



International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2626/2015

Decision adopted by the Committee at its 115th session (19 October- 6 November 2015)

<i>Submitted by:</i>	A.G.S. (represented by counsel, Diego Fernández Fernández)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	21 June 2014 (initial submission)
<i>Date of adoption of the decision:</i>	2 November 2015
<i>Subject matter:</i>	<i>Ne bis in idem</i>
<i>Substantive issues:</i>	Double jeopardy in economic-administrative and criminal proceedings
<i>Procedural issues:</i>	Other procedures of international investigation or settlement; admissibility — insufficient substantiation of claims
<i>Article of the Covenant:</i>	14 (para. 7)
<i>Article of the Optional Protocol:</i>	2



Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (115th session)

concerning

Communication No. 2626/2015*

<i>Submitted by:</i>	A.G.S. (represented by counsel, Diego Fernández Fernández)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	21 June 2014 (initial submission)

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

Meeting on 2 November 2015,

Having concluded its consideration of communication No. 2626/2015, submitted to the Committee by A.G.S. 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:

Decision on admissibility

1.1 The author of the communication is A.G.S., a Spanish national born on 6 April 1942, who claims to be the victim of a violation by the State party of article 14, paragraph 7, of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 25 April 1985.

1.2 On 2 July 2015, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, determined that observations from the State party were not needed in order to ascertain the admissibility of the present communication.

Factual background

2.1 On 27 February 1989, the author, who was the director and the owner of 99.8 per cent of four companies namely Graveras del Centro S.A., Iberhormigones S.A.,

* The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Sarah Cleveland, Mr. Ahmed Amin Fathalla, Mr. Olivier de Frouville, Mr. Yuji Iwasawa, Ms. Ivana Jelić, Mr. Duncan Laki Muhumuza, Ms. Photini Pazartzis, Mr. Mauro Politi, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Mr. Dheerujall Seetulsingh, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Tracento S.A. and Ariberia S.A.,¹ sold subscription rights to these four companies for 3.8 billion pesetas to a fifth company, Aribéricos S.A., of which he was also the sole director. On 6 April 1989, Aribéricos S.A. increased its share capital, which made the author the company's majority shareholder. On 5 May 1989, Aribéricos S.A. sold part of the subscribed shares to Steetley Iberia S.A. — a company owned by the author — and, on 10 May 1990, sold the remaining shares for a total of 4,202,600,000 pesetas. By means of these transactions, the author ensured that the transfer of ownership was taxed at a rate of 13 per cent instead of 56 per cent.

2.2 The Special Tax Office for Madrid of the State Tax Administration Agency initiated a tax audit of the author in relation to suspected fraudulent personal income tax statements for the 1989 and 1990 tax years.

2.3 On 6 September 1996, the Special Tax Office for Madrid of the State Tax Administration Agency issued a decision in which it concluded that the author owed 4,636,928,588 pesetas in relation to the 1989 tax year,² which included the tax due, a fine and late-payment interest.³ With regard to the 1990 tax year, the regional auditing division of the Special Tax Office for Madrid of the State Tax Administration Agency referred the author's case file to the Public Prosecution Service on the grounds that it might contain evidence of a tax offence.⁴

2.4 On 28 October 1996, the author lodged an appeal against the decision of 6 September 1996 with the Madrid Regional Economic-Administrative Court because he believed that the tax settlement sought by the State Tax Administration Agency was in error. On 27 November 1996, he asked the Court to suspend the administrative proceedings because a criminal court was in the process of reaching a determination on a preliminary point of law on the basis of the same matters that were being examined by the Economic-Administrative Court.

2.5 On 13 January 1997, the Madrid Regional Economic-Administrative Court granted the author's request and stayed the administrative appeal by reason of the existence of those preliminary criminal proceedings,⁵ until such time as the court had handed down its decision.⁶

2.6 On 11 September 2000, Madrid Criminal Court No. 27 acquitted the author of the tax offence with respect to the 1990 tax year.⁷ The State Attorney's Office and the

¹ The transaction was concluded 23 days before the entry into force of Royal Decree-Law No. 1/1999 on 22 March, the purpose of which was to prevent companies from being sold by means of a transfer of subscription rights, which had the effect of exempting the capital gain from taxation.

² According to Case No. 998/96 and Decision No. 60326990, according to which a fine of 70 per cent was imposed under Act No. 25/1995.

³ Due on the capital gain achieved through the sale of shares in Graveras del Centro S.A., Iberhormigones S.A., Tracento S.A. and Ariberia S.A. to Steetley Iberia S.A. through the special purpose vehicle Aribéricos S.A. and on the net return on movable capital obtained through Aribéricos S.A.

⁴ The Treasury is of the view that the transactions described in paragraph 2.1 were simulated and in fact concealed a direct sale by the author to Steetley Iberia S.A.

⁵ The author maintains that the State Tax Administration Agency did not initiate criminal proceedings in relation to the 1989 tax year because the statute of limitations had expired.

