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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2762/2016*, **

Communication submitted by:	D.E.P. (represented by counsel, Diego Fernández Fernández)
Alleged victim:	The author
State party:	Spain
Date of communication:	26 October 2015 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 16 April 2016 (not issued in document form)
Date of adoption of Views:	31 October 2023
Subject matter:	Lack of impartiality of a judge
Procedural issue:	Abuse of the right of submission
Substantive issues:	Fair trial; competent, independent and impartial tribunal
Article of the Covenant:	14 (1)
Article of the Optional Protocol:	5 (2)

1. The author of the communication is D.E.P., a national of Spain born on 17 November 1950. He claims that the State party has violated his rights under article 14 (1) of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 25 April 1985.

Facts as presented by the author

2.1 The author was the manager of S.A.T. No. 2393 Mansilla Lacto Ganadera (hereinafter referred to as SAT), a dairy and livestock company. On 15 July 2002, the Public Prosecution Service filed a complaint against the author with the District Court of León, alleging tax fraud offences against the public purse under article 306 of the Criminal Code. The Public Prosecution Service had received a report from the Spanish Agricultural Guarantee Fund revealing irregularities committed by SAT during the 1998/99 and 1999/2000 tax years, when

* Adopted by the Committee at its 139th session (9 October–3 November 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

it declared purchases of milk from another company, Tampa S.L., which had no corporate structure or staff. In the complaint, the Public Prosecution Service argued that SAT had intended to avoid paying the supplementary tax imposed on farmers for overproduction by not declaring its excess dairy products. The author reportedly retained for his own use the amount that had been saved by not paying the supplementary tax. The complaint formed the basis for the opening of preliminary proceedings by Court of Investigation No. 4 of León.

2.2 On 27 September 2005, after investigating the facts it considered relevant, the Court issued an order dismissing the case because the commission of a criminal offence had not been proven. The Court relied on the accounting documentation which showed that SAT had purchased products from Tampa S.L., that the products did exist and had been accounted for and that they were dairy by-products rather than milk. There was therefore no evidence relating to products that were subject to the supplementary tax.

2.3 On 19 October 2005, the Counsel for the State, acting as plaintiff in the case, filed an application for reconsideration, with a subsidiary appeal against the dismissal order and a request for the proceedings to be continued. In the appeal, the Counsel made a series of allegations regarding the existence of the criminal offence of which the author was accused, indicating that it was proven that, during the periods under investigation, Tampa S.L. was not an approved buyer in the register of buyers of cow's milk maintained by the Agricultural Guarantee Fund and that the milk purchased by SAT from Tampa S.L. should therefore be considered to have been purchased from dairy producers. The Counsel also alleged that there were multiple pieces of evidence showing that the products purchased by SAT from Tampa S.L. were milk or dairy products that were subject to the supplementary tax.

2.4 On 30 June 2006, the Second Chamber of the Provincial Court of León issued order No. 127/06, in which it upheld the appeal, overturned the dismissal decision issued by the Court of Investigation and ordered the continuation of the proceedings. As can be seen in the arguments set out by the Chamber of the Provincial Court that decided the appeal, the Chamber was fully aware of the facts being prosecuted and of the evidence that had been submitted up until that point. The Chamber examined the different rules applicable to the case and confirmed that, in its opinion, it had been proven that Tampa S.L. was not authorized by the Agricultural Guarantee Fund as a buyer of milk and that SAT was therefore obliged to pay the supplementary tax for the purchases it made from Tampa S.L. The Chamber evaluated the evidence and confirmed that there were indications that the goods acquired from Tampa S.L. were milk or dairy products.

2.5 On 16 June 2007, pursuant to the order issued by the Provincial Court of León, Court of Investigation No. 4 of León issued an order in which it agreed to the continuation of the preliminary proceedings. The author filed an appeal for reconsideration against that order and requested that the case be dismissed. On 1 July 2008, the Court of Investigation issued an order rejecting the author's appeal for reconsideration. It also set aside the order of 16 June 2007, with the sole aim of facilitating the drafting of an expert report to determine whether the price reflected in the invoices issued by Tampa S.L. corresponded to the average market price of the products to which they related. Following the preparation of the report, the Court of Investigation agreed to provide a copy to the parties to allow them to submit an indictment or request the dismissal of the case. The Public Prosecution Office filed a brief in which it stated that, in its opinion, the existence of a criminal offence was not proven, and requested the dismissal of the proceedings. On 7 April 2010, the Counsel for the State filed a brief indicting the author and requesting the opening of an oral trial.

