



**International Covenant on
Civil and Political Rights**

Distr.: General*
23 August 2011

English
Original: Spanish

Human Rights Committee

102nd session
11-29 July 2011

Decision

Communication No. 1622/2007

<i>Submitted by:</i>	L.D.L.P. (represented by counsel, Luis Olay Pichel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	23 December 2006 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 November 2007 (not issued in document form)
<i>Date of decision:</i>	26 July 2011

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Author's removal from his post on grounds of unsuitability
<i>Procedural issues:</i>	Degree of substantiation of the claim; admissibility <i>ratione materiae</i>
<i>Substantive issues:</i>	Right to a fair and public hearing by a competent, independent and impartial tribunal; right to have a conviction and sentence reviewed by a higher tribunal according to law; right not to be subjected to arbitrary or unlawful interference with one's privacy, family and home; right to hold opinions without interference; right to equal protection of the law without discrimination.
<i>Articles of the Covenant:</i>	2 and 3
<i>Articles of the Optional Protocol:</i>	2, paragraph 3 (a); 8, paragraph 3 (a); 12; 14; 15; 17; 18; 19; and 26

[Annex]

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (102nd session)

concerning

Communication No. 1622/2007**

Submitted by: L.D.L.P. (represented by counsel, Luis Olay Pichel)

Alleged victim: The author

State party: Spain

Date of communication: 23 December 2006 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2011,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is José Antonio L.D.L.P., a Spanish citizen born on 26 May 1961. He claims to be a victim of a violation by Spain of article 2, paragraph 3 (a), read in conjunction with article 14; article 8, paragraph 3 (a); article 12; article 15; article 17; article 18; article 19; and article 26 of the Covenant. The Optional Protocol entered into force for Spain on 25 January 1985. The author is represented by counsel, Mr. Luis Olay Pichel.

1.2 On 4 February 2008, the Committee, acting through the Special Rapporteur on new communications and interim measures, agreed to the State party's request that the admissibility of the communication should be considered separately from the merits of the case.

Factual background

2.1 The author is a career military officer. In June 2002, he was posted to the Garellano Regiment in Munguía in the province of Vizcaya, where he had served for three years with the rank of captain and a further three with the rank of major. He had also performed highly responsible duties, acting, for example, as Chief of the Classified Documentation Service

** The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

and of the Second Section (information) from September 1999 to August 2000 and as Chief of Security for the Munguía barracks for the first six months of 2000. He performed these duties to the full satisfaction of three different colonels when they commanded the regiment, who awarded him the Cross of the Order of Military Merit and issued three of the four written commendations which he has in his service record. He volunteered for a posting to the Basque Country, which is one of the most hazardous and most demanding places of duty and one to which most officers are posted under a compulsory rotational system for periods of approximately one year.

2.2 During the first year of Colonel G.A.'s command, the author had a good relationship with him, and it was evident that the Colonel was pleased with his work. Subsequently, however, the Colonel's attitude towards him changed dramatically. During the first half of 2002, the author began to be subjected to various types of psychological harassment, including two arrests lasting four days each. A third arrest, lasting one month and five days, occurred in 2003. In addition, on 10 June 2002, his home was searched without a warrant and without authorization from a neutral military authority. The author claims that these actions were taken in retaliation for the fact that, after the Colonel had started levelling false accusations against him, he had exercised his right to defend himself by requesting reports from his subordinates. As a result of this harassment, the author fell ill and remained on sick leave for a total of 21 months up to 18 February 2004.

2.3 On 7 June 2002, the author filed a complaint against Lieutenant Colonel B., who had also begun to participate in the harassment. He subsequently extended his complaint to include Colonel G.A., accusing him of abuse of command authority. On 12 June, the author lodged a complaint against Colonel G.A. for having ordered a search of his home without a warrant.

2.4 On 8 July 2002, Colonel G.A. requested the author's removal from his posting in Munguía on the grounds that he was unsuited to perform the associated duties. The author had requested a transfer in the intervening period. The transfer was eventually granted on 19 July 2002, when the author was assigned to the 45th Light Infantry Garellano Regiment in Vitoria. However, his illness prevented him from taking up this post.

