



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE  
Eighty-fifth session  
17 October – 3 November 2005

**DECISION**

**Communication No. 1396/2005**

<u>Submitted by:</u>	Jesús Rivera Fernández (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Spain
<u>Date of communication:</u>	29 July 2004 (initial submission)
<u>Date of adoption of decision:</u>	28 October 2005

*Subject matter:* Dismissal of application for membership in the High Council of the Judiciary.

*Procedural issues:* Same matter examined under another proceeding of international investigation or settlement; inadmissibility *ratione materiae*.

*Substantive issues:* Freedom of association, fair trial, non-discrimination.

*Articles of the Covenant:* 14 (1), 22 and 26

*Articles of the Optional Protocol:* 3 and 5 (2) (a)

[ANNEX]

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\* Made public by decision of the Human Rights Committee.

**ANNEX**

**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER  
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT  
ON CIVIL AND POLITICAL RIGHTS**

Eighty-fifth session

concerning

**Communication No. 1396/2005\*\***

Submitted by: Jesús Rivera Fernández (not represented by  
counsel)

Alleged victim: The author

State party: Spain

Date of communication: 29 July 2004 (initial submission)

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

Meeting on 28 October 2005

Adopts the following:

**DECISION ON ADMISSIBILITY**

1.1 The author of the communication, dated 29 July 2004, is Jesús Rivera Fernández, a Spanish judge born in 1957. He claims to be a victim by Spain of violations of article 14, paragraph 1, and article 22, paragraph 1, read in conjunction with article 26 of the Covenant. The Optional Protocol entered into force for Spain on 25 April 1985. The author is not represented by counsel.

1.2 On 19 August 2005, the Special Rapporteur on New Communications and Interim Measures granted the State party's request that the admissibility of the communication be dealt with separately from the merits.

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

## **Factual Background**

2.1 On 13 June 2001, the author applied for membership in the General Council of the Judiciary (*Consejo General del Poder Judicial*, hereinafter referred to as the Council). The Council is the managing body of the Spanish judiciary. It is composed of 21 members, 12 of whom come from the Bench. These 12 members are designated by the Congress. On 28 June 2001, an amendment to the Law on the Judiciary modified the system for the appointment of the 12 members of the Council from the Bench. Before the entry into force of the amendment, judges could freely elect their candidates to be proposed to Congress as representatives of the Bench in the Council. After the amendment, up to 36 candidates have to be proposed by either an existing judges association, or by non-associated judges supported at least by 2% of all the judges in active service. Associated judges can only vote for candidates who belong to their respective association. Non-associated judges running for membership in the General Council, although obliged to be supported at least by 2% of all judges in service, can only seek such endorsement among non-associated judges. The law also set out that the total membership of any association of judges should remain unchanged as of 1 June 2001.

2.2 Until 12 June 2001, the author was a member of the Professional Association of Magistrates of Murcia, to which he resigned in order to present an independent candidacy, which was supported by 40 judges, none of whom belonged at that time to any of the existing judges' associations. On 18 July 2001, the President of the General Council dismissed the author's application, because it was not supported by the minimum number of endorsements required by the Law on the Judiciary (*Ley Orgánica del Poder Judicial*).

2.3 On 31 July 2001, the author appealed (*recurso contencioso-administrativo*) to the Seventh Section of the Third Chamber of the Supreme Court. On 27 September 2001, the Third Chamber dismissed the author's appeal. It considered that the General Council's prerogative to communicate to Congress a list with the names of 36 candidates for membership in the Council was preparatory in nature, and that the final decision nominating the 12 candidates to the King belonged to Congress. This prerogative of the Congress, not being a definite administrative act, could not be challenged through an appeal (*recurso contencioso-administrativo*). On 9 October 2001, the author asked the Court to reconsider its decision. He alleged violations of fair trial guarantees and that he had been discriminated. On 15 November 2001, the Chamber dismissed the appeal for reconsideration. On 27 November 2001, the author appealed (*amparo*) to the Constitutional Court. While this appeal was pending, the author withdrew the allegations related to fair trial guarantees and discrimination. On 14 November 2002, the Court dismissed the appeal.

2.4 On 19 March 2003, the author applied to the European Court of Human Rights, alleging violations of article 11 (1) (freedom of association), in conjunction with article 14 (prohibition of discrimination), article 6(1) (right to fair trial), and article 13 (right to an effective remedy), of the European Convention on Human Rights. On 11 May 2004, the Court declared the application inadmissible, since it did not reveal the appearance of any violation of any of the rights enshrined in the Convention.

## **The complaint**

3.1 The author alleges a violation to his right to freedom association and his right to equality before the law (article 22, paragraph 1, read in conjunction with article 26 of the

Covenant). He alleges that the voluntary character of the right to freedom of association was violated by the legislative amendment to the Law on the Judiciary. Although he had withdrawn his membership in the professional association of judges of Murcia as of 12 June 2001, the law continued to consider him as an associated judge, thereby denying him the opportunity to endorse candidates who were not associated, as was his intention, because the law only authorizes non-associated candidates to seek endorsement from non-associated judges. Furthermore, he contends that non-associated candidates are at a disadvantage if compared to associated judges: (i) they must seek the endorsement of non-associated judges, requirement that is not applicable to associated judges; (ii) the law obliges non-associated candidates to seek the endorsement by at least 2% of all active judges instead of allowing them to seek such endorsement only among non-associated judges, thereby raising the eligibility threshold to become eligible for appointment; (iii) the President of the General Council had denied advance access to the list of non-associated judges, so candidates did not have prompt access to potential electors and had to investigate who they were.

