 1975. The author claims that the State party has violated her rights under articles 14 (1) and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel.

* Adopted by the Committee at its 131st session (1–26 March 2021).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V. J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** An opinion by Committee members Marcia V. J. Kran and Gentian Zyberi (dissenting) is annexed to the present decision.



1.2 On 15 June 2015, the Committee's Special Rapporteurs on new communications and interim measures dismissed the State party's request for the admissibility and merits of the communication to be considered separately. Consequently, they will be considered together.

Factual background

2.1 On 7 December 1999, the author enlisted in the army as an engineering and artillery specialist. The author notes that, although her employment with the military was temporary, it was a long-term commitment given that, when she turned 45, she would become a reservist with the right to a salary until she retired, in accordance with the Soldiers and Sailors Act (No. 8/2006 of 24 April).

2.2 On 16 February 2007, the author was placed on leave for a depressive disorder, subsequently categorized as a mixed adjustment disorder,¹ which the author claims was linked to her professional environment and harassment by her direct superiors. The author notes that the link between her illness and her workplace had been demonstrated in a medical report drawn up by her psychiatrist.²

2.3 Owing to the author's placement on leave, the Office of the Undersecretary of Defence initiated administrative proceedings to assess her psychophysical fitness and determine whether her illness was work-related and whether she was incapable of carrying out her usual functions and, on that basis, what her employment situation should be, in accordance with Act No. 8/2006 and Royal Decree No. 1186/2001, which builds on article 52 bis of Royal Legislative Decree No. 670/1987 of 30 April on the adoption of the State Pensioners Act (Consolidated).³ These laws regulate the labour relations of professional soldiers and sailors in the Armed Forces, as well as the disability pension and other compensation to which they are entitled.

2.4 On 26 June 2008, the Expert Medical Board of Valencia ruled that the author had an anxiety disorder unrelated to her service, as it was a disorder that she was predisposed to, not one with a specific environmental or other external cause. On 22 October 2008, a report of the General Legal Advisory Department terminating the author's service with the Armed Forces was included in the administrative proceedings.

2.5 On 11 November 2008, the administrative proceedings to assess the author's psychophysical fitness culminated in the determination that her condition made her unfit for military service, that her depressive disorder bore no relation to her work and, moreover, that her illness had not been proved to have occurred during her service. Therefore, her case fell outside the scope of Royal Decree No. 1186/2001⁴ with regard to the right to a disability pension or other compensation. Furthermore, the Office of the Undersecretary of Defence stated that the author's illness was covered by Royal Decree No. 1971/1999 on the Recognition, Declaration and Calculation of Degree of Disability and that her disability

¹ The author notes that mixed adjustment disorder develops in reaction to an external stressor (the workplace) and can, when exposure to the stressor is prolonged, as in her case, present as a depressive or mood disorder. The author also notes that her unit's medical commander acknowledged that she was indeed suffering from mixed adjustment disorder, as recorded in a report of 28 November 2007 included in the administrative proceedings.

² The author does not provide a copy of the expert report.

³ Article 52 bis states:

(1) Non-career ... soldiers and sailors who have not acquired the right to remain in the Armed Forces until retirement age shall be entitled, for the duration of their non-permanent service, to an ordinary or extraordinary pension, in accordance with chapters II and V, in the event that they become unfit for service, provided that the lack of fitness falls under article 28 (2) (c) of this Decree as it relates to total incapacity for any occupation or trade.

(2) These service members shall be entitled, within the applicable regulatory terms, to a pension or lump-sum compensation if they have permanent non-incapacitating injuries or injuries that do not disqualify them for all occupations and trades.

⁴ Article 1 (2) establishes that the Royal Decree applies when the accident, injury or illness causing the psychophysical unfitness is the consequence of an event that occurred at any time from the outset of a professional soldier's or sailor's term of enlistment to the completion of that term for reasons provided for in applicable law.

rating was on the order of 5 per cent.⁵ The author claims that these determinations mean that, in practice, she does not have the right to a pension or compensation of any other kind for her disability.

2.6 On 29 June 2009, the author lodged an administrative appeal with the High Court of Justice of the Community of Valencia against the outcome of the administrative proceedings. The author notes that the Expert Medical Board of Valencia was wrong to characterize her illness as an anxiety disorder to which she was predisposed – she was suffering from a mixed adjustment disorder caused by her work environment, where, in her most recent posting, as confirmed by her psychiatrist and shown in a number of supporting documents included in the proceedings, she was subjected by her superiors to psychological harassment, humiliation and professional disparagement. She submits that the competent authorities, in a bid to prevent professional military personnel from collecting a disability pension or lump sum, generally try to exclude such personnel from the scope of Royal Decree No. 1186/2001 by narrowly interpreting article 1 (2) to mean that the illness causing the disability must stem from a specific physical event, thereby excluding illnesses that a person could be predisposed to or that were not caused by a specific event. In addition, the author is of the opinion that her right to equality was violated, as non-career enlisted service members, of whom she was one, are entitled to a pension or lump sum only when their illness is a consequence of an event that occurred while they held enlisted status, whereas that condition does not apply to career military personnel or any other public servant under the State pension regime or even other workers in Spain. The author applied for annulment of the decision on the grounds that her illness was a direct consequence of her employment in the Armed Forces and that she contracted it while she held enlisted status. Accordingly, she requested a pension for permanent incapacity for her occupation.⁶ Secondly, she requested the recognition of her right to any other appropriate pension or compensation on the basis of the determination of her disability rating, irrespective of whether she had acquired the disability in the line of duty.⁷

