



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Ninety-second session
17 March-4 April 2008

VIEWS

Communication No. 1413/2005

<i>Submitted by:</i>	José Ignacio de Jorge Asensi (not represented by counsel)
<i>Alleged victim:</i>	José Ignacio de Jorge Asensi
<i>State party:</i>	Spain
<i>Date of communication:</i>	25 April 2005 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 30 June 2005 (not issued in document form)
<i>Date of adoption of Views:</i>	25 March 2008
<i>Subject matter:</i>	Irregularities in the decision-making process for the promotion of military personnel
<i>Procedural issues:</i>	Insufficient substantiation, incompatibility with the provisions of the Covenant

* Made public by decision of the Human Rights Committee.

Substantive issues: Lack of a fair hearing, infringement of the right to have access to public service

Articles of the Covenant: 14, paragraph 1; 19, paragraph 2; 25 (c)

Articles of the Optional Protocol: 2, 3

On 25 March 2008, the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1413/2005.

[ANNEX]

Annex

**VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5,
PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS**

Ninety-second session

concerning

Communication No. 1413/2005*

Submitted by: José Ignacio de Jorge Asensi (not represented by counsel)
Alleged victim: The author
State party: Spain
Date of communication: 25 April 2005 (initial submission)

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

Meeting on 25 March 2008,

Having concluded its consideration of communication No. 1413/2005, submitted by José Ignacio de Jorge Asensi under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 25 April 2005, is José Ignacio de Jorge Asensi, a Spanish citizen born in 1943. He claims to be the victim of violations by Spain of article 14, paragraph 1, taken together with article 19, paragraph 2; and article 25 (c) of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is not represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

1.2 On 6 February 2006 the Committee, acting through its Special Rapporteur on new communications, decided to consider the admissibility and merits of the case jointly.

Factual background

2.1 The author, an army colonel, applied for promotion to the rank of brigadier general in the context of the 1998/1999 appraisal cycle. Under Act No. 17/1989 stipulating the regulations for professional military personnel and complementary regulations,¹ the procedure for promotion to this grade consists of one obligatory stage, which is subject to regulations, and two discretionary stages. The stage of the procedure that is subject to regulations consists in assessing candidates' merits and qualifications, with the aim of establishing a ranking order, which serves as a basis for those responsible for the discretionary stages of the procedure to make their proposal and final selection.

2.2 Candidates' merits and qualifications are assessed by the Army High Council, in its capacity as a consultative body, on the basis of a number of public, objective rules for assessment that set out the objective criteria to be applied and the corresponding merit scales. In accordance with these rules the Council draws up a list of candidates and submits it to the Minister of Defence who, after requesting a written report from the Chief of the General Staff, carries out a second appraisal and submits a proposal for the consideration of the Council of Ministers. The Council of Ministers takes the final decision. While the Minister of Defence and the Council of Ministers have full discretionary decision-making powers, the High Council may base its decision solely on the criteria provided for by law, the main one of which is that of the candidates' merits.

2.3 The author claims that when he applied for promotion the appraisal of candidates did not comply with the procedure described, and that the High Council decided on the final ranking order not on the basis of candidates' merits but simply by means of a secret ballot of its members, as shown by the statements signed by two members that the author presented as witnesses. According to the author, the secret ballot system is incompatible with the principle of equality between candidates, since it favours some candidates over others. The author also alleges that the High Council changed, by secret ballot, the ranking order that had been established by the working group assisting the Council in the assessment of candidates' merits and qualifications. To support these claims the author submitted statements by two former members of the High Council. One of the members had taken part in the ballot concerning the selection process in which the author was a candidate.

¹ General regulations on the appraisal, ranking and promotion of professional military personnel of 14 December 1990, and Ministerial Order of 30 March 1992 establishing rules for the appraisal and ranking of professional military personnel.

2.4 According to the second witness, it was common practice to hold secret ballots when making decisions of this kind. He states that the author was ranked No. 26 by the Council, despite having been ranked No. 14 by the working group, which prevented him from being promoted. In the witness' opinion, the reason for the drop in rank could have been that the author's most recent, higher-level postings had been abroad. This had prevented daily contact with some of the senior commanders sitting on the High Council who, when they voted in the secret ballot, may have incorporated in their ranking the subjective element that always goes with frequent, personal and direct contact with the person concerned, which undoubtedly influences how that person is judged.