2.6 The proceedings were assigned to Criminal Court No. 1 of León. On 8 November 2010, the Court's presiding judge, L.T.Q., issued a decision recusing himself from the case because he had been the presiding judge at the Court of Investigation, which had previously dealt with the case and had ordered the provisional dismissal of the proceedings. The decision stated that "since the impartiality of the judge was compromised owing to a reasoned decision in which he evaluated the proceedings conducted in that phase of the investigation, … it must be concluded that there are legal grounds for the signatory judge to recuse himself, pursuant to article 219.11 of the Organic Act on the Judiciary".

2.7 Following the appointment of a new judge to hear the case, the oral hearing took place on 11 January 2012, and the author was convicted of an offence against the public purse

committed during the 1998/99 tax year. There were deemed to be mitigating circumstances in the form of the undue and unusually long delay in processing the case, and the author was sentenced to nine months' imprisonment and a fine of €1,284,741.83.

2.8 On 31 January 2012, the author lodged an appeal against the conviction handed down by Criminal Court No. 1 of León. On 8 March 2013, the Third Section of the Provincial Court of León issued a decision dismissing the author's appeal. Among the judges in the Third Section was Judge T.G.S., who had also been a member of the Section of the Provincial Court that had issued the order of 30 June 2006 by which the decision of the Court of Investigation to dismiss the proceedings had been overturned and the proceedings had been resumed. The order of 30 June 2006 contained an assessment of the various proceedings conducted and of the existence of sufficient evidence of the commission of the offence with which the author had been charged. Certain tests were ordered to ascertain whether some of the evidence did in fact exist. In spite of this, Judge T.G.S. did not at any time recuse himself from hearing the appeal, as Judge L.A.T. had done. The author was not informed of the composition of the Section before the decision was handed down and was therefore unable to file a motion for recusal as provided for in law. The legal grounds set out in the decision to dismiss the appeal, handed down by the Third Section of the Provincial Court of León, were based on arguments that were, to a large extent, identical to those put forward by the Second Section of the same Court, of which Judge L.A.T. was also a member, in the order of 30 June 2006.

2.9 The author filed an appeal in cassation against the previous decision. The appeal was denied by the Provincial Court of León on 17 May 2013. Having noted that the name of Judge T.G.S., who had heard the facts during the investigation phase, appeared on the decision issued by the Third Section of the Provincial Court, the author filed an exceptional application for annulment of the proceedings on 5 September 2013. In the application, the author requested the annulment of the decision issued on appeal by the Third Section of the Provincial Court, because he had not been notified of the composition of the Section and therefore had not been able to file the corresponding motion for recusal. The author also claimed that his right to an impartial tribunal had been violated.

2.10 On 30 October 2013, the Third Section of the Provincial Court of León dismissed the author's application for annulment of the proceedings, arguing that the aforementioned judge had not participated in the investigation of the criminal case and had not issued a decision on the lawsuit or case in a previous instance. The Court considered that the fact that the aforementioned judge had been a member of the Chamber of the Second Section of the same Court, which had decided to indict the author, did not constitute grounds for recusal and, furthermore, that the indictment order had been issued almost seven years before the decision being challenged by the author.

2.11 On 17 December 2013, the author filed an application for *amparo* before the Constitutional Court, claiming violations of the right to effective judicial protection and the right to a trial, accompanied by all relevant guarantees, both of which are recognized in article 24 of the Spanish Constitution.

2.12 On 17 March 2014, the Second Chamber, Fourth Section, of the Constitutional Court issued a ruling refusing the application for *amparo* on the grounds that it was irremediably flawed because it had not in any way satisfied the burden of demonstrating that it had particular constitutional significance.

2.13 Since an application for *amparo* does not halt the enforcement of a sentence, on 4 June 2013, Criminal Court No. 1 of León declared the sentence final. On 12 November 2013, the author requested a suspension of the enforcement of the sentence. The suspension was refused on 20 June 2014 by Criminal Court No. 1 of León and, subsequently, by the Third Section of the Provincial Court of León. On 22 December 2014, the Secretary of Criminal Court No. 1 of León issued an arrest warrant and an order for the author to surrender himself and voluntarily attend prison to serve his sentence.