2.7 On 21 May 2012, the Administrative Chamber of the High Court dismissed the appeal, noting that what needed resolving was the issue of whether the author's illness, which was the source of her disability, had been caused by her service. The High Court referred to the expert opinion requested by the author, according to which she had a mixed depressive disorder caused by her work environment rather than by any personal or endogenous factors. However, the High Court was of the view that the opinion failed to take into account some of the elements of the opinion issued by a military psychologist in 2007, according to which the author had contacted the psychological services of the Armed Forces in 2004 on account of symptoms of depression and, in 2005 and 2006, had had anxiety attacks that had led to her placement on leave in 2007. Lastly, the High Court concluded that, based on all the tests run during the administrative proceedings, the events with which the author associated the alleged psychological ill-treatment – a harsh assessment by a superior officer in 2006 and confinement in 2007 – had not caused her illness and that, on the contrary, its origins lay not in her work but in external factors.

2.8 On 18 June 2012, the author filed an exceptional application for annulment before the Administrative Chamber of the High Court of Justice of the Community of Valencia in which she claimed that the lack of reasoning in the judgment of 21 May 2012 constituted an infringement of her right to an effective judicial remedy, as provided for in article 24 of the Constitution, as the High Court had not ruled on her claim of a violation of her right to

⁵ The author notes that it has been established that her illness was covered under item 267 (a), coefficient 5, of the table on psychophysical conditions contained in the annex to Royal Decree No. 994/2001, which indicates that the illness is irreversible or is highly or somewhat unlikely to be reversed, leading to a total inability to perform the functions of her corps, rank, post or profession, and a disability rating of 5 per cent.

⁶ Royal Decree No. 1186/2001, art. 5.

⁷ Article 6 (1) (a) of Royal Decree No. 1186/2001 provides for partial incapacity for an occupation stemming from “lack of fitness for service owing to circumstances unrelated to service or to an act performed while in service or as a consequence of such an act”. Article 7 covers moderate incapacity resulting from an act carried out in the line of duty or not. The amount of the pension or other compensation varies depending on whether the illness occurred in the line of duty.

equality. The author noted that the High Court had also violated her right to an effective judicial remedy by ruling solely on whether her illness was covered under article 1 (2) of Royal Decree No. 1186/2001 and by examining the link between the illness and her service, without determining whether the author's situation might fall under one of the cases provided for in articles 6 and 7 of the Royal Decree, which establish pensions and other forms of compensation that do not require such a link as long as the illness presents in the period from the acquisition of enlisted status to the end of service.

2.9 On 27 December 2012, the Administrative Chamber of the High Court issued a ruling dismissing the author's exceptional application for annulment and fleshed out the judgment of 21 May 2012. The High Court was of the view that the main claim had been addressed insofar as it had rejected the argument that her illness resulted from an act performed in the line of duty, thus putting the illness outside the scope of article 1 (2) of Royal Decree No. 1186/2001. The High Court acknowledged that the judgment under appeal did not address the secondary claim regarding the recognition of the right to any other appropriate pension or compensation, as the Expert Medical Board's assessment of a disability rating of 5 per cent did not contain an explanation of how this figure had been calculated. Therefore, the High Court ordered the competent authority to recalculate the disability rating, taking into account the expert test conducted during the annulment proceedings.⁸

2.10 On 1 February 2013, the author applied to the Constitutional Court for *amparo* against the ruling of 27 December 2012, claiming that it violated her rights to an effective judicial remedy and equality, as recognized in articles 24 and 14 of the Constitution, respectively. The author noted that her right to an effective judicial remedy had been violated owing to the lack of reasoning, as the ruling merely indicated that the author's illness was not caused by her service, without delving deeper into the reasons that had led to this finding. Moreover, the ruling was limited to addressing the claims concerning the violation of the right to equality and the erroneous interpretation of article 1 (2) of Royal Decree No. 1186/2001 in such a way as to keep it from being applied to any but work-related illnesses, even though the Decree clearly provides for the award of a pension or other compensation in cases involving circumstances unrelated to service, provided that the illness occurred while the person held enlisted status. As for the violation of the right to equality, the author noted that the authorities' application of the law discriminates against non-career service members, who are not awarded compensation or a pension for a disability, even when it has been officially declared, thus putting them at a disadvantage to career military personnel and even to workers in general.

2.11 On 22 April 2013, the Constitutional Court dismissed the author's application on the grounds that she had not demonstrated its special constitutional significance, in accordance with article 49 (1) of the Organic Act on the Constitutional Court.

2.12 On 17 October 2014, in compliance with the judgment of 21 May 2012, completed by the ruling of 27 December 2012, Expert Medical Board No. 41 calculated the author's degree of disability to be 35 per cent.

2.13 On 16 September 2013, the author lodged an application with the European Court of Human Rights, which was dismissed on 13 February 2014 in a single-judge decision on the grounds that it was inadmissible under articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

The complaint

3.1 The author claims that the State party violated her rights under articles 14 (1) and 26 of the Covenant. Regarding the violation of article 14 (1),⁹ the author considers that the right to due process, enshrined in article 14 of the Covenant, includes the right to a reasoned decision – in other words, a decision must be duly reasoned with regard to all the claims

⁸ The order indicates only that the test was carried out on 27 December 2011, not who requested or conducted it.

