



**Convention on the Elimination  
of All Forms of Discrimination  
against Women**

Distr.: General  
28 October 2013  
English  
Original: Spanish

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**Committee on the Elimination of Discrimination  
against Women**

**Fifty-sixth session**

30 September-18 October 2013

Agenda item 8

**Activities of the Committee under the Optional Protocol  
to the Convention on the Elimination of All Forms of  
Discrimination against Women**

**Communication No. 29/2011**

**Decision adopted by the Committee at its fifty-sixth session,  
30 September-18 October 2013\***

*Submitted by:* Maïmouna Sankhé (not represented by counsel)  
*Alleged victim:* The author  
*State party:* Spain  
*Date of communication:* 30 December 2010 (initial submission)  
*References:* Transmitted to the State party on 10 February 2011  
(not issued in document form)  
*Date of adoption of decision:* 11 October 2013

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\* The following members of the Committee took part in the consideration of the present communication: Ayse Acar, Noor Al-Jehani, Olinda Bareiro-Bobadilla, Náela Gabr, Hilary Gbedemah, Nahla Haidar, Yoko Hayashi, Dalia Leinarte, Violeta Neubauer, Theodora Nwankwo, Pramila Patten, Maria Helena Pires, Biancamaria Pomeranzi, Patricia Schulz, Dubravka Šimonović and Xiaoqiao Zou.



## Annex

### **Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (fifty-sixth session)**

#### **Communication No. 29/2011, *Maïmouna Sankhé v. Spain*\***

<i>Submitted by:</i>	Maïmouna Sankhé (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	30 December 2010 (initial submission)
<i>References:</i>	Transmitted to the State party on 10 February 2011 (not issued in document form)

*The Committee on the Elimination of Discrimination against Women*, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

*Meeting* on 11 October 2013,

*Adopts* the following:

#### **Decision on admissibility**

1.1 The author of the communication is Maïmouna Sankhé, a national of Senegal. She claims to be a victim of violations by Spain of articles 1, 2 (a)-(g), 3, 6, 9 (1), 10 (a), 11 (1) (a) and (d), 11 (2) (c), 15 (1) and (2), and 16 (1) (c), (d) and (f) of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention entered into force for the State party on 4 February 1984 and its Optional Protocol on 6 October 2001. The author is not represented by counsel.

1.2 In accordance with rule 69 of its rules of procedure, the Committee transmitted the communication to the State party by means of a note verbale dated 10 February 2011. At the same time, the Committee requested the State party to refrain from deporting the author to Senegal while her case was being considered by the Committee, in accordance with article 5 of the Optional Protocol and rule 63 of the rules of procedure. On 7 March 2011, the State party informed the Committee that it had not begun deportation proceedings against the author.

#### **Facts as presented by the author**

2.1 The author, a Senegalese national, arrived in Spain in 2000 to undertake postgraduate studies. From 2000 to 2005, she had a student visa.

2.2 The author states that in 2001 she married Mr. S. A. A., a Nigerian citizen with permanent legal residency and a fixed-term employment contract in Spain. According to the civil registry of Cubas de la Sagra, however, the civil marriage ceremony was conducted on 2 September 2003. The author has two sons, born on

8 September 2003 and 26 October 2009. The first has Spanish nationality and the second has permanent residency in Spain.

2.3 On 30 September 2005, the Government Delegate Office in Valencia granted the author a temporary residence and work permit on the grounds of a pre-existing employment relationship (known as an *arraigo laboral* permit) under the regularization process provided for in the third transitional provision of Royal Decree 2393/2004, the Aliens Act regulations, because she had been hired by her spouse to work in his company. On 30 November 2006, the author's permit was renewed for a period of two years. On 15 August 2008, the author signed a new contract for part-time work with the SeproTec Translation and Interpretation S. L. company.

2.4 On 28 October 2008, the author submitted an application for the renewal of her temporary residence and work permit to the Government Delegate Office in Madrid. She attached a work certificate to the application covering the following periods: from 2 December 2005 to 31 March 2006; from 1 April 2006 to 30 June 2006; from 24 June 2006 to 7 September 2006; and from 15 August 2008 on. On 15 January 2009, her request was denied because the author had not certified that she had been employed for more than six months per year, in accordance with article 54 (3) and (4) of the Aliens Act regulations, Royal Decree 2393/2004. The author was informed that she had three months to apply for a new residence permit, without permission to work, or any type of residence permit on exceptional grounds, including *arraigo* permits.