Complaint

3.1 The author claims that the State party has violated his right to a fair trial as protected by article 14 (1) of the Covenant by arbitrarily and unreasonably denying him the opportunity to file a motion for the recusal of judges as provided for in Spanish law and by failing to

remedy the violation of his right to an impartial tribunal. He claims to have exhausted all effective domestic remedies available to him to obtain redress for the alleged violation.

3.2 The author does not intend to ask the Committee to judge the correctness of the decisions handed down by the Spanish courts, but rather to verify whether these decisions are properly founded or whether there has been any arbitrariness or patent material error. The author argues that article 219 of the Organic Act on the Judiciary, which sets out the circumstances that may give rise to abstention or recusal, includes the circumstance of having participated in the investigation of the criminal case or having issued a decision on the lawsuit or case in a previous instance. Article 221 of the same Act provides for judges to recuse themselves of their own accord. Under articles 223 et seq., the parties may request recusal. The author alleges that Judge T.G.S. did not recuse himself from hearing the author's appeal against the first instance judgment despite meeting the criteria for recusal set out in article 219 of the Organic Act on the Judiciary, given that he had had previous involvement in the proceedings and had issued a decision on the merits of the case. The author maintains that it is very significant that the presiding judge of Criminal Court No. 1 of León, who heard the case in the first instance court, did recuse himself, as it was he who, in his role as presiding judge of the Court of Investigation, had ordered the provisional dismissal of the proceedings.

3.3 The author claims that he was unable to request the recusal of Judge T.G.S. earlier because he was not notified of the composition of the Chamber at any point, as is required under the Organic Act on the Judiciary and as has been established by the jurisprudence of the domestic courts.[1] The author argues that, logically, he should have received prior notification. He cites decision No. 230/1992 of the Constitutional Court, which states that failure to provide such notification is not a simple procedural irregularity, but amounts to "deprivation of the exercise of the right to challenge a judge, which is an essential guarantee linked to the impartiality of the judge and an integral part of the right to a trial with all the guarantees enshrined in article 24.2 [of the Spanish Constitution]".[2] The author alleges that, as he complained about the situation once he became aware of the composition of the Chamber, his application for annulment of the proceedings should have been admitted and the proceedings should have been reset to their status prior to the Provincial Court's decision, so that he could challenge T.G.S. The author claims that, by failing to take such action, the Spanish courts have violated his right to a fair trial with full guarantees, as well as his right to make use of the mechanisms provided for by law to defend his interests, both of which are protected under article 14 (1) of the Covenant.

3.4 The author argues that the Committee has pointed out that the "impartiality" recognized in article 14 (1) of the Covenant implies that judges should have no preconceived opinions regarding the matter before them, and that a trial tainted by the participation of a judge who, under domestic statutes, should have been disqualified, cannot normally be considered a fair and impartial trial. The author argues that the provisions of article 14 (1) of the Covenant apply to every member of a tribunal and to all stages of the proceedings.[3] The author claims that it is clear that Judge T.G.S. should have recused himself from hearing the present case, as provided for in articles 217 and 219 (11) of the Organic Act on the Judiciary, because he had been a member of the Chamber that had issued the order in which the decision to dismiss the proceedings was overturned and the proceedings were resumed. The author claims that there is no denying that the judge had clear prior knowledge of the matter being prosecuted and that the aforementioned ground for recusal therefore applied. The author points out that, in their doctrine, the Spanish High Courts have unanimously and repeatedly established that the deciding factor is the existence of objectively justified reasons to doubt judicial impartiality and that that deciding factor is the material element that should give rise to an assessment of any loss of impartiality, rather than the specific form of judicial action from which the loss of impartiality is allegedly derived.[4] The author alleges that Judge T.G.S., who was a member of the Section of the Provincial Court of León that ruled on the appeal, had previously issued an order overturning the decision to dismiss the proceedings which

[1] The author cites Constitutional Court decisions No. 230/1992 and No. 282/1993.

[2] Constitutional Court, decision No. 230/1992, 14 December, II. Legal Basis, para. 3.

[3] The author cites *Karttunen v. Finland* (CCPR/C/46/D/387/1989), annex, individual opinion of Committee member Bertil Wennergren.

