United Nations E/C.12/65/D/9/2015

Economic and Social Council

Distr.: General
25 March 2019
English
Original: Spanish

Committee on Economic, Social and Cultural Rights

Decision adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 9/2015*

Communication submitted by:	Irma Elisabeth Makinen Pankka and Teófilo Fernández Pérez (represented by counsel, Antonia Barba García)
Alleged victims:	The authors
State party:	Spain
Date of communication:	15 September 2015 (initial submission)
Date of adoption of decision:	1 March 2019
Subject matter:	Seizure of a home
Substantive issues:	Right to adequate housing
Procedural issues:	Exhaustion of domestic remedies; failure to sufficiently substantiate allegations
Article of the Covenant:	11
Articles of the Optional Protocol:	2 and 3 (1) and (2) (a), (b) and (e)

* Adopted by the Committee at its sixty-fifth session (18 February–8 March 2019).

GE.19-04903 (E) 290319 290319

1904903

1.1 The authors of the communication, submitted on 15 September 2015, are Irma Elisabeth Makinen Pankka and Teófilo Fernández Pérez, both Spanish nationals, born on 7 August 1945 and 16 March 1940, respectively. The authors submit that they are the victims of a violation, by Spain, of articles 2 and 11 of the Covenant. The Optional Protocol entered into force for the State party on 5 May 2013. The authors are represented by counsel.

1.2 On 1 December 2015, the Committee registered the communication, requesting the State party to take interim measures to prevent the authors from being evicted while the case is being considered by the Committee. On 19 July 2016, the Committee decided to withdraw the request for interim measures.

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

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

Facts as submitted by the author

2.1 The authors have lived in an apartment in Málaga since 1996. On 29 January 2007, Mr. Fernández Pérez signed a private contract of sale with a private company for an apartment in a building under construction in Málaga. The sale price was 343,470 euros and the agreement was signed on the basis of features enumerated in the building's advertisement brochure. The author paid an 87,694-euro deposit while awaiting the completion of the building. The authors submit that Mr. Fernández Pérez bought the property for his daughter and that Ms. Makinen Pankka did not contribute to the transaction or have any knowledge of it.

2.2 During the construction, Mr. Fernández Pérez noticed substantial changes to the front of the building, meaning that its final façade would be considerably different from the one in the brochure. As he disagreed with the changes, on 20 June 2008, he contacted the company through his real estate agent and requested the annulment of the contract, with reimbursement of the amounts paid. The authors contend that the company did not reply to the request and that, a year later, they were asked to sign the deed of conveyance.

2.3 On 26 April 2010, the company filed a suit against Mr. Fernández Pérez before trial court No. 18 in Málaga (Court No. 18), requesting the fulfilment of the contract of 29 January 2007 and the payment of the total amount of the sale plus 10 per cent per year in default interest. As part of these proceedings, Mr. Fernández Pérez filed a counterclaim against the company for failure to fulfil the initial contract.

2.4 On 22 December 2010, Court No. 18 dismissed Mr. Fernández Pérez's counterclaim and ordered him to fulfil the contract of 29 January 2007. The Court stated that, while changes had been made to the building's façade, they were made for technical reasons related to security, building maintenance and energy efficiency. The changes should be considered as an improvement to the property and did not affect either the purchased apartment or its price. The Court gave Mr. Fernández Pérez two months to pay 255,776 euros plus 10 per cent in default interest.

2.5 Mr. Fernández Pérez appealed the decision before the High Court of Málaga. On 15 February 2013, the High Court dismissed the appeal, stating that the appellant's main claims were based on objections of an aesthetic rather than substantive nature and were insufficient to justify the termination of the contract.

2.6 On 17 June 2013, Mr. Fernández Pérez filed for *amparo* before the Constitutional Court. He claimed that his right to an effective judicial remedy, as enshrined in article 24 (1) of the Constitution, had been violated.