2.5 On 16 February 2009, the author filed an administrative appeal with the Ministry of Labour and Immigration. The author maintained that, although she could not certify that she had been employed for more than six months per year, she met all the requirements established in article 54 (4) of Royal Decree 2393/2004. The decision to deny the temporary residence and work permit failed to take into account the fact that her ability to work had been subject to instances of force majeure, arbitrarily disregarded her work and family situation, and interfered with the right and duty of parents to protect and care for their minor children. The author maintains that the decision of the Government Delegate Office did not take into account the fact that the State Civil Code establishes the principle of the equality of rights and duties between the father and the mother, giving rise to "inequalities in the duties of the parents" (sic).

2.6 On 19 May 2009, the author submitted an application for judicial review to the Administrative Court in which she alleged a violation of her right to equality as set forth in article 14 of the Spanish Constitution. She stated that she had a current employment contract but could no longer provide services to the company where she worked owing to the decision not to renew her temporary residence and work permit. The decision denying the renewal of the residence and work permit had not provided for the flexibility that was to be accorded to foreign nationals with either ascendants or descendants of Spanish nationality under articles 39 and 40 of the Aliens Act, and the decision was accordingly not in keeping with the law and perpetuated a situation of unequal treatment between the author, a foreign national with dependent minor children, and Spanish citizens who had dependent minor children. However, the provisions of the Aliens Act to which the author refers and which were in force at the time of the dispute and of the filing of the application for judicial review govern the framework for the State party's establishment of its

immigration policy within the context of the labour market, and the exceptions set out in article 40 do not apply to the renewal of work permits for self-employed workers.

2.7 In response to a petition submitted by the author, on 2 July 2009 the Office of the Ombudsman (*Defensoría del Pueblo*) informed her that, according to the information provided to the Office, it was clear that she had not demonstrated that she fell into any of the categories for which the Aliens Act regulations provided for the renewal of temporary work and residence permits. Because the author had resided in the State party for several years, however, the Office also indicated that article 31.3 of the Aliens Act provides that the Administration may grant a temporary residence permit on the grounds of the existence of family ties, as well as for humanitarian reasons, cooperation with the judiciary or any other exceptional circumstances specified in the regulations and that, in such cases, a visa is not required. The Office of the Ombudsman also stated that, in accordance with article 45 of the Aliens Act regulations, an application for a temporary residence permit on the grounds of the existence of family ties could be approved if the following requirements were met: (a) continuous residence in Spain for a minimum of three years; (b) no criminal record in Spain or in the country of origin; (c) possession of an employment contract of no less than one year in length at the time that the application is submitted; and (d) submission of proof of family ties with other resident aliens or a report on the extent of the individual's integration into the community issued by the municipal council where the person had his or her domicile.

2.8 On 28 August 2009, the Prosecutor of the High Court of Justice of the Community of Madrid intervened in the proceedings pursuant to articles 114 and 119 of Act 29/1998, since this was a special proceeding for the purpose of protecting fundamental rights. Regarding the author's claim that she was not being treated on an equal basis with women of Spanish nationality who are mothers of a Spanish child, the Prosecutor stated that the comparison made by the author was valid and that the right to equality was based on the fact that both were guardians of Spanish citizens who were minors and that both therefore should enjoy the same rights. By denying the author a work permit, her fundamental right to equality was being violated. The Prosecutor concluded that the Court should consider the application because it revealed a violation of the right to equality enshrined in article 14 of the State party's Constitution.

2.9 On 3 September 2009, Administrative Court No. 22 dismissed the author's application. The Court, following the jurisprudence of the Constitutional Court relating to the right to equality before the law, stated that the legal status of the complainant, as a foreign national, was not identical to that of Spanish citizens, whose status regarding the right to reside in Spanish territory and to work was being proposed by the complainant as a comparator and that foreign nationals did not enjoy the same rights as Spanish citizens; the Court went on to say that the status of foreign nationals was not equivalent in either constitutional terms, or in terms of ordinary law.

