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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3778/2020*, **

Communication submitted by:	M.J.B.B., M.J.Z.S., M.J.F.Z., M. del C. del R.M., F.M.H. and M.N.S.V. (represented by counsel, Diego Fernández Fernández)
Alleged victims:	The authors
State party:	Spain
Date of communication:	8 October 2015 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 2 July 2020 (not issued in document form)
Date of adoption of decision:	6 November 2020
Subject matter:	Access to public service
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Equality before the courts and tribunals; equality before the law; discrimination; equal protection of the law; equality of access to public service
Articles of the Covenant:	14 (1), 25 and 26
Articles of the Optional Protocol:	2 and 5 (2) (a)

1. The authors are M.J.B.B., M.J.Z.S., M.J.F.Z., M. del C. del R.M., F.M.H. and M.N.S.V., all of whom are Spanish nationals. They contend that Spain has violated their rights under articles 14 (1), 25 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The authors are represented by counsel.

The facts as submitted by the authors

2.1 The authors took a competitive examination organized by order of the Ministry of Justice of 17 November 1997 as part of the process of recruiting court officers. When the process had concluded, the Office of the State Secretary of Justice, in a decision of 4

* Adopted by the Committee at its 130th session (12 October–6 November 2020).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christoph Heyns, Bamariam Koita, David H. Moore, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

November 1998,[1] approved and published the list of applicants who had passed the examination. The authors were not on the list. They did not challenge the decision, however, as they believed that the applicants had been properly assessed.

2.2 Between 2007 and 2009, the authors, having been made aware of dozens of challenges by other applicants, discovered that there had apparently been irregularities in the assessment of the examinations. The exam had two parts. For the first part, the single examination board, exercising the authority conferred on it under rule 9.1 of the rules laid out in the call for applications, decided that at least 78 questions had to be answered correctly for a passing score.[2] Instead of awarding 78 points for 78 correct answers, however, the board decided to award 50 points for the first 78 correct answers and made each subsequent correct answer worth 2.5 points, using the following mathematical formula: score = ((correct answers – 78) x 2.5) + 50. The second part, in which one point was awarded for each question answered correctly, was graded appropriately. On the first part, the scores of the applicants who got fewer than 78 questions right were artificially low, while those of people who got more than 78 questions right were inflated, giving the latter an advantage.

2.3 Between 2005 and 2011, in more than 30 cases, the Administrative Litigation Division of the Supreme Court found that the mathematical formula that had been used was discriminatory, in violation of articles 14 and 23 of the Constitution. The Court therefore declared null and void the exclusion of the plaintiffs in those cases from the list of applicants selected in 1998, stated that they had the right to posts as court officers and ordered that they be offered such posts.

2.4 In response to these initial rulings, the Ombudsman issued a recommendation[3] reaffirming that the formula used to grade the examination favoured some people over others, in violation of the right of equal access to public service When they learned of this recommendation, the authors, between 2007 and 2009, submitted petitions to the Ministry of Justice in which they requested the nullification of the decision containing the list of applicants.

2.5 In view of the authorities' failure to respond, the authors, claiming that their rights to equality before the law and equal access to public service had been violated, also filed suit with the Administrative Litigation Division of the National High Court between 2009 and 2011. The authors requested that they be considered successful applicants, with economic and administrative effect from the date on which they would have been hired, given the exam grades they would have received had the contested grading method not been used (in that scenario, each of the authors had a final grade that was higher than those of many people who had been offered posts on the strength of their performance on the exam as graded with the disputed mathematical formula). Between June 2009 and January 2011, the Division dismissed the lawsuits of each of the authors in the same manner, holding that, as the contested decision had been in force for more than ten years, and as legal certainty was an imperative, the decision could not be declared null and void.[4]

2.6 The authors, again requesting that the authorities' decision be declared null and void, lodged appeals in cassation with the Supreme Court. Between February and September 2012, the Administrative Litigation Division of the Supreme Court overturned all the lower court judgments, holding that, regardless of how much time had passed, the appeals were

[1] *Boletín Oficial del Estado*, No. 278 (20 November 1998).

[2] Ibid., No. 290 (4 December 1997).

[3] Case No. Q9817884:

> Real differences have been accentuated artificially – the real differences from one applicant to another are not properly reflected – with the help of a stratagem that, not mentioned in the call for applications, can be viewed as discriminating against some applicants (those who had obtained scores closer to 78) while favouring others, thus leading to violations of both article 14 of the Constitution and the right, enshrined in article 23 (2) of the Constitution, of equal access to public service.

