



# 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. 4063/2021\*\*, \*\*\*

<i>Communication submitted by:</i>	F.C.S. (represented by counsel Antonia Barba García)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	22 June 2020 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 16 December 2021
<i>Date of adoption of Views:</i>	28 March 2024
<i>Subject matter:</i>	Fair trial for business owner convicted of political corruption-related offences
<i>Procedural issues:</i>	Same matter examined under another procedure of international investigation or settlement; substantiation of claims; exhaustion of domestic remedies
<i>Substantive issues:</i>	Political activities; accused/convicted persons; criminal conviction; criminal offence; right to an effective remedy; equality before courts and tribunals; fair trial; undue delay; presumption of innocence; criminal procedure; competent, independent and impartial tribunal
<i>Articles of the Covenant:</i>	14 (1), (2), (3) (c) and (g) and (5)
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (a) and (b)

1.1 The author of the communication is F.C.S., a national of Spain. He claims that the State party has violated his rights under articles 14 (1), (2), (3) (c) and (g) and (5) of the

\* Reissued for technical reasons on 24 June 2024.

\*\* Adopted by the Committee at its 140th session (4–28 March 2024).

\*\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobayah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu. Pursuant to rule 108 (b) of the Committee's rules of procedure, Carlos Gómez Martínez did not participate in the examination of the communication.



Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 25 April 1985.

1.2 On 27 December 2023, the author and the State party were informed of the decision of the Special Rapporteurs on New Communications and Interim Measures, acting on behalf of the Committee, to examine the admissibility of the communication first, separately from the merits.

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

2.1 The author of the communication is a business owner active in the media sector. He is accused of being the leader of a corruption scheme known as the Gürtel case. The case is considered to be one of the biggest political corruption scandals in Spain.

2.2 The legal proceedings against the author arose following voice recordings that were made between 2006 and 2007 without the consent of the persons recorded. The recordings were used to extort money from the defendants and were later turned over to the police. During the criminal investigation, the investigating judge issued several orders authorizing State agents to monitor conversations between the imprisoned defendants and their lawyers. The surveillance was conducted in order to determine the defendants' guilt and their legal defence strategy. Their conversations were listened to for more than 70 days. During that time, the defendants discussed their innocence or guilt with their lawyers.

2.3 The surveillance was subsequently the subject of a criminal investigation that resulted in the prosecution of the investigating judge. On 9 February 2012, the Criminal Chamber of the Supreme Court convicted the investigating judge of an offence against the administration of justice. He was disqualified from serving as a judge for 11 years. The material that had been recorded was removed from the public archives; consequently, the Criminal Chamber of the High Court of Valencia did not consider that the surveillance could be deemed an infringement of the author's fundamental rights.

2.4 However, on 8 February 2017, amid intense media and political pressure, the Civil and Criminal Chamber of the High Court of the Autonomous Community of Valencia convicted the author of criminal conspiracy, influence-peddling, embezzlement of public funds and active bribery. For those offences, the Court sentenced the author to several years' imprisonment and secondary punishments including substantial fines. The author is currently serving his criminal sentence at the Valdemoro prison in Madrid.

2.5 On 7 July 2017, the author filed a cassation appeal against his conviction before the Second Chamber of the Supreme Court, which dismissed it on 8 May 2018. On 14 June 2018, the author filed an *amparo* appeal with the Constitutional Court, which declared it inadmissible in a judgment of 7 February 2019.

2.6 In addition, on 26 July 2019, the author filed an application with the European Court of Human Rights, which declared it inadmissible on 13 October 2019 on the ground that it did not meet the admissibility criteria set out in articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). According to the author, the European Court of Human Rights has been criticized for having rejected applications owing to the influence of the multimillionaire George Soros. The European Court selected a judge who has strong connections to non-governmental organizations linked to Mr. Soros. The author therefore asserts that the European Court may not have been the most suitable body to consider his claims.

### **Complaint**

3.1 The author claims that the State party has violated his rights under articles 14 (1), (2), (3) (c) and (g) and (5) of the Covenant.