2.10 On 18 September 2009, the author filed an appeal, reiterating her claims and asserting that the Court had violated her right to effective judicial protection by dismissing the content of her request without due consideration and without taking into account the findings of the Prosecutor of the High Court of Justice of the

Community of Madrid. The author likewise maintained that the Court had denied her a work permit but not a residence permit, since the decision under appeal suggested that she should request any permit that was not employment-related, including one granted on grounds of the existence of family ties. She also indicated that her application entailed a substantive rather than an absolute comparison, since the requirements set out in article 40 of the Aliens Act did not apply to mothers of Spanish nationality, even though, in both cases, the persons involved were women who were guardians of a Spanish citizen who was a minor.

2.11 On 4 March 2010, the Ministry of Labour and Immigration dismissed the administrative appeal filed by the author on 16 February 2009 on the grounds that she had not certified that she had been employed from 7 September 2006 to 15 August 2008 or that she fell into any of the other categories established in article 54 (4) of the Aliens Act regulations.

2.12 On 13 July 2010, the High Court of Justice of Madrid dismissed the appeal and ordered the author to pay court costs. With regard to the author's claim that the rights undermined by the unequal treatment related to work rather than to residence, the Court rejected the allegation of discrimination, stating that:

In order for the appellant to be able to work in Spain, she, like other foreign nationals, must have met the requirements for obtaining authorization to work and must have been granted such authorization in advance, whereas Spanish nationals may work without having to obtain any type of prior administrative authorization. Therefore, the denial of administrative authorization to work on the grounds that the legal requirements for obtaining a work permit have not been met — which is not questioned by the appellant — cannot be equated with a violation of the constitutional principle of equality in relation to Spanish citizens, since they need no administrative authorization to be employed. The law has thus provided for differential treatment of citizens and foreign nationals in relation to the right to work (a difference that is constitutionally legitimate, as explained above), which precludes a demand of equal treatment in that respect between Spanish nationals and foreigners.

And in this case, furthermore, the appellant has not been absolutely deprived of the possibility of working in Spain, since the decision that is being challenged actually sets out other ways in which she could go about doing so, namely, by obtaining a residence permit on the grounds of the existence of family ties (art. 31.3 of Organic Act 4/2000), which authorizes the permit holder to work in Spain (art. 45.7 of Royal Decree 2393/2004). The decision under appeal thus does not deprive the appellant of the right to work, but only to obtain authorization to work in the specific way that she attempted to do so; ... the decision itself indicates other ways in which she could obtain the necessary authorization to work, given her ties to the country, since she is married to a legal resident with permanent resident status, they have a son who has Spanish citizenship, she has previously been issued residence and work permits and has been employed under the terms of those permits, currently has a new employment contract, etc.

2.13 On 21 September 2010, the author filed for the remedy of *amparo* before the Constitutional Court, alleging violations of her rights to effective judicial protection and to equality before the law. The author requested that she be allowed to represent herself, since her income exceeded the limit established by law for the assignment

of a court-appointed counsel, or that a *procurador* and lawyer be appointed in the interests of justice. The author reiterated her arguments that she had a new work contract and, in addition, was the mother of a minor who had Spanish nationality and the spouse of a foreign national who had a permanent residence and work permit and that she accordingly had been deliberately denied a right set out in the Aliens Act.

2.14 On 29 September 2010, the Constitutional Court requested the Madrid Bar Association to designate a lawyer or *procurador* to serve as court-appointed counsel for the author. Both the Bar Association and the Central Committee on Free Legal Assistance of the Ministry of Justice denied the request for free legal assistance, however, because the author's household income, calculated annually from all sources and by family unit, was more than double the statutory minimum wage established in article 3 of Act 1/1996.

2.15 On 1 December 2010, the author informed the Constitutional Court of the Madrid Bar Association's refusal and requested that her right to legal assistance be recognized. The author maintained that she had borne the cost of her representation in the previous proceedings, but lacked the means to continue to do so. The author also requested the following interim measures to avert any action that would be prejudicial to the objective and purpose of *amparo*: that her residence and work permit be extended until such time as her complaint was resolved; that authorization be granted for her to leave and re-enter Spain; and that the rules governing the deduction of income taxes be applied without discrimination. The author asserted that her right to freedom of movement had been restricted in practice, since on various occasions she had been denied the possibility of obtaining authorization to leave and re-enter Spain owing to the fact that in the government database her immigration status had been listed as "illegal" since 15 January 2009.<sup>1</sup> She had therefore, for example, been unable to attend her mother's funeral, and the tax authorities had not allowed her to make the appropriate deductions on her income tax declaration for 2009.