2.5 The author lodged an administrative appeal with the Supreme Court, calling for the appointments to be cancelled and for the selection process to be resumed at the point where the Ministry of Defence carried out the appraisals provided for under article 86.1 of Act No. 17/1989. He also called for the appraisals corresponding to the 1997/1998 and 1998/1999 cycles to be carried out, for the results concerning him to be communicated, and for the procedure for promotion to be implemented as provided for under Act No. 17/1989. Lastly, he sought compensation for the damage caused by the administration's shortcomings, which included the material damage resulting from his early transfer to the reserve with the rank of colonel, moral damage and damage with regard to his family and to his honour.

2.6 The appeal was dismissed on 25 July 2003. In its judgement the Court held that, although the legislation in force established the assessment criteria to be taken into account in the analysis of merits and qualifications, it did not establish mathematical formulae for the mechanical calculation of the ranking results. Although the assessment criteria were fixed or pre-established, their evaluation and quantification allowed a wide margin of decision. The appraisal had to take the form of a decision that, for each candidate, incorporated each and every one of the assessment criteria considered. The failure to substantiate the final decision did not render it invalid, provided that the procedures followed prior to the decision had included consideration of the aforementioned criteria, since that was sufficient to ensure that the informational function of the appraisal had been fulfilled.

2.7 The judgement stated that the documents relating to the case showed that the appraisal consisted of two stages. A preparatory appraisal was carried out by the working group assisting the Army High Council, which produced a ranked list of assessed candidates in conformity with the assessment criteria provided for by law. On the basis of that, the Council itself carried out a subsequent appraisal, establishing the ranking order of the candidates. The judgement stated that the Council had not proceeded in the most judicious manner, as it should have been for the Council itself to specify, in respect of each candidate, the assessment criteria used, and the weighting factors applying to each of those criteria. However, this irregularity was not sufficient to nullify the entire procedure. The appraisal served to provide information for the subsequent discretionary acts, and was not binding for the Ministry of Defence or the Council of Ministers. The overriding consideration was to establish that the appraisal had been performed on the basis of the assessment criteria provided for by law, and thus fulfilled its function of providing information to serve as a basis for the subsequent discretionary acts.

2.8 In his appeal, the author requested the Court to ask the Army High Council for information of concern to him, including the list of assessed candidates and the marks obtained. On 15 March 2002 the Secretary of the High Council informed the Court that he could not provide it with the definitive list of all assessed candidates, because the minutes of the High Council were classified as secret under article 1, paragraph 3, of the Council of Ministers decision of 28 November 1986. That decision was taken under the Official Secrets Act, which classifies as "secret" the deliberations of the high councils of the three branches of the armed forces in general. The Secretary did inform the Court, however, of the place assigned to the author in each of the three appraisals carried out on the candidates in his year. By decision of 19 November 2002, the Court upheld the grounds put forward concerning the secret nature of the information requested and dismissed the author's request. The Court did not refer to the other allegations made by the author regarding the unlawful nature of the secret ballot used by the members of the High Council.

2.9 The author filed an application for *amparo* with the Constitutional Court contesting, inter alia, the judicial decision not to request the Army High Council to submit information about the appraisals of concern to him. The Court held that the complaints lacked constitutional significance in terms of the right to evidence and the right to receive truthful information, enshrined in the Constitution. The Court did not rule on the author's allegations concerning the secret ballot that had been held at the High Council. The application for *amparo* was dismissed on 30 March 2005.