⁶ The General Tax Act establishes new provisions regarding the precautionary measures that may be adopted once proceedings have been initiated in relation to an alleged tax offence: (a) If a guilty verdict is reached, no administrative penalty may be imposed; (b) If no criminal offence is found to have been committed, the tax authority may initiate or continue proceedings based on the facts proven in court and may resume the calculation of the period of limitation as from the date of suspension.

⁷ Criminal Court ruling: "As regards the legality or illegality of the facts described, as we have already stated, all are perfectly lawful when considered in isolation, but it is necessary to look at the full picture, the entire corporate framework, in order to determine whether or not the author evaded payment of taxes due and adds that "all the acts examined ... are perfectly lawful and

Public Prosecution Service filed appeals against this decision with the Madrid Provincial Court. However, on 19 February 2002, the Madrid Provincial Court dismissed the appeals on the grounds that the author had opted to use the most advantageous tax regulations available to him but had not committed tax fraud⁸ within the meaning established in the current Criminal Code.⁹

2.7 On 20 May 2002, the Madrid Regional Economic-Administrative Court resumed consideration of the administrative appeal lodged on 6 September 1996. On 28 April 2003, the Court dismissed the author's appeal against the settlement sought by the State Tax Administration Authority in relation to personal income tax payments for the 1989 tax year, on the grounds that the transactions carried out prior to the sale of the Steetley Iberia S.A. shares had been simulated. This decision was also challenged by the author but his appeal was dismissed on 1 June 2006 by the Central Economic-Administrative Court.

2.8 On 22 September 2006, the author appealed to the National High Court to set aside the Central Economic-Administrative Court's decision of 1 June 2006 and hence to suspend the administrative order for the settlement of personal income tax due for the 1989 tax year issued on 6 September 1996.

2.9 On 21 May 2009, the National High Court upheld the administrative appeal against the Central Economic-Administrative Court's decision of 1 June 2006 and thus declared the previous decisions null and void on the grounds that they were not compliant with the legal framework.¹⁰

2.10 On 14 May 2010, the Spanish Government, represented by the State Attorney, filed an appeal in cassation with the Supreme Court in which it cited a breach of article 77.6, paragraph 3, of the 1963 General Tax Act, which establishes that "if no criminal offence is found to have been committed" by the judicial authority, "the tax authority shall proceed with the punitive case based on the facts that the courts consider to have been proven".¹¹ On 29 October 2012, the Supreme Court agreed to allow this appeal, thereby overturning the Central Economic-Administrative Court's decision of 31 May 2015, and to allow the part of the administrative appeal against the Central Economic-Administrative Court's decision of 1 June 2006 which challenged the penalty, the settlement sought being confirmed in all other respects.

2.11 On 17 December 2012, the author submitted an application for *amparo* to the Constitutional Court in respect of the previous decisions and of what he claimed was a violation of article 24 (right to effective legal protection) of the State party's Constitution. On 1 March 2013, the Constitutional Court decided not to admit the

legitimate. No act has been committed which, in and of itself, constitutes a criminal offence".

⁸ Provincial Court ruling: "Given the possibility that we may be dealing with a case of 'fraud in law' in relation to tax matters (a point alluded to towards the end of the appeal submitted by the State Attorney's Office), the case could be of concern to the tax authorities, but never to the criminal authorities. If the fraud in law does not warrant the imposition of a penalty by the tax authorities, then it is highly unlikely to be of concern to the criminal authorities."

⁹ Article 349 of the Criminal Code in force at the time or article 305 of the current Criminal Code.

¹⁰ Including the settlement of the personal income tax owed by the author for 1989.

¹¹ Article 77.6 of the General Tax Act of 1963: "In cases where the tax authority considers that the violations could constitute tax offences, it shall refer the evidence of guilt to the appropriate court and shall refrain from pursuing the administrative proceedings until the judicial authority issues a final judgement, the case is stayed or set aside, or the file is returned by the Public Prosecution Service.

A conviction by the judicial authority shall exclude the possibility of imposing an administrative penalty. If no criminal offence is found to have been committed, the tax authority shall proceed with the punitive case based on the facts that the courts consider to have been proven."

appeal on the grounds that the appellant had failed to “duly exhaust the available judicial remedies”.¹²

2.12 On 14 August 2013, the author lodged a complaint against the State party before the European Court of Human Rights. On 17 October 2013, the Court, sitting in a single-judge formation, found the author’s complaint inadmissible because it did not meet the admissibility criteria established in articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

The complaint

3.1 The author considers that the Spanish judicial authorities subjected him to double jeopardy by bringing both criminal and economic-administrative proceedings against him on the basis of the same facts, issues and grounds,¹³ in violation of his rights under article 14, paragraph 7, of the Covenant. The author contends that, after the final judgement of acquittal was issued in the criminal proceedings, he was subjected to a new trial dealing with the same events in administrative proceedings.¹⁴

3.2 Lastly, the author argues that he did not submit an exceptional application for annulment of proceedings against the judgement issued by the Supreme Court because such a remedy was manifestly inappropriate and ineffective, as indicated by decisions of the Spanish Constitutional Court.¹⁵

¹² The author had not applied for an annulment of proceedings, as provided for in article 241.1 of the Organic Act on the Judiciary.