2.7 On 29 October 2013, Court No. 18 ordered the author to fulfil his contractual obligation and pay 380,088.15 euros (principal) and 114,000 euros (interest). An attachment was initiated in respect of the authors' properties, including the family apartment where they have lived since 1996.

2.8 On 12 February 2014, Ms. Makinen Pankka filed a suit before Court No. 18, challenging the decision of 29 October 2013. She claimed that Mr. Fernández Pérez's debt towards the private entity should be declared an individual debt for which Mr. Fernández Pérez was solely liable and should not be considered a part of their acquired matrimonial assets. On 6 March 2014, Court No. 18 dismissed her suit. She appealed the decision before the High Court of Málaga. In the light of the appeal, the enforcement of the order of Court No. 18 was suspended.

2.9 On 17 March 2014, the Constitutional Court, in keeping with article 241 (1) of the Organic Act on the Judiciary, found Mr. Fernández Pérez's application inadmissible for failure to exhaust previous judicial remedies and for failure to apply to have the order annulled prior to filing for *amparo*. The authors claim that the Constitutional Court's decision was contrary to its own jurisprudence on the exhaustion of judicial remedies as set forth in its decision of 19 December 2013.

2.10 On 26 March 2014, Mr. Fernández Pérez filed an application with the European Court of Human Rights, claiming that his rights under article 6 (1) (right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) had been violated.

2.11 The authors and the company subsequently filed suits before Court No. 18. On 16 February 2015, Court No. 18 ordered the resumption of the enforcement of its decision of 6 March 2014.

2.12 On 2 April 2015, the European Court of Human Rights found the application inadmissible on the grounds that it did not meet the requirements under articles 34 and 35 of the European Convention on Human Rights.

2.13 On 15 September 2015, the High Court of Málaga dismissed Ms. Makinen Pankka's appeal. On 28 October 2015, at the request of Court No. 18, the company submitted documents regarding the registers and the price of the property and requested Court No. 18 to set a date for auction. The authors claim that there is no domestic remedy whatsoever to prevent their forced eviction and that the auction of their home is imminent.

Complaint

3.1 The authors claim that their rights under articles 2 and 11 of the Covenant have been violated. Despite Ms. Makinen Pankka, Mr. Fernández Pérez's wife, not having been involved in the purchase of the property concerned or being a party to the main proceedings regarding the validity of the contract, she was notified that the family home was the subject of a judicial enforcement procedure and might be put to auction. The authors claim that there is a substantial risk that the family home will be auctioned off since the current value of the disputed property is now much lower than at the time Mr. Fernández Pérez signed the contract. Moreover, the contract contained abusive clauses that imposed an annual default interest of 10 per cent. The authors contend that, under Spanish law, a property purchased by one spouse becomes part of the spouses' community property and the liability for community property, including any debt incurred to purchase it, must have been accepted by both spouses for them both to be liable.

3.2 Under article 561 (3) of the Civil Procedure Act, an appeal against an auction order does not have a suspensive effect on an enforcement procedure. Therefore, the authors claim that the auction of their habitual residence is imminent and can be initiated at any time. By virtue of not providing for sufficient safeguards, the enforcement procedure is a violation of article 11 of the Covenant.

3.3 The authors refer to article 2 of the Covenant and to the Committee's general comments Nos. 4 and 7[1] and argue that the State party's legislation must contain safeguards against forced eviction. In practice, mortgage enforcement procedures do not respect the principle of equality of arms since appeals of orders that might result in forced eviction are precluded from referring to the presence of abusive clauses in mortgage contracts and do

[1] Committee's general comment No. 4 (1991) on the right to adequate housing, para. 18, and general comment No. 7 (1997) on the right to adequate housing: Forced evictions, para. 8.

not have a suspensive effect.[2] The authors note that, although the State party amended the relevant legislation on mortgage enforcement procedures in 2013, the current law does not effectively protect the right to housing when mortgage contracts contain abusive clauses. The fourth transitory provision of Act No. 1/2013 on measures to strengthen protection for mortgage holders, debt restructuring and social housing established that the parties to enforcement procedures under way at the time of the entry into force of the Act (15 May 2013) had one month, from the day following the entry into force, to submit an extraordinary application objecting to the enforcement on the basis of new grounds for a challenge.