The complaint

3.1 The author alleges that the refusal by the Supreme Court and the Constitutional Court to provide him with information on his appraisal for promotion constitutes a violation of article 14, paragraph 1, and article 19, paragraph 2, of the Covenant. The right to a fair hearing must include the right to use all lawful means of evidence used in proceedings to determine a civil right such as the right to have access to public service on general terms of equality. Lawful means of evidence include, inter alia, information contained in the administrative case file of the person concerned. Consequently, he considers that in the administrative appeal that was dismissed by the Supreme Court - a ruling that was upheld by the Constitutional Court without consideration of the merits - he did not receive a fair hearing. Without legal substantiation of its decision, the Court denied his request to use as evidence the above-mentioned information contained in his administrative case file. For this reason he was unable to properly substantiate his claims with the relevant documents, and the Courts did not have all the necessary objective facts with which to form a judgement.

3.2 The Constitutional Court, in its decision, stated that the Supreme Court considered that not providing the requested information was justified under the Official Secrets Act (Act No. 9/1968). However, neither of the two courts cited which article of that Act classified as secret the information requested. According to the author, this is because no such article exists. The information the Secretary of the High Council provided to the Supreme Court indicated that article 1, paragraph 3, of the Council of Ministers decision of 28 November 1986 classified as secret the deliberations of the high councils of the three branches of the armed forces in general. According to the author, that secrecy does not extend to the minutes of those deliberations.

3.3 The author claims that the secret ballot system is not provided for by law and is incompatible with the principle of equality between candidates, since it favours some candidates over others. In this way, the High Council violated article 25, paragraph (c), of the Covenant. It is clear that the number of votes a candidate obtains is closely related to how well the voters know the candidate in question, and the relationship, friendship or affinity that exists between them. Furthermore, the vote could be the object of prior negotiation between the voters.

State party's observations on admissibility

4.1 In its observations dated 18 January 2006 the State party challenges the admissibility of the communication. It considers that the Supreme Court's decision of 19 November 2002 is sufficiently substantiated with regard to the author's claim that, in having been refused leave to use evidence, he was denied the right to a defence. The information submitted to the Court by the Secretary of the Army High Council provided suitable explanations and, in particular, underlined that it was not possible to submit to the Court the list of names requested, as the deliberations of the working group assisting the Army High Council, and those of the High Council itself, were classified as secret under article 1, paragraph 3, of the Council of Ministers decision of 28 November 1986, and article 10 of Act No. 51/69 of 26 April. The Court held that the evidence submitted during the proceedings, together with the explanations provided by the military authority, were sufficient in order to be able to decide on the author's claims. Similarly, the Constitutional Court stated that, in order for the appeal based on the right to evidence to have been successful, it would have been necessary for the refusal of leave to use evidence to have resulted, in practice, in the violation of the right to a defence. However, a compelling argument had not been made that, in its final judicial decision, the Supreme Court would have found in favour of the author if the evidence in question had been allowed, and had been examined. The author did not specify which facts he claimed the refused information would substantiate.

4.2 The domestic courts weighed and considered the extent and possible consequences of the irregularities observed in the appraisal process. Also, it was decided that the right to impart and receive information, enshrined in the Spanish Constitution, does not extend to the possibility of citizens demanding specific information from public or private institutions.

4.3 Lastly, the courts informed the author that the right to have access to public service on terms of equality was not a simple right to enforcement of the law in the selection process, but must entail infringement of equality between candidates; this requires the existence of a point of comparison on which to base any equality proceedings, which at no time was provided. The communication lacks any point of comparison for the purposes of application of article 25 (c). The author did not specify what facts he intended to substantiate, or indicate any relevant irregularities in the preparatory process for decisions of a discretionary nature.

4.4 The State party therefore considers that the communication should be considered inadmissible because it constitutes an abuse of the purpose of the Covenant, in accordance with article 3 of the Optional Protocol, and because of failure to substantiate the complaint.

State party's observations on the merits

5.1 On 7 December 2006 the State party claimed that there had been no violation of article 14, paragraph 1; article 19, paragraph 2; or article 25 (c) of the Covenant. It was permissible under

the Covenant for a member of the armed forces to be promoted to the rank of general as a result of a discretionary decision on the part of the Government or a discretionary proposal on the part of the Minister of Defence, and on the basis of confidential or secret information.

5.2 The State party reiterated the arguments put forward to contest admissibility. It stated that, according to the Supreme Court, the military authority had exercised its rights in accordance with legislation on official secrets, and that the evidence it had submitted, together with the explanations provided, were sufficient to enable the Court to take a decision.

