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HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11-29 July 2005

DECISION

Communication No. 1105/2002

Submitted by:	Concepción López González (represented by counsel, Mr. José Luis Mazón Costa)
Alleged victim:	The author
State party:	Spain
Date of communication:	28 July 2000 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 25 July 2002 (not issued in document form)
Date of decision:	26 July 2005
Subject matter:	Right to request the summons of an expert on the same terms as the defendant in an action under labour laws
Procedural issues:	Adequate substantiation of the alleged violation - exhaustion of domestic remedies
Substantive issues:	Equality of arms in the courts
Article of the Covenant:	14, para. 1
Articles of the Optional Protocol:	2 and 5, para. 2 (b)

* Made public by decision of the Human Rights Committee.

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Annex

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

Eighty-fourth session

concerning

Communication No. 1105/2002*

Submitted by: Concepción López González (represented by counsel, Mr. José Luis Mazón Costa)

Alleged victim: The author

State party: Spain

Date of communication: 28 July 2000 (initial submission)

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

Meeting on 26 July 2005,

Adopts the following:

Decision on admissibility

1. The author of the communication dated 28 July 2000 is Ms. Concepción López González, a Spanish citizen. She claims to be the victim of a violation by Spain of article 14, paragraph 1, of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by Mr. José Luis Mazón Costa.

Factual background

2.1 The author was employed as a temporary worker by the Fruta Romu company. On 2 July 1993, eight days before her contract ended, she had an occupational accident when she was struck in the right eye by a lemon. The effects of the injury worsened as time went by.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson López, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Sir. Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

She suffered a detached retina and had to be operated on several times, and was left with a 45 per cent decrease in vision in the injured eye. The author did not go to a doctor for treatment immediately, but a month after the accident, on 2 August 1993, when she went to the Beniaján health centre to complain of vision problems. On the following day, 3 August 1993, she was operated on, for a detached retina, at the General University Hospital. The ophthalmologist who operated on her explained in his report that the appearance of a tear leading to detachment of the retina weeks after the accident was consistent with a blow to the eye.

2.2 On 24 June 1994, the author filed a lawsuit against the company, the National Social Security Institute, the National Health Institute, the Social Security Regional Treasury and the Frenap mutual society (an employers' association), requesting that the accident be recognized as an occupational accident and the defendants ordered to pay compensation.

2.3 On 27 February 1995, the author requested that the judge should summon two witnesses and the ophthalmologist who had attended her in the General University Hospital in Murcia. The judge agreed to summon the witnesses but not the doctor, without giving reasons for his decision.

2.4 In a ruling dated 17 March 1995, Murcia employment tribunal No. 3 rejected the author's claim. The judge found no evidence that the author's injury had been caused when she was working for the company named in the suit. The author considers that the testimony she had requested was vital to the outcome of the case. She maintains that the ruling was principally based on the opinion of the expert put forward by the defendant (an employers' association), who did not believe that the author's accident could have caused the injury. If it had been the cause, since the author was predisposed to injury because she suffered from a basic pathology (myopia magna), the detachment of the retina would have occurred sooner. The ophthalmologist who operated on her, however, concluded in his report that an ocular contusion with subsequent tearing might well have given rise to a detached retina a month after the accident.

2.5 The author filed an application for reconsideration of the judgement, requesting that the evidence be properly assessed, taking into account that the expert evidence proposed by the defendant had been heard in court, while the testimony of the expert proposed by the author had been disallowed without cause. The High Court dismissed the application on 25 September 1996. The author filed an appeal for unification of doctrine before the Employment Division of the High Court, which dismissed it on 10 June 1997.

2.6 On 21 October 1997, the author filed an application for judicial review before the Supreme Court, citing a previously undisclosed document which revealed that the company had failed to register the author in the General Social Security System for four months; this explained why the company did not report the accident and why its representatives denied that an occupational accident had occurred. The application was dismissed on 30 June 1998. The Supreme Court held that the document on which the application was based could have been obtained and submitted earlier, during the proceedings. Finally, the author filed an application for *amparo* before the Constitutional Court, alleging that her right to effective legal protection had been violated, in that she had been left without a defence by the refusal to allow the doctor's

testimony to be heard even though the expert evidence proposed by the defendant had been allowed. On 13 May 1999, the Constitutional Court dismissed the application, finding the author's argument that the judgement could have gone in her favour had her request been granted unconvincing.

2.7 The author submitted two clinical reports, dated July and August 2002 respectively, attesting to a serious visual impairment that prevents her from engaging in some occupational, social and personal activities.