¹³ The author refers to the decision of the Madrid Regional Economic-Administrative Court. The author asked the Court to stay the administrative proceedings because preliminary criminal proceedings dealing with exactly the same facts, issues and legal grounds were under way. The Madrid Regional Economic-Administrative Court ruled that: “This Court has reviewed the issues raised by the appellant and has reached the conclusion that the matters on which this Court is being asked to pass judgement are the same matters that are the subject of Preliminary Proceedings No. 2587/96, for while it is clear that they relate to different tax years, it is also clear that, in order to determine whether or not a tax offence has been committed, the investigating court will have to consider the transactions made on 27 February 1989, 6 April 1989, 5 May 1989 and 10 May 1990. ... However, the determination of a preliminary point of criminal law which cannot be dispensed with in arriving at a sound decision, or which may have a direct influence on that decision, dictates that the proceedings should be suspended until the criminal court has made that determination, except where the law allows otherwise.”

¹⁴ The author maintains that there has been a violation of the principle of *res judicata*, as the administrative court ruled that the transactions conducted by the author were “simulated”, whereas the criminal court concluded that the transactions were duly reported and substantiated.

¹⁵ See Spanish Constitutional Court Decision No. 2/2013 of 12 February: “*As stated in our Decision No. 153/2012, of 16 July, following the introduction of the new constitutional amparo procedure, actions for annulment of proceedings have become a key mechanism in the protection and defence of fundamental rights that can and should be overseen by the Constitutional Court if the presumed separate torts to which they relate have ‘special constitutional significance’.*” See also Constitutional Court Decision No. 200/2012 of 12 November “*the applicant for amparo having availed himself of a manifestly inappropriate remedy which unduly extended the deadline for appeal... The appeal must be interpreted as relating to all allegations, in application of article 43 of the Organic Act of the Constitutional Court, since the alleged violations of the Constitution relate directly to decisions reached in the administrative proceedings. Accordingly, separate violations attributable to the judicial decisions being contested are not covered.*” The same conclusion was reached in Constitutional Court Decisions No. 234/1991 of 10 December; No. 141/2004 of 26 April; No. 180/2004 of 2 November; No. 70/2012 of 16 April; and No. 175/2009 of 1 June.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Committee must determine whether the communication is admissible under the Optional Protocol to the Covenant.

4.2 The Committee recalls that, when Spain ratified the Optional Protocol, it entered a reservation excluding the Committee's competence in matters that had been or were being examined under another procedure of international investigation or settlement. The Committee also recalls its jurisprudence regarding article 5, paragraph 2 (a), of the Optional Protocol, to the effect that when the European Court of Human Rights bases a finding of inadmissibility not only on procedural grounds, but also on grounds arising from some degree of consideration of the substance of the case, the matter should be deemed to have been examined within the meaning of the relevant reservations to article 5, paragraph 2 (a), of the Optional Protocol.¹⁶ In the present case, the Committee notes that, on 17 October 2013, the Court declared the author's application inadmissible. According to the letter from the Court relating to the author's Complaint No. 52832/13 against Spain, the Court ruled that: "On the basis of the items of evidence in its possession and insofar as it is competent to decide on the complaints submitted to it, the Court has concluded that his application does not meet the admissibility criteria established under articles 34 and 35 of the European Convention on Human Rights." The Committee notes, however, that the Court's decision provides no explanation for the finding of inadmissibility and that the Court does not elucidate the grounds for its decision.¹⁷ Accordingly, the Committee considers that it is not precluded from considering the present communication in accordance with article 5, paragraph 2 (a), of the Optional Protocol.

4.3 The Committee notes that, according to the author, he was tried twice on the basis of the same facts, issues and grounds, in violation of article 14, paragraph 7, of the Covenant. However, the Committee notes that the tax authority sought payment of the author's personal income tax for the 1989 tax year in the economic-administrative courts, while the author was acquitted by a criminal court of the tax offence in relation to the 1990 tax year. Therefore, the proceedings relate to two different tax years. In addition, the Committee considers that, following an acquittal of a criminal charge, provided that proven facts are not disputed, there is nothing to prevent any outstanding tax issues in the case concerned from being addressed. In the light of the above, the Committee considers that the claims made under article 14, paragraph 5, of the Covenant have not been sufficiently substantiated for the purposes of admissibility and therefore concludes that they are inadmissible under article 2 of the Optional Protocol.

5. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be notified to the the author, and forwarded to the State party.

¹⁶ See communication No. 944/2000, *Mahabir v. Austria*, decision on inadmissibility of 26 October 2004, paras. 8.3 and 8.4.

¹⁷ See communication No. 1636/2007, *Onoufriou v. Cyprus*, decision on inadmissibility of 25 October 2010, para. 6.2; communication No. 1510/2006, *Vojnović v. Croatia*, decision adopted on 30 March 2009; communication No. 168/1984, *V.O. v. Norway*, decision on inadmissibility of 17 July 1985, paras. 4.2 and 4.3; communication No. 452/1991, *Jean Glaziou v. France*; communication No. 121/1982, *A.M. v. Denmark*, decision on inadmissibility of 23 July 1982, para. 4.5.