5.3 The evidence invoked by the author was irrelevant in the context of completely discretionary acts linked to issues of national defence. As the Constitutional Court stated, in order for the appeal based on the right to evidence to have been successful, it would have been necessary for the refusal of leave to use evidence to have resulted, in practice, in the violation of the right to a defence; in other words, it would have been necessary for the evidence to have been a decisive element of the defence. Furthermore, a compelling argument had not been made that, in its final judicial decision, the Supreme Court would have found in favour of the author if the evidence in question had been allowed and had been examined. The author did not specify which facts he claimed the refused information would substantiate, or any details or circumstances that would make it possible to identify the legal situation of another candidate alleged to have been unfairly favoured over him on grounds other than the principles of merit and ability.

5.4 The domestic courts weighed and considered the extent and possible consequences of the irregularities observed in the appraisal process. Thus, in its judgement, the Supreme Court stated that the overriding consideration was to establish that the administrative procedure followed in appraisals for promotion had incorporated, for each person assessed, the assessment criteria provided for by law, which fulfilled the function of providing information to serve as a basis for the contested discretionary acts. Similarly, the domestic courts stated that the right to impart and receive information, enshrined in the Spanish Constitution, does not extend to the possibility of citizens demanding specific information from public or private institutions.

5.5 Lastly, the domestic courts maintained that the right to have access to public service on terms of equality was not a simple right to enforcement of the law in the selection process, but must entail infringement of equality between candidates; this requires the existence of a point of comparison on which to base any equality proceedings, which at no time was provided.

5.6 It is clear that the Covenant, in its article 19, allows for a plea invoking official secrets. Such a plea is therefore perfectly legitimate and was upheld by the domestic courts. Furthermore, the communication lacks any point of comparison for the purposes of application of article 25 (c). In any event, the author did not specify what facts he intended to substantiate, or indicate any relevant irregularities in the preparatory process for decisions of a discretionary nature relating to promotion to the rank of general.

Author's comments

6.1 On 23 March 2007 the author responded to the State party's observations on the admissibility and merits of the communication. The author disagreed with the observation that the court believed the military authority to have exercised its rights in accordance with the legislation on official secrets. Under the legislation in force at the time, the military authority

referred to by the State party did not have the power to classify certain material as secret. Consequently, the authority did not exercise any legally granted right; rather, it refused to provide the information that was repeatedly requested by the author, wrongfully alleging that the information was legally classified as secret.

6.2 It is not true that the author did not specify the facts he intended to substantiate with the information that was refused. These facts were recorded in his complaint to the Supreme Court in which it was stated, *inter alia*, that during the 1998/1999 cycle, colonels of his year with merits and qualifications inferior to his - according to the appraisal and ranking carried out by the working group - were promoted to the grade of brigadier general. It was also stated in the complaint that Ministerial Order No. 24/92 establishing rules for the appraisal and ranking of professional military personnel required there to be a report justifying the discrepancy between the author's provisional ranking by the working group and his final ranking by the Army High Council, carried out by means of a secret ballot, which entailed a drop of 12 places.

6.3 The author dismisses the State party's claim that the appraisal for promotion incorporated, for each candidate, the assessment criteria provided for by law. The statements obtained from two members of the High Council confirm that the ranking order was established by means of secret ballot. Therefore, it did not take into account the assessment criteria provided for by law.

6.4 With regard to the claim that the author did not provide any point of comparison that might have made it possible to determine whether or not the right to equality between candidates was respected, the author alleges that the court prevented him from doing so, by arguing that the appraisals were secret. Furthermore, the Committee's general comment on article 25 of the Covenant does not require any comparison to be made; it simply requires that access to public service should be based on the application of objective and reasonable criteria and processes, which was not the case in this instance.