2.16 On 3 December 2010, the Constitutional Court informed the author that she had 10 days in which to appear before it, represented by counsel, failing which the proceedings would be closed and the case dismissed. On 13 December 2010, the author contested the decision to deny free legal assistance before the Central Committee, claiming that, even though her household income exceeded the limit established by law for persons qualifying for free legal assistance, it barely sufficed to meet daily living expenses; she accordingly requested recognition on an exceptional basis of the right to free legal assistance.

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<sup>1</sup> The Committee observes, however, that, in accordance with the documentation provided by the author on 17 January 2013, the information sheet regarding the status of the matter, issued by the Ministry of the Treasury and Public Administrations, states: "temporary residence and work permit, 2nd renewal — decision, denied"; and the notice dated 31 May 2010, issued by the Government Delegate Office in Madrid — Employment and Immigration, states "application for renewal of the temporary residence and work permit ... was denied on 15/01/09 ... on 29/06/09 an appeal was filed in the Administrative Court and to date there is no indication that the court has issued a ruling". The Committee also observes that, according to the information provided by the State party on 22 April 2013, 15 January 2009 was the date on which the author's residence and work permit expired.

2.17 On 21 September 2010, the author's spouse appeared before the Immigration Office of Leganés, Madrid, to submit an application for family reunification in support of the author. An immigration officer did not accept the application because the person concerned was located in Spain, and such applications can be filed only when the absent family member is outside Spain. The author considers this decision to be incompatible with the Convention. She states that this condition is not applied to spouses of Spanish nationals of foreign origin or to spouses of resident aliens in other countries of the European Union. She maintains that she meets the requirements for family reunification under the law, but that the State party has imposed a condition on her that is a greater hardship than that imposed on other foreign nationals in her situation.

2.18 The author claims that she has exhausted all domestic remedies and that the Constitutional Court's decision of 3 December 2010 setting aside the application for *amparo* is final and definitive.

### **Complaint**

3.1 The author considers that the aforementioned facts constitute a violation of articles 1, 2 (a)-(g), 3, 6, 9 (1), 10 (a), 11 (1) (a) and (d), 11 (2) (c), 15 (1) and (2) and 16 (1) (c), (d) and (f) of the Convention.

3.2 The fact that she was denied a work permit simply because she did not work for six months a year between September 2006 and August 2008 constitutes inequality of treatment in that she has not been treated on an equal footing with other people in the same position, namely people who have a dependent child of Spanish nationality whom they must protect and care for. The denial jeopardizes the rights of the family and, in particular, of the children whom the author must aid for as long as they are minors. The State party's Civil Code establishes — as does the preamble to the Convention — that a mother and father have equal duties and rights; however, the denial of her work permit has resulted in an inequality of duties between the two.

3.3 Under Organic Act 4/2000, a person must meet two special requirements in order to obtain a work permit: be the spouse of a foreign national who has a permanent residence and work permit; and be the guardian of a minor who is a Spanish national. The author meets both of these requirements. Refusal to renew her temporary work permit is therefore an arbitrary decision that is contrary to the law.

3.4 The rejection of her application for the renewal of her temporary residence and work permit has left her with only one option — that of requesting a residence permit based on family ties (an *arraigo* permit) — which would mean she would have to leave her job and her family and return to her country in order to obtain a certificate of good conduct, since her country's embassy in Spain has no official or unit that could assist her with that formality. This would have been very difficult at the time because she was in a high-risk pregnancy. Ordering the author to leave her work and making it necessary for her to voluntarily leave the country was a divisive, antisocial and unjust decision that infringed her children's rights. The author further maintains that the refusal to renew her temporary work permit and the fact that she was barred from requesting a new one have done her great harm. The refusal to renew her temporary work permit will make it very difficult for her to obtain a permanent residence permit or acquire Spanish nationality later on, given that one of the requirements is an uninterrupted period of residence of 5 or 10 years,

respectively. Because the renewal was refused, her four previous years of continuous residence will not count for that purpose. The other options suggested by the authorities, including an application on grounds of family ties, carry the risk that she might be left in an irregular situation if the authorities fail to respond to the application within a period of three months, whereas appealing against the decision to deny the renewal of her residence and work permit would give her some degree of certainty that she could continue to work, remain with her family and complete her doctoral studies in the State party.