⁹ Human Rights Committee, general comment No. 32 (2007), paras. 2–4, 15–17 and 26.

made by the parties. The author refers to the Committee's Views in various cases¹⁰ where it has ruled on article 14, pointing out that the Committee's analysis leads to the conclusion that, as a rule, it is the role of domestic courts to assess the facts and evidence in each specific case, unless that assessment is manifestly arbitrary or constitutes a denial of justice, which is what happened in her case.

3.2 The author submits that her right to due process, recognized in article 14 of the Covenant, has been violated, arguing that the High Court disregarded her right to a duly reasoned decision grounded in law when it dismissed her application for annulment of the judgment of 21 May 2012 without ruling on the violation of her right to equality, a claim that she had duly substantiated. The author requests the Committee to verify whether the High Court's decisions were sufficiently reasoned and whether they were arbitrary. She also requests the Committee to determine whether failing to rule on her claim can be considered serious enough to amount to a violation of her rights under the Covenant.

3.3 Concerning the violation of article 26, the author submits that the principle of non-discrimination, together with equality before the law and equal protection of the law, is a basic principle of human rights protection.¹¹ The author refers to the Committee's Views in a number of cases relating to article 26¹² and concludes that she was discriminated against, as, according to this jurisprudence, the Committee had found that there had been discrimination in comparable situations where there had been different treatment without objective or reasonable justification. She claims that in most cases, owing to legal changes in the social security regime for non-career enlisted personnel, the latter have no right to any disability pension or compensation, unlike career military personnel, public servants and even other Spanish workers. Non-career enlisted personnel currently have a right to a disability pension or other compensation depending on the level of disability, but that right is contingent on a number of conditions – for example, the injury or illness must be the consequence of an event that occurred while the person held enlisted status, in accordance with article 1 (2) of Royal Decree No. 1186/2001 (see para 2.5). The interpretation of this norm by the authorities and the courts is restrictive in that they require the event that caused the disability to be physical, tangible and easily demonstrable, thereby excluding illnesses not triggered by a specific event – for instance, genetic disorders or disorders to which a person could be predisposed.

3.4 The same does not apply to career military personal or to public servants, who would receive a pension or other compensation in the event of temporary disability stemming from ordinary or occupational illnesses, an ordinary accident or the performance of their duties. The same entitlements would accrue in case of unfitness for duty, regardless of when the illness or injury occurred.¹³ The author also notes that the Social Security Act (Consolidated) (Legislative Decree No. 1/1994) does not establish, for either temporary or permanent disability, a period within which an injury or illness must have occurred. In the case of temporary disability, the illness can present while a worker is receiving social security benefits and is prevented from working (art. 128) and, in the case of permanent disability, a person's anatomical or functional limitations at the date of his or her affiliation with the social security scheme do not prevent his or her disability from being recognized as a permanent disability (art. 136 (1)).

3.5 Thus, if a career member of the military, a public servant or a worker affiliated with the general social security scheme experiences, for example, a heart attack or, like the author, a psychological problem, that person, unlike the author, would receive a pension or other compensation, as the applicable law stipulates that he or she would be entitled to such benefits

¹⁰ *Arredondo v. Peru* (CCPR/C/69/D/688/1996), *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997 and CCPR/C/69/D/770/1997/Corr.1), *Ben Said v. Norway* (CCPR/C/68/D/767/1997), *Johnson v. Spain* (CCPR/C/86/D/1102/2002) and others.

¹¹ Human Rights Committee, general comment No. 18 (1989) on non-discrimination, paras. 1–12.

¹² See, inter alia, *Sprenger v. Netherlands* (CCPR/C/44/D/395/1990), *Foin v. France* (CCPR/C/67/D/666/1995) and *Haraldsson and Sveinsson v. Iceland* (CCPR/C/91/D/1306/2004).

¹³ The author refers to articles 3 and 8 of the Armed Forces Social Security Act (Consolidated) (Legislative Decree No. 1/2000) and articles 11 and 12 of the Civil Servants Social Security Act (Consolidated) (Legislative Decree No. 4/2000).

regardless of whether the illness was ordinary or occupational, whether it stemmed from the performance of his or her duties or whether it was a consequence of a physical or tangible event that occurred during the person's professional commitment. Therefore, the author is of the opinion that she was not provided with the same protection under the law as other workers in Spain and that the different treatment did not flow from reasonable or objective criteria or have a legitimate purpose.

State party's observations on admissibility

4.1 On 25 March 2015, the State party submitted its observations on the admissibility of the communication. It contends that the communication is inadmissible because the author has submitted the matter to another procedure of international settlement and has failed to exhaust domestic remedies.

4.2 The State party notes that this matter was submitted to the European Court of Human Rights on 16 September 2013. The Court found the application inadmissible on 13 February 2014 on the basis of articles 34 and 35 of the European Convention on Human Rights. The State party claims that, although the Court's letter does not indicate a specific reason for its finding, it can be deduced that it was based on article 35 (3) of the Convention, which states that the Court will declare an application inadmissible if it is "incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application", as the application does not fall under any of the other cases provided for in articles 34 and 35.