2.5 On 23 August 2002, the author requested that the Minister of Defence take disciplinary action in order to curtail Colonel G.A.'s harassment, having learned that the Colonel had, among other things, refused to accept the sick-leave certifications that had been submitted to him. This request prompted an investigation during which the circumstances surrounding the author's sick leave and illness were examined for the first time. This investigation did not begin until 22 November 2002, however. In December 2002, Colonel G.A. was charged with misconduct in respect of the author. Colonel G.A. was tried in October 2005 and was ultimately acquitted.

2.6 On 20 September 2002, the author was summoned to a barracks in Asturias to collect an official letter inviting his submissions in relation to his proposed removal. When his father, who was legally empowered to represent the author, went to collect the letter on his son's behalf, the authorities refused to release the letter to him on the grounds that it was a confidential document. The letter was not sent to the author's home until many months later, after it had been specifically requested from the authorities and the author had already been removed from his position. The author asserts that the report in which the Colonel proposed his removal was not attached to the official letter and that he could therefore not make any counterclaims on this basis.

2.7 Colonel G.A. made various unfounded allegations against the author on different occasions, holding him responsible for a number of serious infractions and offences. All of these allegations were dismissed and the author was not found to be responsible in any of these instances.

2.8 The author was informed of his removal at the Vitoria Unit by an official letter dated 8 November 2002. The letter stated that, since the Vitoria Unit was composed of a battalion belonging to the same regiment that was under Colonel G.A.'s command, the circumstances set out in the proposal of removal remained applicable. The author claims that the decision concerning his removal was taken without having given him an opportunity to defend himself, was based solely on the report issued by Colonel G.A. and was issued before the investigation into the author's complaint against the Colonel had been concluded. The author tried to gain access to his case file on several occasions, but his requests were denied. He claims that his removal was undoubtedly an act of retaliation for having filed a complaint against his superior officer. Furthermore, the author's suitability for his post was not analysed at any point in time, despite the existence of a legally established procedure for this purpose.

2.9 On 11 December 2002, the author asked the Directorate of Army Personnel Management to set aside the decision to remove him. On 21 December 2002, he filed a provisional appeal with the Ministry of Defence, being unable to file a definitive appeal because he had not yet received the case file regarding the proposed removal. On 18 January 2003, the author received a copy of the case file containing the report in which his removal from his post was proposed, and on 4 February 2003 he filed a definitive appeal with the Minister of Defence.

2.10 The appeal was rejected on 25 February 2003. The accompanying legal report addresses the issue of notification which the author had raised in his appeal. The report says that the author's mother took delivery of the notification at his home on 13 September 2002 and that the decision to remove him from his posting was taken once the period granted to the author to prepare his submissions had passed. The author alleges that the Ministry of Defence acted improperly by considering only his provisional appeal rather than the definitive appeal filed on 4 February 2003.

2.11 In April 2003, the author was ordered to take up a discretionary assignment to a similar but higher post in a unit requiring a higher skill level than the unit from which he had been removed. When the author objected to this posting on the grounds that it was inappropriate because, according to the regulations, he could not be given an assignment similar to the one from which he had been removed, his objection was accepted. At the same time he was refused postings for which he applied, with the authorities preferring to state that no qualified candidates had applied for those vacancies.

2.12 On 29 October 2003, the author filed an appeal with the administrative litigation division of the National High Court in which he adduced: (a) procedural irregularities, inasmuch as the failure to hold a hearing had denied him his right to defend himself; (b) a lack of evidence to substantiate the allegations of unsuitability; and (c) abuse of power on the part of the military authorities in finding against the author, presumably out of support for Colonel G.A. The High Court rejected the appeal on 28 September 2004. In its ruling, the Court recognizes that holding a hearing for the interested party is a legal obligation but states that, in order to fulfil this obligation, the author had been summoned to appear on 20 September 2002 to collect an official letter dated 3 September 2002 from the 45th Light Infantry Garellano Regiment concerning allegations regarding the processing of his removal from his posting. This summons was sent to the author's home in Oviedo and was received by his mother on 13 September 2002. It constituted a fully valid notification issued in accordance with the law. On 20 September 2002, the author's father went to collect the letter on his behalf, bringing with him a medical certificate attesting to his son's condition. However, the authorities did not release the letter to his father because they did not recognize his claim to be duly authorized to represent his son and because, as the document was confidential, it should be delivered to the author in person. According to the High Court, the authorities' refusal to recognize his father's capacity to represent his son cannot