[4] Judgments of the Administrative Litigation Division of the National High Court: 2 December 2010, claim No. 475/09, filed by B.B.; 23 June 2009, claim No. 948/07, filed by F.Z.; 3 December 2009, claim No. 295/08, filed by Z.S.; 24 January 2011, claim No. 474/09, filed by del R.M.; 1 October 2009, claim No. 77/06, filed by M.H.; 30 June 2011, claim No. 463/09, filed by S.V.

admissible.[5] The Division nonetheless dismissed all the appeals on the merits, as by that time the authorities had already used the scores the applicants would have obtained had the contested formula not been used to revise the lists of applicants. As part of the revision, the authorities put the applicants who had been left off on the lists by order of their scores on the exam, from highest to lowest, and offered them posts (the number of posts that were offered was equal to the number of vacant posts mentioned in the original call for applications).

2.7 The authors, arguing that all the applicants who passed the examination when the discriminatory mathematical formula was eliminated should have been offered posts, filed petitions for nullity of proceedings in respect of the Supreme Court judgments. In the authors' view, limiting the number of hires to the number of available vacancies meant that many applicants with scores lower than the authors' had been made officers of the court either because they had been offered a post on publication of the first list in 1998, which had been drawn up using the nullified formula, or because they had been taken on in the wake of a later court ruling. The petitions for nullity of proceedings were found inadmissible by the Supreme Court between June 2012 and June 2013.

2.8 Between July and September 2012, the authors filed applications for *amparo* with the Constitutional Court. The Constitutional Court found the appeals inadmissible in *limine* between October 2012 and July 2014.[6]

2.9 On 8 April 2013, authors B.B., Z.S., F.Z. and del R.M. lodged an application in which a complaint was made against the State party with the European Court of Human Rights. In a decision of 13 November 2014, the Court stated that the application did not meet the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights. On 6 May 2014, author M.H. also lodged a complaint against the State party with the European Court. It was found inadmissible on 19 June 2014 for the same reason as those of the other authors.

The complaint

3.1 The authors are of the view that the more than 30 rulings of the Supreme Court resulted in a violation of their rights under articles 14 (1) (equality before the courts and tribunals) and 26 (equality before the law and non-discrimination) of the Covenant, as well as of their right to equal access to public service, enshrined in article 25.

3.2 The authors argue that the Supreme Court's Administrative Litigation Division itself found that the mathematical formula that had been used was discriminatory, in violation of articles 14 and 23 of the Constitution. The Court itself, or the judicial authorities, should have declared the decision of 4 November 1998 null and void and drawn up a new list in which everyone who had passed the exam was offered a post, regardless of the number of vacant posts made available under the 1998 decision.

3.3 The authors also argue that their rights to equality and to equal access to public service have clearly been violated since, for reasons unrelated to their suitability for the work, many applicants with scores lower than theirs were offered posts. The inaction of the State party's authorities meant that, when the number of posts offered to the people who had been left off the first list of successful applicants was limited to the initial number of vacant posts, many of the applicants who had been given posts were, to judge by properly assessed qualifications, not as well qualified as the authors.

[5] Judgments handed down by the Seventh Section of the Administrative Litigation Division of the Supreme Court: 27 March 2012, appeal No. 524/2011, filed by B.B.; 27 March 2012, appeal No. 918/2010, filed by Z.S.; 27 March 2012, appeal No. 4780/2009, filed by F.Z.; 27 March 2012, appeal No. 1124/2011, filed by del R.M.; 13 February 2012, appeal No. 6884/2009, filed by M.H.; 28 September 2012, appeal No. 4721/2011, filed by S.V.

[6] Decisions of the Constitutional Court: 24 October 2012, Third Section of the Second Chamber, appeal filed by B.B.; 18 October 2012, Third Section of the First Chamber, appeal filed by Z.S.; 10 October 2012, Third Section of the Second Chamber, appeal filed by F.Z.; 18 October 2012, Third Section of the Second Chamber, appeal filed by del R.M.; 30 October 2013, First Section of the First Chamber, appeal filed by M.H.; 21 July 2014, Third Section of the Second Chamber, appeal filed by S.V.