3.5 The author also claims that denying her the right to go to court without the assistance of counsel is discriminatory because she cannot afford to pay a lawyer and is not entitled to free legal assistance. Although her income was higher than the maximum established by law to qualify for free legal assistance, it was significantly lower in 2010 and 2011, and the judicial authorities took more than a year and a half to rule on her request for free legal assistance, thereby negating the effect of her application for *amparo*. The State party should therefore have granted her the requested assistance on an exceptional basis in accordance with article 5 of Act 1/1996.

3.6 The author asks the Committee to request the State party to amend all the laws that have directly and/or indirectly resulted in violations of the Convention, in particular the arbitrary, degrading and discriminatory treatment that she and her family have suffered as a result of the State party's actions and omissions. She also requests compensation in the amount of 20,000 euros for the psychological and financial harm that the violations have caused her.

#### **State party's observations on admissibility**

4.1 In a note verbale dated 14 March 2011, the State party maintained that the communication was inadmissible pursuant to articles 4 (1) and 4 (2) (c), respectively, of the Optional Protocol to the Convention because domestic resources had not been exhausted and because the matter was ill-founded.

4.2 After receiving the Central Committee's communication of 29 November 2010, in which it said that the author did not qualify for free legal assistance, on 3 December 2010 the Constitutional Court instructed the author to appear before it within 10 days, accompanied by an attorney, and indicated that, should she fail to do so, it would declare the proceedings and the case closed. On 9 December 2010, the author appealed against the Central Committee's decision. On 3 January 2011, the Constitutional Court issued a new ruling that temporarily suspended the proceedings until such time as the appeal had been heard and instructed the author to inform the Court of the final decision on the appeal.

4.3 The State party therefore asserts that available domestic resources have not been exhausted because the Constitutional Court has not taken a decision on the merits.

4.4 The author does not provide sufficient justification or grounds for her complaint; the reasons she cites for considering her rights to have been infringed are entirely general in nature. Moreover, given that the complaint is not about a specific violation but is, rather, an abstract questioning of the legal system as a whole, it is an abuse of the right to submit a communication.

4.5 Denial of a temporary residence and work permit is an administrative measure that the Spanish State has every right to take within the context of its immigration policy, which includes the requirements and conditions that foreign nationals must satisfy in order to enter and reside in Spain and is in accordance with the international treaties that the State party has signed. The State party asserts that its Constitution does not accord foreign nationals the right to enter and reside in its territory or a fundamental right to family reunification. It is true, however, that immigration laws have been evolving towards the inclusion of the right to family reunification, as long as the requirements set down in the law are met.

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

5.1 On 28 April 2011, the author submitted comments on the observations made by the State party.

5.2 She contends that the State party did not give a detailed explanation of the effective remedies available to the author in the case.

5.3 The author asserts that the Constitutional Court acted precipitously in definitively setting aside the application for *amparo* by its decision of 3 December 2010 based on a decision of the Central Committee that was not final and that she had duly contested. As a result of that decision, her application for *amparo* has become pointless and ineffective, especially because the Constitutional Court failed to act on request for interim measures.

5.4 On 17 December 2010, the appeal was referred to the Constitutional Court. The author's claims that the Constitutional Court was the competent body for deciding the matter notwithstanding, the Court chose, with no proper justification, not to take it up.

5.5 On 14 February 2011, the Court declared that it was not competent to consider the author's appeal and stated that the administrative courts should hear it.

5.6 The file was then transferred to an administrative court. The author stated that this court was not competent to hear the appeal either and, at the time at which she submitted her comments to the Committee, she contended that, in the light of this situation, the proceedings had been unreasonably prolonged within the meaning of article 4 (1) of the Optional Protocol.

5.7 She contends that the submission of an application for *amparo* to the Constitutional Court is not an effective and sufficient remedy. According to a study carried out in the State party, 96 per cent of all applications for *amparo* are declared inadmissible each year, and a considerable number of such applications remain unresolved.

5.8 As regards the merits, the author reaffirms the grounds that she cited in her initial communication and recalls that the Prosecutor of the High Court of Justice of Madrid considered them to be valid.