4.3 Regarding the exhaustion of domestic remedies, the State party submits that the application for annulment filed by the author before the High Court raised only the violation of the right to an effective judicial remedy, enshrined in article 24 of the Constitution, resulting from the failure of the High Court's judgment of 21 May 2012 to provide an adequate statement of grounds. The State party notes that, in her application for *amparo*, the author again invoked article 24 of the Constitution but added alleged violations of the rights to equality and physical integrity. It also notes that, in her communication to the Committee, the author alleges a violation of articles 14 and 26 of the Covenant, on due process and the right to equality, respectively. The State party submits that the communication should be declared inadmissible on the grounds of failure to exhaust domestic remedies.

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

5.1 The author provided her comments on 22 May 2015. She notes that the only justification contained in the inadmissibility decision of the European Court of Human Rights is the reference to articles 34 and 35 of the Convention; therefore, it cannot be determined on which particular provision the Court's decision was based. The author claims that the Committee has established in its jurisprudence¹⁴ that only when an international organization has based its decision not only on procedural issues but also on issues implying that a matter has been considered on the merits will the Committee consider a matter to have been examined within the meaning of reservations to article 5 (2) (a) of the Optional Protocol. Consequently, she believes that her communication was not examined by the European Court of Human Rights.

5.2 Concerning the State party's arguments about the failure to exhaust domestic remedies, the author notes that at no time does the State party name any remedy in the Spanish legal order for which she has not applied. She adds, enumerating the remedies she has sought, that she followed the procedures provided for in domestic law at both the administrative and judicial levels. The author also adds that, contrary to what the State party appears to be stating, the violation of her right to equality was raised in her first appeal (the administrative appeal of 29 June 2009) and again in the other procedures – namely, the applications for annulment and for *amparo*.

¹⁴ *Kehler v. Germany* (CCPR/C/71/D/834/1998), *Dugin v. Russian Federation* (CCPR/C/81/D/815/1998) and *Fillacier v. France* (CCPR/C/86/D/1434/2005).

State party's observations on admissibility

6.1 The State party submitted its observations on the admissibility of the communication on 14 October 2015. The State party provides an overview of the facts, noting that, contrary to the author's claims, the judgment of 21 May 2012 of the High Court, completed through the ruling of 27 December 2012, upheld part of the author's appeal against the decision of 11 November 2008 insofar as it annulled the part relating to the disability rating of 5 per cent and requested the authorities to assign her an appropriate disability rating.

6.2 The State party notes that on 17 October 2014, in fulfilment of the ruling of 27 December 2012, Ordinary Expert Medical Board No. 41 assigned the author a disability rating of 35 per cent.¹⁵ The State party further notes that, once the High Court was informed of the order on 24 April 2014, it viewed its ruling of 27 December 2012 as having been executed.¹⁶

6.3 The State party repeats its claims regarding the submission of the case to another procedure of international settlement and the failure to exhaust domestic remedies. In that connection, it adds that the author did not exhaust domestic remedies in relation to the alleged violation of her right to equality under article 52 bis of Royal Legislative Decree No. 670/1987 (see para 2.3), given that she did not raise that point in any administrative or court proceeding as grounds for the annulment of a decision that, in her view, constituted a direct violation of her right to a pension. The State party notes that the decision appealed by the author (the decision in the administrative proceedings of 11 November 2008) was limited to recognizing the author's disability and placing her on leave from the Armed Forces and that the body in question could not rule on her pension rights because that was the jurisdiction of a different administrative body. Therefore, notwithstanding the fact that, in her administrative appeal of 29 June 2009, the author referred to a violation of the principle of equality, she did not include any claim in that regard.¹⁷ Nor could she have, since the decision being referred to did not grant or deny a pension but simply certified the disability and its cause.

6.4 In addition, the State party is of the view that, as a consequence, the author lacks victim status and that she is committing an abuse of the right of submission under article 3 of the Optional Protocol. The author contends that the arguments regarding the alleged violation of the principle of equality contained in her administrative appeal should be considered by the Committee, even though hers was a generic petition unrelated to the proceedings before the High Court, which, the State party repeats, had to do with the degree and causes of the disability, not with the right to a disability pension.

6.5 As for the merits, the State party notes that the author believes that the internal inconsistency of the decision, which did not address her claim that career military personnel and other workers were unduly favoured over non-career personnel in terms of collecting a pension under article 52 bis of Royal Legislative Decree No. 670/1987, constituted a violation of article 14 of the Covenant. The State party refers to the Committee's jurisprudence according to which the Committee can intervene only when it has been demonstrated that proceedings before the domestic courts were arbitrary or resulted in denial of justice or when the courts were not independent or impartial.¹⁸ The State party is of the opinion that these situations do not apply in the present case, given that the author has not claimed that the courts lacked independence or impartiality or that their actions were arbitrary. The State party also refers to its arguments regarding the failure to exhaust available domestic remedies and the abuse of the right of submission (see paras. 6.3–6.4).

6.6 Regarding the violation of article 26 of the Covenant, the State party submits that the right to equality before the law entails an absolute ban not on differences in treatment but on discrimination. Accordingly, there is no inequality when the distinction between one group

¹⁵ The State party does not provide any information on the Board's reasoning for changing the author's disability rating.

¹⁶ The State party provides two documents from the Ministry of Defence, dated 30 October and 10 December 2014, indicating that the judgment of 21 May 2012, completed pursuant to the ruling of 27 December 2012, had been executed and that no further action for its implementation was necessary.

¹⁷ The State party notes that this would be within the jurisdiction of the Constitutional Court.