3.4 In addition, the authors argue that it is made clear both in the Committee's general comment No. 18 (1989) and in its jurisprudence that differentiation is discriminatory if it is not based on reasonable and objective criteria – i.e., if the ends of the differentiation are illegitimate or if the means are, in view of the ends, out of all proportion.[7] Citing the case law of the Constitutional Court,[8] the authors explain that if an applicant is excluded from a selection process because of an error in the assessment of his or her qualifications, and the error has been corrected as a result of an appeal by a third party, the authorities are objectively obliged to treat everyone equally. The failure to treat everyone thus at this second level is itself a rights violation that entails a right to redress.

3.5 The authors point out that, in their case, the Supreme Court gave posts to all the applicants who had won their cases before 2012, when the authorities finally revised the lists and filled a number of posts equal to the number of posts to be filled mentioned in the call for applications in 1998. The violation of the authors' right to equality is thus a double violation: they were victims of unequal treatment when the applicants on the original lists were offered posts in 1998 and when those who won their cases before 2012 were given posts by order of the Supreme Court. Throughout the entire process, there was never an objective and reasonable justification or a legitimate aim.

3.6 The authors request the Committee to find that the above-mentioned articles of the Covenant have been violated and to ensure that this violation is remedied by requiring the State party to declare null and void all the cases they have lost. In addition, the authors request the Committee to order the State party to pay equitable compensation for the violations of their rights.

Issues and proceedings before the Committee

Consideration of admissibility

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

4.2 The Committee notes the State party's reservation to article 5 (2) (a) of the Optional Protocol, as a result of which the Committee is deemed not competent to consider a communication from an individual if the same matter has been or is being examined under another procedure of international investigation or settlement. Although five of the six authors referred the same matter to the European Court of Human Rights, the Committee notes that the Court found their applications inadmissible for failure to meet the admissibility requirements set forth in articles 34 and 35 of the European Convention on Human Rights. In past cases, however, the Committee has stated that a matter will not be considered examined under an international procedure of investigation or settlement if it was found inadmissible for procedural reasons alone and involved no consideration of the merits.[9] Not being able to rule out, on the basis of the European Court's decision, that the Court found the authors' applications 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.

4.3 The Committee is of the view that the authors have exhausted domestic remedies and that their claims are admissible under article 5 (2) (b) of the Optional Protocol.

4.4 The Committee notes the authors' argument that they were victims of discrimination in their bid to gain employment in public service because the Supreme Court gave posts to all the applicants who won their cases before 2012 and because, when the authorities finally revised the list of applicants, they limited the number of posts filled to the number of vacant

[7] The authors cite general comment No. 18 (1989), paras. 1 and 12, *Foin v. France* (CCPR/C/67/D/666/1995), para. 10.3, and other examples of the Committee's jurisprudence.

[8] Judgments No. 10/1998 of 13 January, No. 85/1998 of 20 May and No. 210/2002 of 11 November.

[9] *Bertelli Gálvez v. Spain* (CCPR/C/84/D/1389/2005), para. 4.3, *Wdowiak v. Poland* (CCPR/C/88/D/1446/2006), para. 6.2, *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 8.1, and *Quliyev v. Azerbaijan* (CCPR/C/112/D/1972/2010 and Corr.1), para. 8.2.

posts mentioned in the 1998 call for applications. In its jurisprudence, the Committee has stated that it is generally for the courts of States parties to review facts and evidence or the application and interpretation of domestic legislation.[10] In this case, the Committee is of the view that the authors have not demonstrated that the steps taken by the domestic administrative and judicial authorities – their application of objective and reasonable standards of differentiation in particular – were arbitrary or amounted to a manifest error or denial of justice.[11] The authors have also failed to sufficiently substantiate, for the purposes of admissibility, how their not being given posts in public service because they failed to file judicial appeals in time or did not receive high enough scores after the list of applicants had been revised constituted discriminatory treatment on the grounds set out in article 26 of the Covenant. The Committee therefore concludes that the authors have not sufficiently substantiated their claims for the purposes of admissibility and finds them inadmissible under article 2 of the Optional Protocol.

5. 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 authors of the communication.

[10] General comment No. 32 (2007), para. 26.

[11] *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3, S*chedko v. Belarus* (CCPR/C/77/D/886/1999), para. 9.3, *Röder and Röder v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6, and *F.B.L. v. Costa Rica* (CCPR/C/109/D/1612/2007), para. 4.2.