3.4 In the authors' case, Court No. 18 initially suspended the enforcement procedure following Ms. Makinen Pankka's appeal, but, on 16 February 2015, following Mr. Fernández Pérez's application, it decided to resume the procedure.

3.5 Ms. Makinen Pankka has been deprived of her right to due process given that she was not involved in the sale, was not mentioned in the deed of conveyance and was not a party to the subsequent declaratory procedure yet her home is subject to an enforcement procedure and she may be evicted from it. The authors consider that, in their case, consumers are being forced to pay an exorbitant price in addition to interest and fees to the developer which could lead to the loss of both their homes.

State party's observations on admissibility

4.1 On 21 January 2016, the State party submitted its arguments regarding the admissibility of the communication.

4.2 The State party begins by stating that a violation of article 11 can be alleged only in respect of Ms. Makinen Pankka, but not of Mr. Fernández Pérez, because only she was a party to the challenge against the order of Court No. 18 regarding the auction of the couple's shared property which was dismissed on 6 March 2014. Furthermore, in her challenge, Ms. Makinen Pankka criticized the acquired matrimonial assets regime into which she entered voluntarily and which is not compulsory under Spanish law.

4.3 The State party is of the view that the communication is an abuse of the right to submission in violation of article 3 (2) (f) of the Optional Protocol. It points out that the community property that has been seized are two homes registered as No. 5489 and No. 3700/B in the property register of Málaga. However, the document from the municipal register of Málaga submitted by the authors lists them as residing at a different address.

4.4 The State party submits that the authors have not exhausted domestic remedies inasmuch as the communication refers to two separate sets of judicial proceedings involving different parties. The first set consists of the declaratory procedure related to Mr. Fernández Pérez's failure to execute the contract, which ended in a first-instance decision requiring him to reimburse the debt. Ms. Makinen Pankka is not mentioned as an injured party or even as an interested party in this procedure or in the appeals filed by Mr. Fernández Pérez before the Constitutional Court and the European Court of Human Rights. The State party argues that Mr. Fernández Pérez has exhausted domestic remedies only with regard to this set of proceedings, which are based on the alleged violation of his right to an effective judicial remedy. The second set comprises the enforcement of judicial decisions. In the State party's view, this set is completely separate from the declaratory procedure and was initiated by the creditor. The purpose of these procedures is to enforce the earlier decision to seize two of the shared properties of the authors, who are in an acquired matrimonial assets regime. Within the enforcement procedure, there is a separate action in which Ms. Makinen Pankka opposes the seizure of shared property by calling into question the nature of the debt. It is the decision taken in relation to this action that the authors claim violates article 11. The State party is of the opinion that remedies related to

[2] See the decision of the Court of Justice of the European Union in *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA* (C-169/14) of 17 July 2014, para. 50, according to which there are not sufficient procedural rules in the applicable legal order to prevent the continued application of an unfair clause contained in the instrument establishing the mortgage.

this action have not been exhausted and that, in any case, only Ms. Makinen Pankka was a party to the impugned procedure. Consequently, the State party contends that the violation of article 11 was invoked solely in relation to this action and applies to Ms. Makinen Pankka alone and that the relevant domestic remedies have not been exhausted.

4.5 The State party emphasizes that there has been no seizure whatsoever of the authors' habitual home, that only violations of the right to an effective judicial remedy were raised as part of domestic remedies and only in respect of Mr. Fernández Pérez and that Ms. Makinen Pankka has not exhausted domestic remedies.

4.6 The State party is of the view that the communication is incompatible with the provisions of the Covenant, is manifestly unfounded and constitutes an abuse of the right of submission given that it stems from a real estate investment and not from the purchase of a main residence and that the authors' home was at no time seized.