¹⁸ See *V.S. v. Lithuania* (CCPR/C/114/D/2437/2014).

and another has an objective and rational justification.¹⁹ The State party submits that the Committee's interpretation of article 26 of the Covenant matches the Constitutional Court's interpretation of article 14 of the Constitution, which deals with the principle of equality. The State party notes that the Constitutional Court has recognized the competence of lawmakers to determine the criteria for eligibility for social security benefits, provided that the fundamental rights enshrined in the Constitution are respected.

6.7 The State party explains the law governing pensions and compensation under the State pensioners regime, which applies to professional military personnel, noting that: (a) the regime is governed by the State Pensioners Act (Consolidated) (Royal Legislative Decree No. 670/87), article 52 bis of which states in which cases non-permanent professional military personnel may receive a pension or other compensation; (b) Royal Decree No. 771/1991 was adopted to further develop article 52 bis to regulate the award of pensions and other compensation under the State pensioners regime to non-career service members and was later superseded by Royal Decree No. 1186/2001 (current), which also defined the medical criteria for eligibility for those benefits; and (c) Royal Decree No. 1186/2001 is designed to solve the problems with the previous system, taking into account the new model for the military introduced through Act No. 17/1999, which sought to professionalize the Armed Forces and ensure that professional service members with reduced ability to serve could re-enter the labour market, while providing for the award of benefits in direct proportion to any loss of a person's ability to work that occurred during his or her service in the Armed Forces and to the resulting difficulty in re-entering the civilian labour market.

6.8 The State party notes that the author claims that it is precisely the discriminatory article 52 bis that put her at a disadvantage to other Spanish workers by providing for a pension or other award of compensation only if unfitness – psychological and physical in her case – has been caused by an event that took place during a person's service. The State party further notes that the author refers only to the cases where psychophysical unfitness does not cause total incapacity for any occupation or trade, as provided for in article 52 bis (2) of Royal Legislative Decree No. 670/1987, and points out that cases where psychophysical unfitness causes a total incapacity for any occupation or trade are covered under article 52 bis (1), which recognizes the right to a pension irrespective of whether the event that caused the incapacity occurred during service. In this regard, the State party refers to article 5 (1) of Royal Decree No. 1186/2001, under which incapacity for any occupation or trade is considered total when the level of disability is 50 per cent or more.

6.9 The State party refers to domestic jurisprudence supporting the application of the above-mentioned legislation on benefits to non-career enlisted personnel. For example, in a 2004 judgment,²⁰ the National High Court ruled that, pursuant to Royal Decree No. 771/1999, for a former service member to have the right to a pension, his or her incapacity for any occupation or trade must be total and derive from an event that occurred during his or her service and is concrete and of a nature to cause the onset of the illness. In other words, the timing of the cause and onset of the injury or illness must be within the period established by law and, therefore, in the cases involving incapacitating illness, the emergence of external symptoms is insufficient if the illness is congenital or endogenous to the patient and its external manifestation at a given point in time is merely coincidental.

6.10 The State party submits that temporary professional military personnel, such as the author, are committed to the Armed Forces through temporary contracts and that, under Royal Decree No. 1186/2001, the expectation is that they will enter the civilian labour market when their service with the Armed Forces comes to an end. Therefore, when, as in the author's case, pathologies arise that disqualify them only from performing their functions within the Armed Forces, it is expected that they will enter the civilian labour market. For that reason, the Royal Decree establishes an entitlement to a pension or other compensation for non-career enlisted personnel who have an illness that originates in their time under contract with the Armed Forces and that renders them completely unfit for any occupation or

¹⁹ Human Rights Committee, general comment No. 18 (1989), paras. 8 and 13.

²⁰ National High Court, judgment of 16 September 2004 regarding appeal No. 92/2004.

trade. In the State party's view, there are sound and objective reasons for this difference in treatment, which does not give rise to a violation of the principle of equality.

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

7.1 On 3 January 2016, the author submitted her comments on the State party's observations. The author submits that, despite not containing an explicit reference to a specific pension, the decision in the administrative proceedings of 11 November 2008 did have an impact on the matter, as the determination that her illness fell outside the scope of Royal Decree No. 1186/2001 meant that she was denied any possibility of requesting a pension or other compensation irrespective of her disability rating. Furthermore, the author is of the view that, while the ruling of 27 December 2012 did partially admit her appeal regarding the degree of disability, it does not follow that the High Court examined her secondary request that her disability be assessed to determine whether she was entitled to a pension or other compensation under articles 6 and 7 of Royal Decree No. 1186/2001. The order of 24 April 2014, under which she was found to be 35 per cent disabled, did not in any way rule on the award of the pension or lump sum provided for in those articles.

7.2 The author also submits that the subsequent determination of her degree of disability to be 35 per cent was purely a formality and had had no effect in practice since the High Court had stated in its judgment of 21 May 2012 that the author was not covered by Royal Decree No. 1186/2001 and therefore had no right to the compensation or pension provided for in the Decree. This was confirmed by Ministry of Defence documents provided to the Committee that note that no action was necessary to enforce the judgment of 21 May 2012, as completed by the ruling of 27 December 2012, which, in accordance with the order of 24 April 2014, was considered to have been carried out (see para. 6.2).