be challenged, as the document presented in support of that claim did not conform to legal requirements, since it was not a certified record of the authorization. The decision to remove the author from his posting was issued 10 days later. The author lodged an appeal against that decision in which, among other applications, he requested true copies of all documents in the case file. The authorities granted this request and provided the author with true copies of the file's entire contents and gave him a further 15 days, counting from the date of their receipt, in which to file his appeal. In view of these facts, the High Court found the claim of a denial of the right of defence unfounded. With regard to the claim that evidence of unsuitability was lacking, the Court considered that Colonel G.A.'s report of 8 July 2002, which detailed the reasons for the proposed removal, provided sufficient grounds to justify that removal. With regard to the alleged abuse of power, the Court ruled that there was no evidence to substantiate that claim.

2.13 On 2 November 2004, the author filed a writ of *amparo* before the Constitutional Court. The Constitutional Court dismissed the writ on 6 June 2006, finding that the author had not appeared in court with proper legal representation when he should have, that the decision to remove him from his post was a reasonable, appropriate and justified action based on coherent documentary evidence, and that there had been no violation of the principle of legality.

2.14 On 30 June 2006, the author lodged a malfeasance complaint with the General Council of the Judiciary against the three judges of the Constitutional Court who had dismissed the writ of *amparo*. On 20 September 2006, the Council rejected his complaint on the grounds that it was not competent to act in the matter, since the Constitutional Court is not subject to the disciplinary regime for members of the legal profession which falls under the mandate of the Council. The author therefore considers that he has exhausted all domestic remedies.

The complaint

3.1 The author claims that the events described above constitute a violation of article 2, paragraph 3 (a), read in conjunction with article 14 of the Covenant, since none of the remedies to which he had recourse were effective and the principle of presumption of innocence was not respected.

3.2 The author explains that there are two types of vacancies in the Spanish Army: discretionary vacancies for which any officer can be considered, and vacancies awarded on the basis of length of service. Any officer can be removed from a post falling into the first category simply on the grounds of "loss of confidence", without any further explanation being required. In such cases, the person can be reassigned to any other vacant post, including one of the same nature. The author, however, was removed from a non-discretionary post to which he had been appointed on the basis of seniority, with the only requirement being that he was the longest-serving candidate. A person in a seniority-based position does not lose it under any circumstances (except in the case of criminal convictions entailing a loss of position in the seniority rankings). A member of the armed forces can be removed from a post on grounds of insufficient physical or mental fitness or loss of professional competence, but never on grounds of "unsuitability". The law provides for removal on this type of ground only in those cases where a person is not even minimally effective in the post to which he is assigned, which was not the case here. This also has the effect of greatly limiting the number of posts for which the person in question may be eligible in the future. The result of this has been that the author has ended up carrying out administrative duties for which he has not been trained.

3.3 The author contends that the judicial decisions in question were not based on sufficient evidence of his alleged unsuitability for his post, that they failed to consider the lawfulness of the decision to remove him and the context in which it was made, and that

they were insufficiently reasoned. They were also arbitrary in that they did not take account of the fact that he was removed from a posting (Vitoria) other than the one from which his removal had been requested (Munguía). The author asks how it was possible to determine that he was unsuitable for a post which he had not yet taken up, in a new battalion, with a different set of colleagues. What is more, the posting in Vitoria to which the Army assigned him was also under the command of Colonel G.A.