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

5.1 In a letter dated 9 March 2016, the authors submitted their comments on the admissibility of the communication. Regarding the State party's observation that the communication is manifestly unfounded, the authors argue that Ms. Makinen Pankka is claiming that the acquired matrimonial assets regime was wrongly applied by the courts. The authors cite articles 1362 and 1377 of the Spanish Civil Code, which require the consent of both spouses for the disposal of acquired property. They submit that, under the Civil Code, a property purchased by Mr. Fernández Pérez for his daughter, without the consent of his wife, does not constitute acquired property. Therefore, Ms. Makinen Pankka should not be subject to the enforcement of a decision that results from a declaratory procedure in which she had no part and which relates to a purchase she had not approved.

5.2 The authors call into question the State party's assertion that they have abused the right of submission because their main residence is not due to be seized. They note that properties No. 5489 and No. 3700/B, which the State party identified as being liable to seizure, are valued at €116,276 and €111,720. Their combined value does not cover even half of the amount specified in the enforcement order, which was €380,088, plus €114,000 in interest. Therefore, if the judicial enforcement procedure continues, they will be evicted from their main residence (even though it is still not listed in the seizure order) because the procedure applies to the entirety of Mr. Fernández Pérez's assets and, not least, because the authors must honour the price set at the time of purchase – i.e. during the real estate bubble – and pay 10 per cent in default interest irrespective of the fact that their properties were evaluated during a real estate crisis.

5.3 The authors argue that there is only one set of judicial proceedings in their case, namely the declaratory procedure and its subsequent enforcement. They acknowledge that the parties to the declaratory procedure and the enforcement are different, which is one of the reasons for their communication in the first place, in other words the fact that the declaratory judgment affects Ms. Makinen Pankka even though it relates to Mr. Fernández Pérez's failure to execute the contract. The authors recall that they have exhausted all domestic remedies in connection with the declaratory judgment. As for the exhaustion of domestic remedies in relation to the violation of article 11, the authors repeat that, since appeals in eviction procedures in Spain do not have a suspensive effect, they are not an effective remedy. In addition, they argue that the violation of article 11 arising from the enforcement of the declaratory procedure affects Mr. Fernández Pérez as well and does not arise solely in the context of Ms. Makinen Pankka's challenge. Thus, it applies to both of them.

5.4 Regarding the State party's assertion that the communication is incompatible with the provisions of the Covenant because Mr. Fernández Pérez is an investor rather than a consumer, the authors stress that Mr. Fernández Pérez purchased the home for his daughter. Therefore, it is an individual purchase in Mr. Fernández Pérez's name for residential purposes and not an investment designed to increase the couple's wealth as part of their community property.

State party's observations on the merits

6.1 In a note verbale of 31 May 2016, the State party submitted its observations on the merits of the communication, stating that there was no violation of the Covenant.

6.2 It notes that Mr. Fernández Pérez made a real estate investment using money acquired during the marriage. It therefore follows that the debt is shared as well, in other words both spouses are liable for it.

6.3 The State party is of the view that a violation of the Covenant might occur if, faced with a hypothetical eviction, the authors did not enjoy the resources or legal protection required under article 11 of the Covenant and general comments Nos. 4 and 7. Article 541 of the Civil Procedure Act, titled "enforcements in respect of acquired assets", stipulates that the non-debtor spouse should be notified when an enforcement procedure has been initiated in relation to debts contracted by the other spouse involving acquired property. The decision to initiate an enforcement procedure can be challenged. The spouse of the person subject to the enforcement procedure may challenge it on the grounds that the debt is not shared or on the basis of the same formal and material reasons as apply to his or her spouse. Thus, the authors refer to decision No. C-169/14 of the Court of Justice of the European Union, according to which the Spanish mortgage enforcement system does not provide for the persons concerned to base a challenge on the merits of their case, in the authors' case the abusive nature of the clauses of the mortgage contract as a public instrument. This jurisprudence does not apply to the present case because it involves a judicial enforcement procedure initiated in response to the failure to reimburse a debt associated with acquired property, a procedure in relation to which Ms. Makinen Pankka had the opportunity to raise issues of merit. The State party concludes that, in the authors' case, legal safeguards against eviction that are in keeping with the Covenant are available.