7.3 Concerning the State party's argument on the absence of victim status and the abuse of the right of submission under article 3 of the Optional Protocol, as well as on the failure to exhaust domestic remedies with regard to the alleged violation of her right to equality, the author reiterates that she raised the alleged violation stemming from the application of article 52 bis of Royal Legislative Decree No. 670/1987 and Royal Decree No. 1186/2001 in her administrative appeal and her exceptional application for annulment of the High Court judgment of 21 May 2012, in which she had pointed out the High Court's failure to rule on that allegation. The author notes that these were the only judicial channels available, given that the Spanish legal order does not include a mechanism for members of the public to contest the constitutionality of a given law.

7.4 Regarding the violation of article 14, the author reiterates that the decisions of the High Court lack the requisite reasoning regarding the duly substantiated allegations of the violation of her right to equality. The author is of the view that the High Court was obliged to rule on her allegations and could have found: (a) that the interpretations of article 52 bis of Royal Legislative Decree No. 670/1987 and article 1 (2) of Royal Decree No. 1186/2001 by the judicial authorities responsible for her case constituted a violation of the principle of equality; (b) that the matter warranted applying to the Constitutional Court to examine its constitutionality;²¹ or (c) that there was simply no violation of the right to equality. What the High Court should not have done was remain completely silent on those allegations. The author notes that she is not claiming that the High Court was not independent or impartial but that it did not address her allegations of the violation of her right to equality, which constitutes a denial of justice and, therefore, an infringement of the right to due process.

7.5 As for the violation of her right to equality, enshrined in article 26 of the Covenant, the author notes that, despite the State party's assertion to the contrary, the subject of her complaint to the Committee is the violation of that right as a result not of the decision of 11 November 2008 but of the manner in which article 52 bis of Royal Legislative Decree No. 670/1987 and Royal Decree No. 1186/2001 have been applied in her case. She also notes that, notwithstanding the State party's contention that the Royal Decree gives non-career service

²¹ Pursuant to articles 35 et seq. of the Constitutional Court Act (No. 2/1979), which states that when "a judge or court, whether automatically or at the request of a party, considers that a law applicable to the case and on whose validity the decision depends may be unconstitutional, the judge or court shall refer the matter to the Constitutional Court, subject to the provisions of this Act".

members greater rights, an examination of the law shows that it clearly puts them at a disadvantage to the rest of the Spanish workforce.

7.6 The author notes that the State party's assertion that the different treatment established in the above-mentioned legislation does not apply in cases of total incapacity for any occupation or trade and that the different treatment of non-career service members who are permanently unfit for their usual occupation or trade was, in its view, justified by the temporary nature of their commitment means that such service members are not afforded protection on an equal footing with the rest of the Spanish workforce. She also notes that, unlike her, any Spanish worker under temporary contract with an illness like hers – in other words, one that causes partial incapacity for any occupation or trade – has the right to a pension, the amount of which depends on such circumstances as how long the person has been paying into the scheme; making contributions for the required period of time also entitles the worker to collect pension benefits. This clearly is not the case for service members whose entire careers are not spent in the military. The author believes that it would be in keeping with the principle of equality to establish a minimum contribution period in order to give non-career personnel the right to a pension rather than abolish the entitlement on the grounds that their employment is temporary.

7.7 The author notes that she had been with the Armed Forces for seven years when the initial medical leave was ordered, which meant that her commitment was already long-term and did not need to be renewed until she turned 45, at which point she would become a reservist. Therefore, to say that the commitment was temporary is rather surprising. The author is thus of the opinion that treating non-career enlisted personnel differently from the rest of the Spanish workforce on the basis of the temporary nature of their enlistment is not a reasonable justification for discriminating against them. Consequently, she believes that she is a victim of a violation of her rights under article 26 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the case is admissible under the Optional Protocol.

8.2 The Committee recalls that, in ratifying the Optional Protocol, the State party had made a reservation excluding the competence of the Committee in relation to cases that had been or were being examined under another procedure of international investigation or settlement. The Committee notes the State party's statement that the present communication was submitted to the European Court of Human Rights on 16 September 2013 and was found inadmissible on 13 February 2014 under articles 34 and 35 of the European Convention on Human Rights and that, although the Court's letter does not indicate a specific reason for the Court's decision to find the author's application inadmissible, it can be deduced that its decision is based on the application's incompatibility with the provisions of the Convention or the Protocols thereto or its being manifestly ill-founded or an abuse of the right of individual application, as her application does not fall under any of the other cases provided for in articles 34 and 35.

8.3 The Committee notes that the European Court of Human Rights found the author's application inadmissible for failure to meet the admissibility criteria in articles 34 and 35 of the Convention. The Committee recalls that, according to its jurisprudence, when a procedure of international investigation or settlement bases a declaration of inadmissibility not solely on procedural grounds but also on grounds that include a certain consideration of the merits of the case, then the matter should be deemed to have been examined within the meaning of the reservations to article 5 (2) (a) of the Optional Protocol.²² Not being able to rule out, on the basis of the European Court's decision, that the Court found the author's application

²² *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010 and CCPR/C/107/D/1945/2010/Corr.1), para. 7.3, *Mahabir v. Austria* (CCPR/C/82/D/944/2000), para. 8.3, *Bertelli Gálvez v. Spain* (CCPR/C/84/D/1389/2005), para. 4.3, and *Wdowiak v. Poland* (CCPR/C/88/D/1446/2006), para. 6.2.

inadmissible for procedural reasons alone without even a cursory examination of the merits, the Committee concludes that there is no obstacle to its considering the communication under article 5 (2) (a) of the Optional Protocol.