5.9 Referring to the Committee's general recommendations 9, 16, 17, 19, 21, 25 and 26, the author contends that the State party has taken no steps to quantify unpaid domestic work, nor does it include such work in its gross national product. Refusing to renew the author's work permit on the grounds that she had worked for more than six months without pay at home is therefore a violation attributable to the State party.

5.10 The author states that the facts cited in her communication demonstrate that the State party does not heed the Committee's recommendations. She refers to the Committee's concluding observations of 22 July 2009, in which it urged the State party "to ensure equal opportunities for women and men in the labour market, including through the use of temporary special measures, with time-bound targets, in accordance with article 4, paragraph 1, of the Convention and its general recommendation 25".<sup>2</sup>

#### **State party's observations on the merits**

6.1 In notes verbales dated 13 July 2011 and 22 April 2013, the State party submitted its observations on the merits. It also reiterated its request that the communication be declared inadmissible on the grounds that the available domestic remedies had not been exhausted and that it constituted an abuse and was ill-founded within the meaning of articles 4 (1) and 4 (2) (c) of the Optional Protocol or, alternatively, that the Committee declare that there had been no violation of the Convention.

6.2 The Constitutional Court has taken no decision on the author's application for *amparo*. It had simply suspended the proceedings provisionally until such time as the appeal against the Central Committee's decision was resolved.

6.3 While the author refers to the violation of numerous provisions of the Convention, her communication focuses on the denial of her alleged right to a work permit and provides no objective information to support her contention that violations of the articles of the Convention have occurred. Refusing a residence and work permit are administrative measures that can legitimately be taken by the State party in the context of its immigration policy. In the author's case, the decisions taken by the authorities have been based, not on the fact that she is a woman, but on her failure to provide the evidence required by law.

6.4 The State party rejects the claim that there has been any discrimination on the basis of gender in the actions taken by officials of the Ministry of the Interior in managing, coordinating and monitoring documentation and dealings with foreign nationals in the State party. In this regard, it has furnished a copy of an official document from the Ministry, dated 7 March 2011, providing statistics, disaggregated by sex, on the number of denials of residence permits between 2006 and 2010. The figures show that more men than women were denied residence permits during that period. In 2009 and 2010, respectively, 44,683 (out of 108,568) and 36,159 (out of 97,033) applications submitted by women were denied; in 2006, 2007 and 2008, 52,260 (out of 146,597), 68,490 (out of 188,276), and 79,919 (out of 201,779) applications submitted by women were denied.

6.5 The State party refutes the arguments made by the public prosecutor to Administrative Court No. 22 of Madrid and maintains that the decision not to extend the temporary residence and work permit taken by the Government Delegate Office in Madrid is consistent with the Aliens Act and Aliens Act regulations. Moreover, the exceptions set forth in articles 38 and 40 of the Act are coupled with a requirement that the person in question must have a work contract. Paragraphs 3 and 4 of article 54 of the regulations, which are entirely consistent with the Act, establish the conditions that must be met for the extension of a residence and work

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<sup>2</sup> See CEDAW/C/ESP/CO/6 and Add.1.

permit when a work contract has been signed with a new employer. They include the requirements that the applicant must provide proof that the activity for which the permit was granted was carried out for a minimum of six months per year or, failing that, evidence of a period of activity of at least three months per year; that the work relationship that gave rise to the permit was interrupted for reasons beyond the individual's control; that the person seeking the permit has been actively looking for work; and that, at the time that the application is filed, the applicant has a work contract that is in force.

6.6 The author failed to make use of any of the options that were outlined in the written decision whereby her request for an extension of her work and residence permit was rejected and that were subsequently enumerated again in the report by the Office of the Ombudsman i.e., to request a new residence permit, without permission to work, or any type of temporary residence authorization based on such grounds as family ties, humanitarian reasons, cooperation with the judiciary or any other of the exceptional circumstances specified in the regulations. She could have requested a non-work residence permit, which would have been granted because she had lived in the State party since 2000 and was married to a foreigner with permanent residency in Spain and because her two minor children, one of whom has Spanish citizenship, reside in Spain. Although that residence permit does not include an authorization to work, this would not prevent her from working, given that article 40 (c) and (g) of Organic 4/2000 provides for exceptions when the person obtaining a work contract or offer of employment is the spouse of a foreigner resident in Spain with a renewed permit, as long as he or she has resided in Spain legally for at least one year or has ascendants or descendants with Spanish citizenship. Moreover, she could have requested a residence permit based on exceptional circumstances (i.e., family ties), as the Office of the Ombudsman had informed her. This latter option includes authorization to work, in accordance with article 47 (7) of the regulations. A certificate of good conduct is required in order to process this request; however, the author was not required to leave Spain in order to obtain such a certificate. What is more, since she had submitted such certification in 2005 and has lived in the State party ever since, the Spanish authorities would have been able to certify the absence of a criminal record from that time up to the date on which she submitted the request. The State party therefore maintains that the author met the requirements to obtain legal permission to work by any of these means.