3.2 With regard to article 14 (1) of the Covenant, the Gürtel case was marked by the arbitrariness and lack of impartiality on the part of the judges, in particular the investigating judge. In similar cases, a sentence of 2 to 3 years' imprisonment has been imposed for the offence of embezzlement, while the author was given a sentence of 6 years. Due to an unforeseeable interpretation of the rule, the penalty applicable to public officials was imposed in his case.

3.3 With regard to article 14 (3) (c) of the Covenant, there were undue delays in the proceedings, which spanned more than a decade from the launch of the investigation in 2007 to the rendering of the judgment in 2017.

3.4 With regard to article 14 (3) (g) of the Covenant, the author's right to confidential communication with his lawyer was violated. During the investigation phase, the judge issued rulings that he knew to be unjust, in which he approved the surveillance of communications in prison between the detainees and their lawyers. These facts led to a criminal conviction against the investigating judge for an offence against the administration of justice. However, the High Court of Valencia did not consider these intrusions to constitute violations of the author's fundamental rights because the recordings and related material had been removed from the archives.

3.5 With regard to article 14 (5) of the Covenant, the proceedings were heard in sole instance by the High Court of the Autonomous Community of Valencia, which prevented the author from lodging an appeal to have his conviction and sentence reviewed by a higher court. In addition, his cassation appeal was dismissed by the Supreme Court following a political and biased examination of it. The Supreme Court upheld the author's conviction despite the finding by the High Court that the recordings could not be used against him as evidence. On the last day of the trial, in a display of exemplary and fair-minded behaviour, and having understood that he was facing a witch-hunt rather than receiving a fair trial, the author requested a pardon for the investigating judge. To justify its actions, the Supreme Court relied on the punishment it had imposed on the investigating judge to make an example of him. The judge went from being the "executioner" to being a victim used to achieve what had always been the aim of the proceedings: to "cook up" the conviction that brought down the Government of Mariano Rajoy. The Supreme Court also noted that while article 65 (3) of the Criminal Code allowed for the possibility of a reduced sentence for the offence of embezzlement, the basis used by the lower court for not reducing the sentence was reasonable. As noted above (see para. 3.2), the sentence should not have exceeded 3 years' imprisonment.

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

4. In its observations of 16 February 2022, the State party argues that the communication should be declared inadmissible under articles 3 and 5 (2) (a) and (b) of the Optional Protocol. The European Court of Human Rights has already examined the same case and issued a decision of inadmissibility on 13 July 2019. Furthermore, the author has failed to exhaust domestic remedies under article 14 (5) of the Covenant, and the communication constitutes an abuse of the right of submission in this respect, because it represents the first time that the State party has been made aware of the claims. Article 14 (5) of the Covenant was not raised either before the Supreme Court in the author's cassation appeal or before the Constitutional Court in his *amparo* appeal.

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

5. In his comments of 28 March 2022, the author argues that the inadmissibility decision of the European Court of Human Rights did not represent an examination of the same matter, because the Court rejected the application on procedural grounds without examining the merits. Moreover, article 14 of the Covenant is broader than article 6 of the European Convention on Human Rights, which also refers to a fair trial. Domestic remedies were therefore ineffective with regard to article 14 (5) of the Covenant. The Supreme Court cannot review whether the sentence adheres to the regulations, but only whether or not a reasonable explanation is provided in the judgment. The author's counsel claimed before the Constitutional Court that the decision of the Supreme Court did not include any consideration of the author's claims. Although the violation of article 14 (5) of the Covenant was not raised before the Constitutional Court, article 24 of the Constitution, which guarantees the right to due process, was invoked.

## 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 notes the State party's argument that the communication is inadmissible under article 5 (2) (a) of the Optional Protocol, when read in conjunction with the State party's reservation thereto, which excludes the Committee's competence in relation to cases where the same matter has been or is being examined under another procedure of international investigation or settlement. The Committee notes that the author raised before the European Court of Human Rights the merits of the claims he has brought before the Committee under articles 14 (1) and (3) of the Covenant. He alleged that his conviction was based on illegal audio recordings and raised questions relating to his rights to a fair trial, to be presumed innocent, to a defence, to not incriminate himself, to the adversarial principle and to equality of arms. The Committee also notes that the European Court of Human Rights, in a reasoned decision rendered following a single-judge review, stated the following:<sup>1</sup>