8.4 In addition, the Committee notes the State party's argument that the author has not exhausted domestic remedies in relation to her allegation of a violation of the right to equality since the decision the author appealed was limited to recognizing her disability and putting her on leave from the Armed Forces. Consequently, although the author referred to the principle of equality in her administrative appeal of that decision, she did not make a claim in that respect; in any event, she could not have made such a claim because her right to a pension was not recognized or denied in the decision.

8.5 The Committee acknowledges the author's claim that the decision of 11 November 2008 did rule on her right to a pension or other compensation insofar as the decision had an impact on the pension matter since, by determining that the author fell outside the scope of Royal Decree No. 1186/2001, she was denied any possibility of requesting a pension or other compensation, irrespective of the level of disability she was found to have. The Committee also notes the author's argument that she did claim a violation of her right to equality stemming from the application of article 52 bis of Royal Legislative Decree No. 670/1987 and Royal Decree No. 1186/2001 to her case in her administrative appeal and the exceptional application for annulment of the High Court judgment of 21 May 2012.

8.6 The Committee notes that the decision of 11 November 2008 determined that the author's situation fell outside the scope of Royal Decree No. 1186/2001 and thus had a direct impact on her right to a pension, given that the consequence of falling outside the scope of the Decree is ineligibility for the pensions and other compensation that it provides for. The Committee further notes that the author raised the violation of her right to equality in the administrative appeal of the decision, in the exceptional application for annulment of the judgment on her appeal and in her application for *amparo* before the Constitutional Court. In addition, the Committee notes the State party's assertion that the author could not have included a claim regarding her right to equality in her administrative appeal because the High Court could not rule on her right to a pension, a matter that came under the jurisdiction of a different body. However, the State party did not indicate what body the author could have seized to that end. In addition, the State party did not respond to the author's claim that the administrative appeal and the application for annulment were the only available judicial remedies through which to raise the violation of her right to equality. Similarly, the State party did not indicate what remedy the author would have had to pursue for domestic remedies to be considered exhausted. The Committee therefore considers that article 5 (2) (b) of the Optional Protocol does not constitute a barrier to the admissibility of the communication.

8.7 The Committee notes the State party's argument that the author abused the right of submission inasmuch as her arguments on the violation of the right to equality were a generic petition unrelated to the object of the procedure before the domestic judicial authorities, which had to do with the degree and causes of the disability, not with the right to a disability pension. As mentioned above, the Committee is of the view that the decision of 11 November 2008 had a direct impact on the recognition of the author's right to a pension or other compensation; therefore, the Committee considers that the arguments relating to the right to equality are tied to the object of the procedure before the domestic judicial authorities. Accordingly, the Committee finds that the communication does not represent an abuse of the right of submission.²³

8.8 The Committee notes the author's claim that her right to due process, as enshrined in article 14 of the Covenant, was violated by the High Court, as its decisions, in particular on her claims of a violation of her right to equality, infringed her right to a duly reasoned decision grounded in law. The Committee also notes the State party's argument that the Committee can intervene only when the actions of domestic courts have been demonstrated to be arbitrary or when the domestic courts have been shown not to be independent and impartial, a situation that, according to the State party, did not arise in this case. The

²³ *Serna et al. v. Colombia* (CCPR/C/114/D/2134/2012), para. 8.5.

Committee notes that the High Court, in its judgment of 21 May 2012, found that the author's situation fell outside the scope of Royal Decree No. 1186/2001 and that, in its ruling of 27 December 2012, it acknowledged that the judgment under appeal had not addressed the author's claim regarding the recognition of the right to any other pension or compensation and ordered the recalculation of the author's level of disability, taking into account the expert test requested by the author. In this respect, the Committee recalls its jurisprudence, according to which it is incumbent on the organs of States parties to evaluate the facts and evidence in a specific case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.²⁴ On the basis of the materials submitted by the author, the Committee considers that she has not shown that the High Court acted arbitrarily or that its decisions entailed a manifest error or denial of justice. Consequently, the Committee concludes that the author has not sufficiently substantiated her claim under article 14 (1) of the Covenant for the purposes of admissibility and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

8.9 With regard to article 26 of the Covenant, the Committee notes the author's claim that non-career service members, of whom she was one, are put at an unfair disadvantage to career military personnel, other public servants and even other Spanish workers in that, despite having a right to a disability pension or other compensation, this right is subject to various restrictions built into Royal Decree No. 1186/2001 that apply only to them. The Committee also notes the State party's argument that non-career personnel are bound to the Armed Forces through temporary commitments, that, under Royal Decree No. 1186/2001, such personnel members are expected to enter the civilian labour market once they are no longer serving in the Armed Forces and that the different treatment is reasonable and objective and does not give rise to a violation of the principle of equality. In that connection, the Committee notes the author's claims that any Spanish worker with temporary employment has a right to a disability pension or other compensation and that she cannot be considered to have merely temporary employment with the Armed Forces since she had a long-term contract that was expected to be renewed until she turned 45, when she would become a reservist.