6.7 As to the request for family reunification submitted by the author's husband on 21 September 2010, the author has not provided any documentation to show that such a request was submitted. In any case, the rejection of the request for family reunification was based on the fact that the absent family member — the author — did not reside outside Spain, and the rejection cannot be deemed to constitute sex discrimination, especially since it was her husband who submitted the request.

6.8 The author's allegations that she was discriminated against by being denied the right to defend herself because she cannot afford to pay for the legal services required by the Constitutional Court are also inadmissible. The right to free legal assistance for those who can prove that they lack sufficient resources to pay for a lawyer is granted to any foreigner in Spain on the same terms as it is to any Spanish citizen, irrespective of whether the person is there legally. It has been established, however, that the author's income was well over twice the level of the statutory minimum wage in effect at the time of her application. Accordingly, under the law, the author did not qualify for free legal assistance.

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

7.1 On 15 September 2011, the author submitted comments on the State party's observations on the merits.

7.2 The High Court of Justice of Madrid itself had stated that the author had certified that she was married to a foreign national who was authorized to reside and work in Spain permanently, had a child of Spanish nationality, resided in the same dwelling and had a part-time employment contract dated 15 August 2008. Nevertheless, even though she had entered into matrimony before the authorities of the State party, her family status was disregarded, as evidenced by the assertion that, had she demonstrated compliance with the relevant legal requirements in a timely manner, she would have benefited from the right to family reunification. Consequently, the State party has not provided sufficient protection for the author's rights as set out in article 11 (1) (a) of the Convention.

7.3 With regard to the right to free legal assistance, the author's personal income for 2010 did not exceed the minimum wage; her income was double the statutory annual minimum wage only once her total household income was taken into account. Yet, in their communications with the Committee, both the Central Committee and the State party itself have referred to the author's income, without indicating that in fact they were talking about her household income. Lastly, the author invokes article 5 of Act 1/1996 on Free Legal Assistance, which provides for exceptions based on the applicant's family circumstances, number of dependent children or family members, state of health, financial obligations, costs in connection with the initiation of legal proceedings and other similar, objectively assessed considerations.

7.4 The author states that all the available means proposed by the authorities of the State party, including an application based on family ties (an *arraigo* permit), involve the submission of a certificate of good conduct from the country of origin. In the case of the author, a request must be made in person, which would oblige her to leave the territory of the State party.

7.5 With regard to the question of the exhaustion of domestic remedies, the author asserts that the State party has failed to provide any reasonable justification for the prolongation of the *amparo* proceedings owing to the delay in ruling on her appeal against the Central Committee's decision to deny her free legal assistance.

7.6 On 10 July 2009, by Royal Decree 1162/2009, the State party amended the discriminatory legislation that had been applied to the author since 2005. The new regulations permit the renewal of residence permits for women married to foreign nationals holding a renewed residence permit, without requiring any minimum period of work during the year. The author maintains that, since then, the refusal rate for applications for work permit renewals submitted by women has decreased significantly.

**Supplementary information submitted by the author**

8.1 According to the author's submission of 22 August 2011, Administrative Court No. 22 of Madrid declared that it was not competent to hear an appeal against the decision of the Central Committee on Free Legal Assistance. The Administrative Court held that it was for the Constitutional Court to hear the appeal.

8.2 On 16 February 2012, the author informed the Committee that, on 13 February 2012, she had requested the Constitutional Court to declare itself competent to hear the appeal, to order interim measures to avert prejudicial effects that would undermine the effectiveness of the remedy of *amparo* and to allow her to register with national employment offices and placement agencies as a foreign worker who is not a national of a country belonging to the European Union.