6.5 According to the author, the fact that the final decision is discretionary does not mean that the prior appraisal process is incidental. The discretionary powers enjoyed by the Minister of Defence and the Council of Ministers, under the legislation on promotion, are not absolute but limited. Those of the Minister of Defence consist in evaluating, with complete freedom, the appraisals that were carried out, together with the report of the Chief of the General Staff, and in nominating for promotion any colonel included in those appraisals. The Council of Ministers, in turn, has the freedom to approve the proposals made by the Minister of Defence. It is clear that the Minister may not nominate for promotion a colonel who was not included in the appraisals, and that the Council of Ministers may not promote a colonel who has not undergone appraisal in the manner prescribed by law. Not acting in accordance with the law, in addition to constituting manifest arbitrariness, violates article 25 (c) of the Covenant. If the Administration had followed the procedure provided for by law, it is probable that instead of the ranking order established by the Army High Council by secret ballot, the nominations for promotion would have been different and could have included the author. If the documents contained in the files relating to the appraisals and promotions were legally classified as secret, then article 112 of Act No. 17/1989, which grants military professionals the right to lodge an administrative appeal against decisions that affect them in the area of appraisals and promotions, would be without effect.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol. The Committee further notes that the State party has not submitted any information suggesting the non-exhaustion of domestic remedies, and therefore considers there to be no impediment to examining the communication under article 5, paragraph 2 (b), of the Optional Protocol.

7.3 The author argues that the refusal of the Spanish authorities to provide him with information about his appraisal for promotion to the rank of brigadier general violates his right to a fair hearing in the determination of his rights, enshrined in article 14, paragraph 1, of the Covenant. The Committee considers that these claims have been sufficiently substantiated for purposes of admissibility and therefore declares them admissible.

7.4 The author also argues that the refusal of the Spanish authorities to provide him with the above-mentioned information constitutes a violation of article 19, paragraph 2, of the Covenant. However, the Committee considers that the author has not substantiated this complaint for the purposes of admissibility and, therefore, that it need not consider whether or not the complaint falls within the scope of article 19 of the Covenant. This part of the communication is therefore inadmissible in accordance with article 2 of the Optional Protocol.

7.5 With regard to the author's complaint that the secret ballot that took place in the Army High Council is incompatible with the principle of equality between candidates, and constitutes a violation of article 25 (c), the Committee considers that the author has failed to substantiate, for the purposes of admissibility, in what way his rights under this provision could have been affected by this system of voting. Furthermore, the Committee considers that the right to have access to public service on general terms of equality is closely linked to the prohibition of discrimination on the grounds set forth in article 2, paragraph 1, of the Covenant. In the present case, the author has failed to substantiate, for the purposes of admissibility, that the secret ballot resulted in discrimination on the grounds set forth in article 2, paragraph 1. Consequently, the Committee considers that this part of the communication has not been sufficiently substantiated and is inadmissible pursuant to article 2 of the Optional Protocol.

Consideration on the merits

8.1 The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.2 The author claims that the refusal of the Spanish courts to provide him with information about his appraisal for promotion constitutes a violation of his right to a fair hearing. In this regard, the Committee notes that, although article 14 does not explain what is meant by a “fair hearing” in a suit at law, the concept of a fair hearing in the context of article 14, paragraph 1, of the Covenant should be interpreted as requiring certain conditions, such as equality of arms² and absence of arbitrariness, manifest error or denial of justice.³

8.3 The Committee observes that the Supreme Court examined the complaints and evidence submitted by the author and, upon the author’s request, sought and obtained from the military authority information about the selection process. On the evidence, and given that domestic legislation provides for broad discretionary decision-making power regarding the promotion of military professionals, the Court found no irregularities in the selection process in which the author was a candidate. The Committee also notes the finding of the Constitutional Court that a compelling argument had not been made by the author that, in its final judicial decision, the Supreme Court would have found in his favour if it had been given the information requested by the author. On this basis, the Committee concludes that the information before it does not point to arbitrariness, manifest error or denial of justice by the Supreme Court or the Constitutional Court, and consequently does not find a violation of article 14, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts before it do not disclose a violation of the Covenant.

[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.]

² Communication No. 207/1986, *Moraël v. France*, para. 9.3.

³ See the Committee’s general comment No. 32 on article 14 of the Covenant, “Right to equality before courts and tribunals and to a fair trial”, para. 26.