6.4 The State party recalls that, as at the date of the note verbale, two properties had been seized, neither of which were the authors' habitual residence. Therefore, there is obviously no violation of the authors' right to adequate housing.

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

7.1 On 24 April 2017, the authors submitted their comments on the merits of the communication. They claim that the risk of their family home being seized is real given that judicial proceedings are ongoing and that, as they involve an enforcement procedure, all the authors' assets are liable to be seized. The authors further claim that, even if they lose both their properties, the debt will not be fully reimbursed because the sale price was much higher than the price that could be obtained in the current market. The contractual price is still considered as the amount of the debt; however, their assets are evaluated at the current market rate.

7.2 Furthermore, Ms. Makinen Pankka was not a party to the contract nor to the declaratory procedure, rendering her defenceless. The authors note the contrast between their lack of protection in the face of their debt and the situation of the company, which has entered into an arrangement with creditors, who enjoy a sufficiently robust protection system to prevent them from suffering the ill-effects of the company's debts.

7.3 The authors reiterate that the facts point to a violation of their right to adequate housing as enshrined in article 11 of the Covenant.

B. Committee's consideration of admissibility

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

8.2 The Committee takes note of the State party's argument that the communication is inadmissible under article 3 (1) of the Optional Protocol given that there are two separate procedures – the declaratory procedure and the enforcement procedure – and that only Mr. Fernández Pérez has exhausted all domestic remedies insofar as he claimed before the Constitutional Court that his right to an effective judicial remedy had been violated, while

Ms. Makinen Pankka did not appeal the decision of the High Court regarding the enforcement procedure.

8.3 The Committee notes that the authors argue that their case consists of a single set of judicial procedures, that they have exhausted domestic remedies in connection with the declaratory judgment and that, since eviction procedures in Spain do not provide for the suspensive effect of appeals, those appeals do not constitute an effective remedy. The Committee also notes that Mr. Fernández Pérez appealed Court No. 18's decision of 22 December 2010, going all the way to the Constitutional Court with a claim that his right to an effective judicial remedy had been violated, and that Ms. Makinen Pankka appealed the enforcement of the decision, which was suspended then resumed on 6 March 2014, thereby exhausting all effective remedies to prevent the enforcement. Accordingly, the Committee is of the view that the authors have exhausted available domestic remedies and that their communication is admissible under article 3 (1) of the Optional Protocol.

8.4 The Committee further notes the authors' claims that their rights under articles 2 and 11 of the Covenant were violated by the fact that Ms. Makinen Pankka was not a party to the main procedure regarding the validity of the contract and yet there is a substantial risk that the family home will be put to auction. In this regard, the Committee notes the State party's observations that the communication is manifestly unfounded because it relates to a real estate investment, not to the purchase of a main residence, and that the authors' home was never seized. The Committee also notes that Court No. 18 of Málaga initiated an attachment in respect of two of the authors' properties but that the seizure did not apply to their main home. The authors have not substantiated their claim that their main home was at imminent risk of being seized, that they would be subject to forced eviction or that their right to housing might, therefore, be infringed. The authors have not adequately demonstrated that they will inevitably be evicted from their main residence should the judicial enforcement procedure continue or that it was ever seized. At the very least, the facts adduced in the communication should allow the Committee to assess whether or not they reveal a violation of the Covenant.[3] Taking into account the fact that the judicial procedure referred to by the authors has not negatively impacted their home and that they have failed to prove that they have been deprived of their right to adequate housing or that this right is genuinely threatened, the Committee is of the view that the communication is not sufficiently founded for the purposes of admissibility and is, accordingly, inadmissible under article 3 (2) (e) of the Optional Protocol.

C. Conclusion

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

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

[3] See *Martins Coelho v. Portugal* (E/C.12/61/D/21/2017), para. 4.3.