The complaint

3. The author contends that article 14, paragraph 1, of the Covenant has been violated. She maintains that she was prevented from producing a decisive piece of evidence, in breach of the principle of equality between the parties in court proceedings. If the ophthalmologist, who worked in the public health system, had been summoned, there would have been two different opinions from two specialists concerning the same facts, and since the expert she had proposed was a public health service official his impartiality could not have been doubted and the judgement would have been different. According to the author, the crux of the matter was whether the injury had had a delayed effect and the problem was that the court had allowed the testimony of an expert hired by the defendant but refused to summon the expert she herself had proposed. She adds that the court, in order to give the impression that its decision was a fair one, gave probative value to the statement by the emergency doctor in the health centre to which she had gone for the first time on 2 August 1993, stating that her injury was approximately 20 days old, but refused to admit as evidence the report of the expert proposed by her stating that the injury had occurred a month previously. Lastly, she states that the issue at stake is the same as that addressed in the Committee's decision concerning communication No. 846/1999 (*Jansen-Gielen v. The Netherlands*), in which the Committee found a violation of article 14, paragraph 1, of the Covenant, "in the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing".[1]

The State party's submission on the admissibility and merits of the communication, and the author's comments thereon

4.1 With regard to the admissibility of the communication, the State party maintains that the author has not exhausted domestic remedies. It states that when the employment tribunal rejected the author's request that the ophthalmologist who had operated on her should be summoned as an expert witness, she could have appealed against that decision, as she is entitled to do under article 184 of the Labour Procedure Act. She did not file an appeal. Secondly, when the defendant's expert gave testimony during the proceedings, the author or her counsel could have objected. She did not do so. Thirdly, when the proceedings ended, the author could have requested that judgement be deferred pending the appearance of the ophthalmologist as an expert witness, under article 95 of the Labour Procedure Act. She did not do so. Fourthly, in her application to the High Court for reconsideration, the author could have requested that the same ophthalmologist be summoned to give expert evidence, as authorized under article 191 of the Labour Procedure Act, but she did not do so.

4.2 With regard to the merits, the State party reports that the author suffered from congenital myopia magna and wore hard contact lenses. She worked as a packer in a lemon-packing firm from 11 January 1993 to 10 July 1993 and duly signed the document ending her employment contract. On 2 August 1993, a month after finishing work, she went to a health centre with a pain in her right eye. The report of the emergency doctor who treated her states that the author presented a traumatism dating back 20 days. The author went into hospital the next day and was operated on for a detached retina; the medical report states that she presented a traumatism dating back a month. Two-and-a-half months after terminating her employment contract, the author reported to the Labour Inspectorate that she had been struck in the right eye by a lemon on 2 July 1993 while working. The Labour Inspectorate reported that there was no proof of an occupational accident, that there was no accident declaration and that the section supervisor stated that the author had never said that she had been struck in the eye. A year after the alleged blow from the lemon, the author applied to a labour court to have the alleged blow from the lemon declared an occupational accident.

4.3 The State party contends that the author failed to prove to the domestic courts the fact of the injury (being struck by a lemon while working) and its alleged consequence (detachment of the retina). During the proceedings, the author was unable to prove that she had been struck in the right eye by a lemon. The supervisor of the section where she worked denied it, and the two witnesses produced by the author contradicted each other. One asserted that he had thrown a lemon at a box from four or five metres away, while the other said that the lemon was thrown from a distance of one metre to where the author was. With regard to the evidence of the alleged consequence, the author's request that the ophthalmologist should be summoned was submitted after the statutory time limit had passed, two days before the hearing, while the law requires requests for evidence to be submitted three days in advance. The author did not appeal against the rejection of her request, probably because the report of the doctor concerned was in the case file. During the proceedings, the author neither objected to nor contested the report of the expert put forward by the defence. The judge considered that neither the blow from the lemon nor the consequence of a detached retina had been proved. The assessment of the evidence by the judge was not arbitrary. He took into account, inter alia, the time that had elapsed before the author went to the health centre, the different dates indicated as the probable date of the accident by the emergency doctor and the ophthalmologist who operated on the author (20 days before 2 August 1993 for the former and 30 days before 3 August 1993 for the latter) and the fact that the alleged blow from the lemon is not mentioned in the record of the first consultation, on 2 August 1993, but appears for the first time in the record dated 3 August 1993.