[4] Constitutional Court decisions No. 143/2006 and No. 1372/2005.

was intended to facilitate an assessment of the available information on the facts, the accused's participation in them and any potential criminal elements, meaning that he had knowledge of the case that limited his ability to remain impartial with respect to the appeal. The author also claims that a reading of the arguments set out in the order of 30 June 2006 issued by the Provincial Court of León and of the decisions issued at first instance and on appeal shows that the arguments are identical, that the assessments made by Judge T.G.S. in the order of 30 June 2006 were identical in substance to those set out in the substantive judgment on the author's criminal liability and that he made an advance pronouncement in that regard.

3.5 The author seeks a declaration of a violation of article 14 (1) of the Covenant, in the form of the order of 30 October 2013 rejecting the author's application for annulment of the proceedings in respect of the decision of 8 March 2013 which dismissed the author's appeal. The author also seeks redress for the violation of his rights under article 14 (1) of the Covenant and wishes the State party to declare the decisions of the Spanish courts null and void and to pay him equitable compensation, to be determined in due course.

State party's observations on admissibility and the merits

4.1 In its observations of 18 October 2016, the State party provides some clarifications with regard to the facts of the case. It points out that the order of 30 June 2006 issued by the Provincial Court of León overturning the dismissal and ordering the continuation of the investigation simply stated that, prima facie, the facts "could perhaps disclose criminal conduct by the accused, since the existence of conduct amounting to offences against the public purse cannot be ruled out with full certainty." The Section of the Court comprised of three judges, including T.G.S. The State party argues, however, that the reporting judge who issued the order was Judge A.M.D. With regard to the recusal of Judge L.T.Q. at Criminal Court No. 1 on 8 November 2010, the State party argues that he recused himself from the case because he had been the investigating judge at Court of Investigation No. 3 of León, which conducted the proceedings during the investigation phase, and that Criminal Court No. 1 was responsible for trying the case. In that instance, the criteria for abstention set out in article 219 (11) of the Organic Act on the Judiciary, relating to judges who participated in the investigation stage, was applied.

4.2 The State party emphasizes that the author did not make any claims, either in his appeal or subsequently, with regard to a lack of independence or impartiality of the court that convicted him in a public trial accompanied by all relevant guarantees. The State party notes that, once the author's appeal was admitted for processing, the Third Section of the Provincial Court of León notified the parties, on 8 June 2012, that a file was being established and provided the names of the appellant and the respondents, as well as that of the reporting judge. The State party argues that the author did not submit a motion for reconsideration at that point in the proceedings.

4.3 The State party submits that the judges' names are clearly displayed at the top of the decision of 8 March 2013 dismissing the author's appeal. On 15 March 2013, the author requested a correction to the decision because there was an error in his lawyer's name. It is therefore inferred that the author had read the decision carefully. On 3 May 2013, the author filed an appeal in cassation against the decision, in which he did not make any claims citing a lack of impartiality or independence of the Third Section of the Provincial Court as a potential ground for annulment of the decision. The State party also notes that the decision stated that there was no right of appeal against it.

4.4 The State party submits that on 5 September 2013, six months after being notified of the decision issued by the Provincial Court, the author filed an application for annulment of the proceedings. It argues that it was in this application, which was clearly filed outside the time frame stipulated in article 241 of the Organic Act on the Judiciary, that the author first alleged that the court was not impartial because he had not been informed of the composition of the Third Section of the Provincial Court of León and had been unable to challenge Judge T.G.S. On 30 October 2013, the Third Section of the Provincial Court of León issued an order rejecting the application for annulment, noting the late submission of the request and

considering that under the Act,[5] notification was required concerning only the reporting judge and not the other staff judges. With regard to the existence of the ground for recusal provided for in article 219 (11) of the Organic Act on the Judiciary, it was considered that Judge T.G.S. had neither heard nor tried the author, which are the two situations referred to in that article.

4.5 The State party argues that, in his application for *amparo*, the author denied that he had been notified of the appointment of the reporting judge. The State party attaches to its observations the decision of 8 June 2012 appointing the reporting judge.

4.6 The State party highlights the Committee's jurisprudence on the rights set out in article 14 of the Covenant with regard to the impartiality of the trial court, together with the Committee's differentiation between subjective and objective impartiality, and argues that the latter applies primarily to the court that tries and sentences a defendant. In the present case, article 14 (1) should be deemed to apply to Criminal Court No. 1 of León, which tried and sentenced the author in open court with full guarantees. The State party reiterates that the author does not allege a lack of impartiality on the part of the court that sentenced him, but rather on the part of the court that heard the appeal. It also notes that one judge recused himself because he had participated in the investigation, which proves that the guarantees set out in the Covenant were complied with in respect of the author.