As concerns the complaints raised under Article 6 § 1 of the Convention and Article 6 § 3 (c) of the Convention, the Court finds that, insofar as the applicant complains of the domestic courts' assessment of the evidence and interpretation of the law and challenges the outcome of the proceedings, the application is of a "fourth-instance" nature. The applicant was able to make submissions before the courts which answered those submissions in decisions that do not appear arbitrary or manifestly unreasonable, and there is nothing to suggest that the proceedings were otherwise unfair. Accordingly, these complaints are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. [...]. The Court declares the application inadmissible.

6.3 In this regard, the Committee recalls its jurisprudence to the effect that when the European Court of Human Rights bases a declaration of inadmissibility not solely on procedural grounds but also on grounds based to some extent on the merits of a case, then the same matter should be deemed to have been examined within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol.<sup>2</sup> The Committee notes that the ground put forward by the European Court inevitably implies a degree of consideration of the merits of the case. The Committee therefore considers that the European Court did not limit itself to a simple examination of purely formal admissibility criteria when it declared the author's application to be manifestly unfounded and therefore inadmissible. Accordingly, the Committee finds the claims under article 14 (1), (2) and (3) of the Covenant inadmissible pursuant to article 5 (2) (b) of the Optional Protocol and the reservation thereto entered by the State party.

6.4 The Committee takes note of the author's claim under article 14 (5) of the Covenant that he was denied the right to have his conviction and sentence reviewed by a higher court, since he had access only to the cassation appeal before the Supreme Court, which in practice meant that he was denied the right to appeal the conviction handed down by the Civil and Criminal Chamber of the High Court of the Autonomous Community of Valencia. 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; mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.<sup>3</sup> The Committee notes that the Supreme Court is a higher instance which is independent from the court that convicted the author, and that the author admits that he did not specifically raise the merits of article 14 (5) of the Covenant before the domestic authorities. The

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<sup>1</sup> The European Court of Human Rights transmitted to the Committee a copy of the decision concerning *Correa Sanchez v. Spain*, Application No. 40445/2019, 26 July 2019.

<sup>2</sup> See, for example, *Pindado Martínez v. Spain* (CCPR/C/94/D/1490/2006), para. 6.3.

<sup>3</sup> See, for example, *D.C. v. Lithuania* (CCPR/C/134/D/3327/2019), para. 8.3; and *X et al. v. Greece* (CCPR/C/126/D/2701/2015), para 8.5.

Committee therefore decides that it is precluded by article 5 (2) (b) of the Optional Protocol from considering this aspect of the communication.

6.5 Furthermore, the Committee notes that in its judgment, the Supreme Court evaluated the author's 14 grounds of appeal and set out the reasons for dismissing each of them. Instead of limiting its examination to the formal aspects of the decision of the Civil and Criminal Chamber of the High Court of the Autonomous Community of Valencia, the Supreme Court assessed the 14 grounds raised by the author in his cassation appeal, including the reasoning in the judgment, the principle of *ne bis in idem*, unlawful detention, the retroactive application of an unfavourable rule, undue delays, the assessment of the evidence and the penalties imposed. The Supreme Court noted that the High Court had excluded certain evidence that prejudiced the author's right of defence, and considered that other evidence formed the basis of his conviction. It therefore did not accept the author's argument that the scope of the exclusion extended to all of the evidentiary material on which his conviction was based, and noted that the author had not provided specific arguments in this regard. With respect to the question of the penalty for the offence of embezzlement, the Supreme Court recalled that the reduction of the penalty was optional rather than mandatory and depended on the individual circumstances of the case. According to the Supreme Court, the High Court had taken into account the numerous circumstances relevant to the author's case, and the penalty imposed was therefore reasonable and logical. In the light of the foregoing, the Committee considers that the author has not sufficiently substantiated his claim under article 14 (5) of the Covenant. The claim is therefore inadmissible under article 2 of the Optional Protocol.

6.6 In the light of these conclusions, the Committee does not deem it necessary to examine any other grounds for admissibility.

7. The Committee therefore decides:

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

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

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