3.2 The author also alleges the violation of his right to equality before the courts (article 14, paragraph 1, of the Covenant): he was not informed in advance of the composition of the Seventh Section of the Third Chamber, so he could exercise his right to recuse the judges; the number of judges was arbitrarily modified from 5 to 7 in his case; the President of the Third Chamber arbitrarily decided to chair the Seventh Section; and three judges should have recused themselves because they were members of an association of judges which took part in the proceedings. Furthermore, the author alleges that his right to have equal access to court was violated, because the Seventh Section of the Third Chamber refused to consider the merits of his appeal, as it did in another, very similar, case.

3.3 The author finally alleges a violation of article 14, paragraph 1; since the courts considered that the decision of the President of the Council was not final in nature and, therefore, not subject to judicial review. The author contends that this characterization of the decision of the President of the Council is arbitrary and unreasonable.

3.4 The author acknowledges that his communication to the Committee is identical to his application to the European Court of Human Rights but considers that the European Court did not deal with the merits of his application, so that it cannot be deemed to have “considered” the “same matter” which he is raising before the Committee.<sup>1</sup>

#### **State party’s submission on the admissibility of the complaint and author’s comments**

4.1 On 11 August 2005, the State party challenges the admissibility of the communication. It alleges that the author’s allegations had already been examined by the European Court of Human Rights, which concluded that his application “did not reveal the appearance of any violation of any of the rights enshrined in the Convention”. The State party considers that the ruling of the European Court amounts to an “examination” of the case, for purposes of article 5, paragraph 2 (a), of the Optional Protocol, and concludes that the communication is inadmissible under that provision and in the light of the State party’s reservation to that provision. It recalls Committee’s decision of 30 March 2004 on communication No. 1074/2002 (Navarra Ferragut v Spain, at para. 6.2).

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<sup>1</sup> European Court of Human Rights, Fourth Section, Application No. 9527/03, Rivera Fernández v Spain, judgement of 11 May 2004.

4.2 The State party argues that the author's claims relate to an alleged right - the right to be proposed as a candidate to membership in the General Council of Justice - which is not protected by the Covenant and does not constitute "the determination of rights and obligations in a suit of law", within the meaning of article 14, paragraph 1. The State party concludes that the communication is incompatible *ratione materiae* with the Covenant, and, therefore, inadmissible.

4.3 The State party adds that the proceedings for the selection of the members of the Council do not impose on candidates any duty to associate. It recalls that issues of evaluation of facts and interpretation of domestic law pertains to national tribunals, and that the regulations concerning the appointment of candidates to membership in a national institution is a matter that falls outside of the Covenant provisions. It concludes that the communication is manifestly ill-founded, and therefore, inadmissible.

5. By submission of 6 September 2005, the author insists that the European Court of Human Rights did not examine the merits of his application because it adopted its decision on the admissibility of his application without having heard him and without providing any reasoning.

## **Issues and proceedings before the Committee**

### **Considerations on the admissibility of the communication**

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the alleged violation of article 22 (freedom of association), the Committee recalls its jurisprudence<sup>2</sup> that article 11, paragraph 1, of the European Convention as interpreted by the European Court of Human Rights, is sufficiently proximate to article 22, paragraph 1, of the Covenant; that when the European Court based a declaration of inadmissibility not solely on procedural grounds but on reasons that include a certain consideration of the merits of the case, then the same matter should be deemed to have been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol; and that the European Court should be considered to have gone beyond the examination of purely procedural admissibility criteria when declaring the application inadmissible, because it does "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols". The same criteria apply to the present case. The fact that article 26 of the Covenant differs from article 14 of the European Convention appears to be of no relevance in this case, because the author invoked these provisions before the respective competent bodies in relation to the right to freedom of association, which is regulated similarly under both treaties. Consequently, the Committee concludes that this part of the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol and the reservation of Spain to the said provision.

6.3 With regard to the alleged violations of article 14, paragraph 1, the Committee recalls its jurisprudence that a claim related to the election of members of the High Council of Justice is

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<sup>2</sup> See Communication 1002/2001, *Franz Wallmann, Rusella Wallmann and Hotel zum Hirschen Josef Wallmann v. Austria*, Views of 1 April 2004, at paragraphs 8.4 and 8.5.

not related to the determination of rights and obligations in a suit at law, within the meaning of article 14, paragraph 1, and concludes that author's allegations concerning article 14 are incompatible *ratione materiae* with that provision and thus inadmissible under article 3 of the Optional Protocol.<sup>3</sup>

6.4 The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 3 and 5, paragraph 2 (a), of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the authors.

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

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<sup>3</sup> See Communication No. 943/2000, *Guido Jacobs v. Belgium*, Views of 7 July 2004, at para.8.7.