4.7 The State party argues that the author alleges bias on the part of the court that heard the appeal against his conviction, which would amount to a violation of article 14 (5), rather than of article 14 (1), of the Covenant. It argues that the Committee's general comment No. 32 (2007) and its jurisprudence on article 14 (5) require the possibility of a review of criminal proceedings, but do not stipulate that a new hearing must take place. The Committee does not, therefore, make provision for the same guarantees to be applied on appeal as are applied to a lower court that tries and convicts a defendant.

4.8 The State party clarifies that the Organic Act on the Judiciary differentiates between the staff judges of each judicial body, alternate judges and reporting judges. The appointments of the staff judges of each judicial body are public and are published in the Official Gazette and on the website of the General Council of the Judiciary. Alternate judges are called upon to sit in the chambers of the courts of justice as necessary. If an alternate judge is to be involved in a case, the parties are notified so that they can discern any circumstance that might give rise to a need for abstention or recusal. The reporting judge's functions are defined in article 205 of the Organic Act on the Judiciary, and the parties to the proceedings are always informed of his or her appointment. The State party argues that the details of T.G.S.'s position as a staff judge of the Criminal Section of the Provincial Court were and are in the public domain. As there were no alternate judges in the Third Section of the Provincial Court of León, which heard the author's appeal, the author was notified of the appointment of the reporting judge (see para. 4.2). The State party adds that T.G.S. was not the reporting judge for either the decision that overturned the provisional dismissal in 2006 or the decision that upheld the author's conviction in 2013.

4.9 In the present case, the State party argues that the court that convicted the author was impartial and that the mechanisms to avoid bias worked as they should have, given that the judge who had participated in the investigation recused himself. It reiterates that T.G.S. is and was a staff judge at the Provincial Court, that this information is public, that the author was notified of the appointment of the reporting judge and that T.G.S. was not the reporting judge for either the decision that overturned the dismissal order in 2006 or for the appeal decision. The State party recognizes that the author diligently adhered to the procedural processes by appealing any court decision he considered prejudicial to him and notes that he was fully aware of the content of the decision from the moment it was handed down. However, his claim that there was grounds for recusal was not submitted in a timely manner. It argues that the author does not allege any subjective grounds for bias, but simply considers that the

[5] Article 202 of the Organic Act on the Judiciary states the following: "When judges from outside the Chamber are appointed, they and the parties shall immediately be informed so as to allow for the possibility of abstention or recusal." Article 203 (2) of the Organic Act on the Judiciary states that: "Appointments shall be made in the first order issued in the proceedings. The parties shall be notified of the name of the reporting judge and, if applicable, of the judge who will replace him or her in accordance with the established rotation. The reason for the replacement shall be given."

fact that T.G.S. was already aware of the facts that he later ruled on implies that he was prejudiced. The State party emphasizes that the order of the Provincial Court overturning the dismissal merely found that prima facie evidence existed. In addition, the State party notes that the investigation was subsequently delayed for six years and that the author's appeal was based on post-2006 information and evidence collected during the investigation. Consequently, the State party argues that these were not known to the Court at the time it issued order No. 127/06 overturning the dismissal of the case.

4.10 The State party considers that the author has not established any evidence of bias by T.G.S. other than his status as a staff judge of the Provincial Court. It argues that the author's actions amount to a blatant abuse of the right to submit a communication, given that he waited six months before claiming there were grounds for the judge to be removed. The communication should therefore be found inadmissible on the ground that it constitutes an abuse of the right to submit a communication under article 3 of the Optional Protocol and rule 99 (c) of the Committee's rules of procedure. Alternatively, the State party considers the alleged violation of article 14 (1) of the Covenant to be ill-founded from the perspective of article 14 (5). It considers the Committee's jurisprudence on subjective impartiality and assessment by a reasonable observer to be applicable and maintains that T.G.S. is impartial.