8.10 The Committee notes that the author's complaint under article 26 of the Covenant appears to relate to the interpretation and application of current domestic law on military pensions, a matter which, in theory, is of national jurisdiction. In addition, the Committee points out that the author has not demonstrated, for the purposes of admissibility, that she has been discriminated against – that is, that career military personnel, other public servants and Spanish workers in general have been unduly favoured over her – as the rules that apply to non-career military personnel such as the author differ from those that apply to career military personnel, other public servants and Spanish workers. The Committee also points out that the author did not sufficiently justify, for the purposes of admissibility, to what extent her status as a non-career enlisted service member with long-term employment would make it necessary to treat her exactly as career military personnel are treated or how failing to do so would constitute discriminatory treatment on any of the grounds enumerated in article 26 of the Covenant. Accordingly, the Committee considers that, in the present case, the author has not demonstrated that the actions of the national judicial authorities, in particular their application of different standards, were arbitrary or constituted a manifest error or denial of justice.²⁵ The Committee therefore concludes that the author has not sufficiently substantiated this part of her complaint for the purposes of admissibility and finds it inadmissible under article 2 of the Optional Protocol.

²⁴ See *F.B.L. v. Costa Rica* (CCPR/C/109/D/1612/2007), para. 4.2, and *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6.

²⁵ *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3, and *Schedko v. Belarus* (CCPR/C/77/D/886/1999).

9. 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 transmitted to the State party and to the author of the communication.

Annex

[Original: English]

Individual opinion of Committee members Marcia V.J. Kran and Gentian Zyberi (dissenting)

1. We are not able to agree with the Committee's findings that the author has not substantiated, for the purposes of admissibility, her claims under articles 14 (1) and 26 of the Covenant. In our opinion, the author's rights under both those articles have been violated.

2. With regard to article 14 (1), the author raised the violation of her right to equality on at least three occasions (paras. 8.5–8.6).¹ She first raised it in her administrative appeal of 29 June 2009 against the decision of 11 November 2008 ruling that her complaint fell outside the scope of Royal Decree No. 1186/2001. She again raised the violation of her right to equality on 18 June 2012 in her application for annulment of the appeal judgment. She raised it yet again on 1 February 2013 in her application for *amparo* before the Constitutional Court. None of the decisions in those three applications for relief addressed her equality claim.

3. The State party does not contest that the decisions of the High Court lacked the requisite reasoning regarding the author's allegation of the violation of her right to equal protection of the law. The High Court remained completely silent on the alleged violation of the right to equality. The Constitutional Court denied the author's application for *amparo* on the grounds that she had not demonstrated the special constitutional significance of her complaint, despite the fact that equality is an explicit constitutional right in the Constitution of Spain (chap. II, art. 14).

4. The State party asserted that the author could not have included a claim regarding her right to equality in her administrative appeal because the High Court could not rule on her right to a pension or other compensation as that determination fell under the jurisdiction of a different body. However, the State party did not indicate which body had jurisdiction to determine that matter. From the information available to the Committee, it thus appears that the courts in the State party have not fully considered and dismissed the author's claim of a violation of her right to equality (paras. 2.8, 3.2, 5.2, 7.1 and 8.7.) The failure to consider her repeatedly raised claim constitutes a denial of justice and, therefore, an infringement of the right to a fair trial under article 14 (1).

5. With regard to article 26, the author raised a complex claim of discrimination based on the grounds of status and disability. Furthermore, the author is a woman working in the military, a traditionally male-dominated profession in which women have long experienced marginalization and disadvantage. Her status as a non-career service member of the military, or temporary professional military personnel (para. 6.10), places her in a vulnerable position, despite having long-term employment.

6. The author alleged that she experienced psychological harassment, humiliation and professional disparagement in the workplace. That ill-treatment contributed to exacerbating her anxiety and depression, causing her to be unable to work as a result of disability. Harassment of women in the workplace constitutes gender-based discrimination, which violates article 26 of the Covenant. States parties have an obligation to address the ways in which instances of discrimination affect women in particular. Despite that obligation, the effect of the discrimination on the author has not been recognized by the State party as a contributing cause to her disability and, as such, she was denied a disability pension.

7. In paragraph 7 of its general comment No. 18 (1989) on non-discrimination, the Committee indicated that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of

¹ All paragraph numbers in parentheses refer to the decision of the Committee.

nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. In paragraph 10, the Committee pointed out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. The right to equal protection of the law, the prohibition of discrimination, and the right to protection against discrimination in article 26 of the Covenant form a unit, highlighting the obligation of States parties to ensure substantive equality by way of legislation. Given the vulnerable position in which the author – a woman with a disability – found herself due to being classified as a long-term but “non-career” employee in a traditionally male-dominated field, the State party should have taken measures to ensure the author received work benefits on an equal footing with persons in similar situations, such as career military personnel, civil servants and other Spanish workers. Instead, the State party’s policies further perpetuated her disadvantage on the basis of status, sex and disability, as she was excluded from receiving disability-related benefits, despite doing substantially the same work as career military personnel.

8. In paragraph 13 of its general comment No. 18 (1989), the Committee observed that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. However, the State party’s criteria for disentitling the author from a disability pension or compensation do not reflect her factual situation of long-term, non-temporary military employment. Nor are the criteria similar to those applied to temporary public, non-military, workers and no justification has been provided for that differentiation by the State party. Therefore, in the present case, those distinctions are arbitrary.

9. We would conclude that the author was not provided with the same protection under the law as other workers in Spain and that this differential treatment did not flow from reasonable or objective criteria or have a legitimate purpose. In summary, we would find that her right to equal protection of the law under article 26 was violated.