8.3 On 16 August 2012, the author informed the Committee that, on 26 March 2012, the Constitutional Court had again found that it was not competent to consider the author's appeal against the Central Committee's decision, citing article 20 of Act 1/1996 on Free Legal Assistance and its own case law, because the request for free legal assistance had been made once proceedings were under way. If the measure had been requested before the proceedings had begun, then the judge of the court of first instance would have had competence to consider the appeal. Consequently, the Court referred the appeal back to Administrative Court No. 22 of Madrid.

8.4 On 1 October 2012, the author informed the Committee that, on 26 July 2012, Administrative Court No. 22 had confirmed the Central Committee's decision that, in accordance with her statement of income for 2009, the household's gross income exceeded 35,000 euros and was therefore above the maximum income level established in article 3 of Act 1/1996 on Free Legal Assistance. To enjoy that right the author would have to demonstrate financial need, which involved more than simply saying that she had debts. The decision was not appealable.

8.5 The author informed the Constitutional Court of the decision of Administrative Court No. 22 and requested that her application for *amparo* be extended to include this decision so that the Court's decision could be overturned and she could be granted the right to legal assistance on an exceptional basis. Even though her income exceeded the maximum amount established by law for the receipt of free legal assistance, she had had financial difficulties in 2010 and 2011. Furthermore, the court had taken more than a year and a half to decide on the matter, thus rendering her application for the remedy of *amparo* ineffective. The court should therefore have taken these elements into consideration and granted the requested assistance on an exceptional basis.

8.6 On 22 February 2013, the author informed the Committee that, on 17 September 2012, the Constitutional Court had given her 10 days to appear, accompanied by a *procurador* and legal counsel at her own expense, in accordance with article 81.1 of the Organic Constitutional Court Act. On 28 January 2013, in response to her failure to appear, the Constitutional Court closed the case.

#### **Deliberations of the Committee with respect to admissibility**

9.1 In accordance with rule 64 of its rules of procedure, the Committee is to decide whether the communication is admissible under the Optional Protocol to the Convention. In accordance with rule 66, the Committee may decide to consider the question of admissibility of a communication and the merits of a communication separately.

9.2 In accordance with article 4 (2) (a) of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

9.3 The Committee notes the State party's argument that the communication should be declared inadmissible on the ground of non-exhaustion of domestic remedies, given that the Constitutional Court had not taken a decision on the merits but instead had only decided to set aside the proceedings on a provisional basis. In that regard, the Committee takes note of the information submitted by the author concerning *amparo* proceedings, namely, that on 21 September 2010 she filed an application for *amparo* with the Constitutional Court; that on 11 and 29 November 2010, the Madrid Bar Association and the Central Committee on Free Legal Assistance, respectively, denied her requests for free legal assistance; that on 3 January 2011, her *amparo* application was set aside on a provisional basis until such time as her appeal against the denial of free legal assistance was resolved; that on 26 July 2012, Administrative Court No. 22 of Madrid denied her request for free legal assistance because the author's household income was higher than the upper limit established by law for qualifying for that right; that, consequently, on 17 September 2012 the Constitutional Court gave the author 10 days to appear with a *procurador* and counsel to enter her appeal; and that, because the author did not do so, the Constitutional Court dismissed the case on 28 January 2013.

9.4 The Committee observes that the author has not explained why she did not comply with the Constitutional Court's instruction to appear before it within 10 days, which is a legal requirement that must be met by any person wishing to file an appeal with the Constitutional Court. The Committee takes note of the author's attempt to obtain free legal assistance in order to appear before the Court and of the fact that that application was denied because the author did not meet the legal requirements for qualifying for such assistance. However, the Committee considers that the author's arguments concerning financial difficulties that prevented her from engaging a lawyer are very general in nature, that the author has not provided specific information on the subject and that the Committee therefore cannot conclude that it has been convincingly demonstrated that the author could not afford to engage a lawyer or that it was impossible for her to obtain a lawyer's services by other means that would not have constituted a prohibitive financial burden for her. Consequently, the Committee finds that domestic remedies have not been exhausted and that the failure to exhaust such remedies is not attributable to the State party. The Committee therefore concludes that the communication is inadmissible under article 4 (1) of the Optional Protocol.

10. The Committee therefore decides:

(a) That the communication is inadmissible under article 4 (1) of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author of the communication.

[Adopted in Arabic, Chinese, English, French, Russian and Spanish, the Spanish text being the original version.]