Author's comments on the State party's observations on admissibility and the merits

5.1 In his comments dated 21 December 2016, the author clarifies several statements on the facts of the communication contained in the State party's observations. He argues that the order of the Provincial Court of León of 30 June 2006 was not "limited" to finding that the facts could amount to a criminal offence, but also contained an analysis of the evidence that was more appropriate for a decision on the merits. Contrary to the State party's assertion that the author did not make any claims about the lack of independence or impartiality of the first instance judge, the author submits that he has never alleged that all courts had preconceived notions about him; rather, he has raised a complaint in connection with a specific ground for abstention or recusal provided for in law. There was no reason for him to allege, in his appeal, a violation of the right to an impartial tribunal, given that one of the judges recused himself because he had been involved in the investigation phase. He argues that the principle of judicial impartiality must be adhered to in all orders and at all stages of proceedings, and for that reason he claimed a violation of the right to an impartial tribunal in respect of the Provincial Court. In response to another of the State party's assertions, the author reiterates that he was never notified of the order dated 8 June 2012 informing him of the name of the reporting judge. Even if he had been notified, he would not have been aware that Judge T.G.S. would have involvement in the appeal, since he was not the reporting judge.

5.2 With regard to the allegation that he filed the application for annulment of the proceedings in an untimely manner and the State party's claim that the communication amounts to an abuse of the right of submission and should be found inadmissible, the author argues that the State party has not provided any evidence that the author filed his brief after the 20-day deadline following notification of the last decision rejecting his appeal, which is the date that should be taken into account, not the date of notification of the decision dismissing his earlier appeal. In addition, the Provincial Court admitted the application for annulment of the proceedings, which it would not have done if the application had not been filed within the established time frame.

5.3 The author disagrees with the State party's assertion that the right to impartial judges and tribunals, as set out in article 14 (1) and the Committee's general comment No. 32 (2007), applies only to courts of first instance. The author notes that general comment No. 32 (2007) clearly indicates that impartiality applies to all courts and tribunals, without distinction.[6] The Constitutional Court, in judgment No. 149/2013 cited by the State party in its observations, also states that the guarantee of objective impartiality in criminal proceedings applies both in the trial phase and in subsequent appeals. The author therefore argues that the provisions of article 14 (1) of the Covenant apply to his case and that he has not alleged a violation of article 14 (5).

[6] Committee's general comment No. 32 (2007), para. 22.

5.4 With regard to the State party's assertion that T.G.S.'s status as a staff judge of the Provincial Court was public information, the author maintains that it is disproportionate to claim that the author should have filed a motion challenging all the staff judges who had had previous involvement in the proceedings, in case they were called upon to hear his appeal. The author reiterates that he was not notified of the appointment of the reporting judge, and that he should have been informed of the composition of the court that would decide the appeal so that he could raise any possible grounds for recusal that might arise. The author argues that it is irrelevant that T.G.S. was not the reporting judge in the decision that overturned the provisional dismissal in 2006 nor in the 2013 decision that upheld his conviction. The guarantees provided for in article 14 (1) of the Covenant apply to all judges involved in the proceedings, and in the present case, the decision on the appeal was made jointly.

5.5 In response to the State party's allegation that he has not established any evidence of bias on the part of T.G.S. other than his status as a staff judge of the Provincial Court and that his arguments regarding possible objective bias are merely formal, the author reiterates some of the facts set out in his communication. He reiterates that it can be deduced from the arguments put forward by the Second Section of the Provincial Court of León, which included Judge T.G.S., who issued an order on 30 June 2006 overturning the decision to dismiss the case, that the Court had sufficiently full knowledge of the facts and evidence in the case to enable it to reach the conclusion that the threshold for the commission of a criminal offence had been met (see paras. 2.9 and 3.4). In the opinion of the Chamber, Tampa S.L. was not authorized by the Spanish Agricultural Guarantee Fund as a buyer of milk. In its evaluation of the evidence, the Chamber confirmed that there were indications that the goods acquired from Tampa S.L. were milk or dairy products. The author reiterates that the legal grounds set out in the 2006 order were largely identical to those set forth in the decision dismissing the appeal, which was issued by the Third Section of the Provincial Court of León, of which T.G.S. was also a member. The author argues that he has not only claimed that T.G.S. should not have decided the appeal for procedural reasons, but has also explained in detail that the same judge had handled the case at a previous stage and had ruled on substantive issues.