3.4 The author claims that there were irregularities in the administrative proceedings: the authorities circumvented the requirement that the author be given a hearing by refusing to accept his father's authorization to represent his son for the purpose of receiving notifications, in contravention of applicable laws; the full texts of the notifications were not delivered to his home; the legally established procedure for assessing suitability was not conducted; the case file was not sent directly to his counsel, whereas, if it had been, he would have had full cognizance of the charges sufficiently ahead of time to prepare an effective appeal instead of a provisional one; and the Minister of Defence ruled on the provisional appeal, instead of the definitive appeal which the author had submitted within the required deadline after finally receiving the case file. With regard to the court proceedings, the author affirms that the High Court failed to perform the checks that he had requested, such as reviewing the ratings that he had received in previous years (by consulting his personnel evaluation reports), when he had never received a negative rating. In addition, the copious documentation that the author provided to attest to his professional merits was not taken into account in either the administrative or the judicial proceedings. Despite the availability of all of this documentation, the authorities made reference only to Colonel G.A.'s report, as if this document constituted irrefutable rather than purely circumstantial evidence. These irregularities seriously compromised the author's right to an effective remedy and to proceedings offering minimum guarantees of objectivity, fairness and respect for the right of defence. He also maintains that there was a violation of article 14, paragraph 5, of the Covenant, as the High Court was the only court that ruled on this case and he did not have the opportunity to appeal to a higher tribunal.

3.5 He notes that the Constitutional Court's decision contains errors in that it refers to a "removal on disciplinary grounds", whereas this was actually an administrative case not subject to Organization Act No. 8/98 on the Armed Forces' disciplinary system or to any other disciplinary procedures, but rather solely to Professional Military Personnel Act No. 17/99 and other related provisions.

3.6 The author claims a violation of article 8, paragraph 3 (a), of the Covenant, given the type of work that he is now obliged to perform. He also alleges a violation of article 12 of the Covenant on the grounds that he has been denied the freedom that his colleagues enjoy in choosing their place of residence or duty station, since the decision to remove him from his position limits the postings available to him.

3.7 In relation to the violation of article 15 of the Covenant, the author claims that administrative removal is too severe a penalty for the alleged faults. He also recalls that he did not have the opportunity to defend himself and that the adversarial principle was not respected in the proceedings. His administrative removal was based on a single item of evidence, i.e., a report produced by a person against whom the author had filed a complaint and who was supported by the authorities because of the particular corporatist nature of the Army.

3.8 The author also alleges a violation of article 17 of the Covenant in connection with the fact that his home was searched, without the authorization of the competent authority, on the instructions of Colonel G.A. These events were the cause of severe suffering on the part of his family and were never investigated.

3.9 With regard to article 18 of the Covenant, the author claims that he suffered prejudice because he had made complaints against Colonel G.A., in the fulfilment of his duty and the exercise of his rights. With regard to the violation of article 19, the author claims that he was the object of reprisals after filing complaints against Colonel G.A. Although members of the military are restricted in the exercise of certain rights, it was his duty and his right under the law to file the complaint. With regard to the violation of article 26 of the Covenant, the author contends that the complaint against his superior does not justify his removal on the grounds of unsuitability and that this action was a disguised form of punishment.

3.10 Lastly, he maintains that he should be compensated for the injury suffered.

State party's observations on admissibility

4.1 The State party submitted observations regarding the admissibility of the communication in a note verbale dated 28 January 2008 in which it stated that the communication should be declared inadmissible.

4.2 The State party maintains that the removal does not in any way constitute a disciplinary sanction and does not affect the author's military status but is simply an expression of the State party's authority to organize its operations freely and independently and, in application of that authority, to remove any person from a given post if that person is deemed unsuitable. The removal was carried out on the basis of a reasoned decision, and the author was given the opportunity to make submissions and to have the decision reviewed on several occasions: in administrative proceedings, before the administrative litigation division of the High Court and before the Constitutional Court.

4.3 The State party maintains that the invocation of articles 8, 12, 15, 17, 18, 19 and 26 is purely rhetorical. With regard to the alleged violation of article 14, since the subject of the communication is not a criminal matter, the claim is incompatible *ratione materiae* with the Covenant. As the author himself states, this was not a disciplinary procedure but simply a case of the State party's use of its organizational authority to decide that the author was unsuitable for a specific post within the Armed Forces. It is nothing more than an adjustment or outcome of the State's special relationship of superiority vis-à-vis the author, as a member of the military, and the State is not at any point under an obligation under the Covenant to retain a member of the military in a specific post if it believes that the person is unsuitable for that post. It is therefore not even a question of determining rights and obligations in a suit at law. Rather, it is simply an outcome of a specific relationship of superiority existing within the context of the service relationship of a career officer who retains his military status.