4.4 The State party contends that the author filed six different applications for review with the domestic courts and that all of these rejected her arguments. The High Court dismissed an application for reconsideration submitted by the author and concluded that if the fact of the injury was not itself proved, at least in relation to the work performed, it was impossible to classify the retinal detachment as an occupational accident. The Court took into account the fact that the author had completed her employment contract on 10 July 1993 and had received her final salary but had never informed the company that she had been struck by a lemon on 2 July 1993, and that it was some time after the alleged accident that she had gone to a health centre. Her appeal for unification of doctrine was rejected by the Supreme Court because the author did not provide proof of a previous or earlier judgement that differed from the one in her case. Her application to the Supreme Court for a judicial review was rejected because she could have submitted the "new" document on which she based her case at an earlier stage. The author

subsequently filed a new application for reconsideration and it too was rejected. Lastly, her application to the Constitutional Court for *amparo* was also rejected. With regard to the fact that the doctor proposed by the author did not testify as an expert, the Court did not consider that the need for him to do so had been demonstrated, nor that the author would have obtained a favourable judgement as a result of his testimony.

4.5 With regard to the medical reports dating from 2002 submitted by the author as evidence of the serious visual impairment that prevented her from leading a normal life, the State party stresses that during the proceedings the author was unable to prove that she had been struck by a lemon. The State party produced various documents relating to the proceedings. In the particulars of her claim, the author only announced that she would use documentary evidence and witnesses. However, two days before the first hearing, she requested the summons of witnesses. The judge suspended the hearing and ordered that a request for information be sent to the Labour Inspectorate, which reported that there was no record of the occupational accident and that the author had not reported having received a blow to the right eye on 2 July 1993. A second hearing was scheduled and the witnesses proposed by the author summoned; they could not, however, be served with notice. The author provided new addresses for the witnesses and for the first time requested that the ophthalmologist who had operated on her be summoned. The defendant supplied three medical reports. During the course of the second hearing, the principle of the adversarial procedure was respected and the judge provided adequate grounds for the judgement.

5.1 In a note dated 11 May 2003, the author states that the State party's claim that domestic remedies had not been exhausted is being raised for the first time before the Committee without having been put before any of the domestic courts. The author considers that the State party is abusing the legal process by introducing a claim that was not raised before the domestic courts. She considers that it was unnecessary to appeal against the decision of the employment tribunal to reject her request to have the ophthalmologist summoned, since when the Constitutional Court rejected her application for *amparo*, it gave a ruling on the merits of the case, stating that the author's right to use means of proof had not been infringed because, by not having argued convincingly that the final judicial decision could have been in her favour had her request been acceded to, she had not demonstrated that she was left without a defence, as she alleged. One of the formal requirements for filing an application for *amparo* before the Constitutional Court is to have exhausted judicial remedies, and the author had referred to the violation of her right to use means of proof in the application for reconsideration before the High Court. The author denies that the other remedies referred to by the State party are effective or were available to her.

5.2 With regard to the merits, the author maintains that since her lawsuit concerned an eye injury and its relation to a traumatic event, the importance of summoning the ophthalmologist who had operated on her was obvious. The importance of expert testimony could be seen in the fact that the judge had indeed listened to the testimony of the expert proposed by the defendant and assigned decisive weight to it in his judgement. The author concludes that her right to equality before the courts was infringed because she was unable to submit evidence on the same terms as the defendant.

Issues and proceedings before the Committee

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

6.2 The Committee has considered all the information provided by the author and the State party, from which it may be inferred that the author was not left without a defence, since although the ophthalmologist who operated on her was not summoned to the hearing, the author was not prevented from submitting the report and having it included in the court record. Moreover, whereas the defendant was not able to cross-question her ophthalmologist, the author had the opportunity to cross-question the expert proposed by the defendant. The Committee observes that the report dated 3 August 1993 referred to by the author is not consistent with the report of 2 August 1993 by the emergency doctor in the health centre to which the author went, which put the probable date of the accident at approximately 20 days previously, i.e. after the author's employment had ended. The Committee also observes that the judge who considered the case explained in his judgement the reasons why he believed that it had not been proven that the injury sustained by the author was work-related. The Committee recalls its jurisprudence to the effect that it is for the courts of States parties to assess the facts and the evidence, unless the assessment is manifestly arbitrary or constitutes a denial of justice,[2] neither of which circumstances applies in this case. The Committee finds that the author has not sufficiently substantiated, for the purpose of admissibility, her complaint of an alleged violation of article 14, paragraph 1, of the Covenant, and that her complaint is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

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

(b) That this decision shall be communicated to the State party, the author of the communication and her lawyer.

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

Notes

[1] Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, decision of 3 April 2001, para. 8.2.

[2] Communication No. 986/2001, *Semey v. Spain*, decision of 30 July 2003, para. 8.6.