5.6 The author reiterates that the Court that ruled on his appeal included Judge T.G.S., to whom the ground for recusal set out in article 219 (11) of the Organic Act on the Judiciary applied. Having previously issued an order overturning the decision of the investigating judge to dismiss the proceedings and therefore, to charge the author ex novo, T.G.S. was aware of the ground that limited his impartiality in the examination of the appeal. The assessments made by T.G.S. in the order issued by the Provincial Court of León on 30 June 2006 were substantially identical to those that would be more suited to a substantive trial examining the criminal liability of the author, thus indicating that the outcome had been decided in advance. The author therefore argues that there was a clear lack of impartiality.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The Committee notes the State party's contention that the communication constitutes an abuse of the right of submission of communications under article 3 of the Optional Protocol because the author filed the application for annulment of proceedings, in which he alleged that there were grounds for one of the judges to recuse himself, six months after having been notified of the decision to dismiss his appeal. The Committee recalls that, pursuant to rule 99 (c) of its rules of procedure, a communication may constitute an abuse of the right of submission when it is submitted five years after the exhaustion of domestic remedies by the author of the communication, or, where applicable, three years from the

conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay, taking into account all the circumstances of the communication. The Committee notes that, in the present case, the author filed an application for *amparo* on 17 December 2013, which was denied on 17 March 2014, and submitted his communication to the Committee on 26 October 2015, which was clearly within the five-year time limit established by rule 99 (c) of the rules of procedure. The Committee notes that the State party's assertion regarding the alleged untimeliness of the author's application for annulment, in which he first raised the ground for recusal of the judge in question, touches on the issue of exhaustion of domestic remedies and will be assessed by the Committee when it examines whether this prerequisite has been met. The Committee therefore considers that the communication does not constitute an abuse of the right of submission under article 3 of the Optional Protocol.

6.4 The Committee notes the author's claim that he has exhausted all the effective domestic remedies available to him. It notes that the author filed an appeal against his conviction and that it was dismissed in a decision of 8 March 2013, against which he then filed an appeal in cassation. The Committee notes the State party's contention that the author did not raise the lack of impartiality of the judge in question in his cassation appeal. However, the Committee notes that the author's appeal in cassation was refused on the ground that the decision was not appealable in cassation, as had been set out in the decision itself. Consequently, the Committee considers that the remedy of appeal in cassation was not available to the author in the present case.

6.5 The Committee takes note of the State party's assertion that the author filed an application for annulment of the proceedings, in which he claimed for the first time that there were grounds for the recusal of a judge, six months after having been notified of the decision of 8 March 2013 dismissing the author's appeal, when the time limit established in law was 20 days. The Committee also notes the author's argument that the application for annulment of the proceedings was accepted for processing and then dealt with by the Provincial Court, and that the 20-day time limit should be counted from the date of notification of the last order rejecting his appeal in cassation, and not from the date of notification of the decision dismissing his earlier appeal. The Committee recalls its jurisprudence according to which, although there is no obligation to exhaust domestic remedies if they have no prospect of being successful, authors of communications must exercise due diligence in the pursuit of available remedies. It notes that mere doubts or assumptions about the effectiveness of domestic remedies do not absolve authors from exhausting them.[7] In the present case, the Committee notes that the author raised the lack of impartiality of the judge in question in an application for annulment of proceedings on 5 September 2013, that is, almost six months after being notified of the decision dismissing the appeal and that, despite ruling on the merits of the case, the Court noted the late submission in that decision. The Committee notes that the author has not provided any information to support the claims he made before the domestic courts concerning the alleged lack of impartiality of the court or to justify the delay or show that he learned some time later that one of the grounds for recusal applied to the judge. According to the file and the State party's submissions, the names of the judges sitting in the Chamber were clearly displayed at the top of the judgment. The author filed timely motions and appeals against the judgment, namely the request made on 15 March 2013 for a correction because there was an error in his lawyer's name and the appeal in cassation on 2 May 2013. Consequently, the Committee does not consider that the author has justified why he could not have challenged the judge within the established time limit, given that he had access to the names of all the judges sitting in the Chamber, since that information was set out in the judgment itself. In these circumstances, the Committee is of the view that the author has not been diligent in pursuing the available domestic remedies. The Committee therefore considers that the communication is inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

[7] See, inter alia, *V.S. v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3; *García Perea and García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2; and *Zsolt Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;

(b) That the present decision shall be communicated to the State party and the author.