4.4 The State argues that the communication is unfounded. The author has had repeated opportunities to make submissions and to challenge the decision that he was unsuitable for the posting to which he was assigned. A hearing process was initiated in which he attempted to participate through a third party without providing legally authenticated proof of that party's authorization to represent him. He was sent true copies of all documents in the case file and was given a further period of 15 days in which to file an appeal, and he was again given access to the entire case file during the administrative appeal process. The author lodged an appeal with the administrative litigation division of the High Court and eventually obtained a reasoned decision from the Constitutional Court.

Author's comments on the State party's submission

5.1 The author submitted comments on the State party's observations on 13 March and 7 October 2008. He reiterates, inter alia, that the reasons for his removal are not specified in the decision. In addition, the observations are inaccurate, in that the State party says that the

author and his counsel refused to accept the notification. The High Court did not review the case properly and failed in its duty of impartiality by not ordering the authorities to present a vital piece of evidence — namely, the author’s personnel evaluations from previous years — in full. The Constitutional Court regarded his removal as being equivalent to a disciplinary sanction.

5.2 The author argues that his case falls within the scope of article 14, which also covers the determination of rights and obligations in a suit at law. Firstly, the administrative decision was issued in a context of disciplinary sanctions that limited the freedom of the author. Secondly, when a person is removed from a seniority-based posting by administrative decision on grounds of unsuitability, that person cannot be reassigned to a similar post in another unit in Spain, cannot exercise the command of another unit and cannot serve in the upper echelons of the military or at army headquarters. In addition, persons finding themselves in this situation are grouped together with those who have been subject to serious disciplinary sanctions in that they are singled out for exhaustive assessments of their suitability for any future promotion. His removal from the post was effectively a disguised form of punishment and is therefore analogous to a criminal or disciplinary procedure. It turns out to be even more serious than a “removal from station of posting”, which is the most serious disciplinary sanction and prohibits the person in question from returning to a duty station (military region) for a period of two years. It is lawful for a member of the military to be removed from a posting on grounds of unsuitability when the circumstances warrant such action, but such circumstances did not exist in the case in point.

5.3 The author reiterates his initial allegations regarding the administrative proceedings brought against him and rejects the State party’s arguments. He claims that his father’s authorization to represent him was perfectly valid. The author’s father had no need to furnish any further documents in addition to those presented (from the military notary and his doctor) in order to collect the official letter. The summons should have indicated that the document to be collected was confidential and whether or not the Colonel’s report was attached to it; both documents could have been sent to the address at which the author was authorized to reside during his convalescence. The author should have been allowed to rectify the document that was deemed to be inadequate or given another opportunity to pick the letter up himself. The case file should have been made available in time. The ruling should have been issued on the basis of the definitive appeal. The full set of recognized evidence should have been submitted to the National High Court, etc. In addition, no hearing was held.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the author’s claims under article 2, paragraph 3 (a), and article 14 that the remedies to which he had recourse were not effective, that there was insufficient evidence to support the judicial decisions that were issued, that the merits of the case were not examined, that his right to defend himself was not respected and that the decision was not reviewed by a higher tribunal. The Committee observes that these complaints relate to the evaluation of facts and evidence by the State party’s courts. The Committee recalls its jurisprudence according to which it is incumbent upon the courts of States parties to evaluate the facts and evidence in each 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.¹ The Committee has examined the materials submitted by the author, including the decisions of the High Court and the Constitutional Court, and is of the opinion that those decisions do not provide sufficient elements to support the conclusion that the court proceedings suffered from such defects. Accordingly, the Committee considers that the author has failed to provide sufficient substantiation of his claims of a violation of article 2, paragraph 3 (a), and article 14, and the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 The author's allegations of violations of article 8, paragraph 3 (a), article 12, article 15, article 17, article 18, article 19, and article 26 have not been sufficiently substantiated to support a finding of admissibility and they are therefore considered inadmissible under article 2 of the Optional Protocol.

7. 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.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

¹ See, inter alia, communication No. 1616/2007, *Manzano v. Colombia*, decision of inadmissibility adopted on 19 March 2010, para. 6.4.