United Nations CCPR/C/127/D/2834/2016

International Covenant on Civil and Political Rights

Distr.: General
18 March 2020
English
Original: Spanish

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2834/2016*, **

Submitted by:	H.J.A.L. (represented by counsel, Mr. Montenegro Figueroa)
Alleged victim:	The author
State party:	Colombia
Date of communication:	21 January 2015
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 21 October 2016 (not issued in document form)
Date of adoption:	8 November 2019
Subject matter:	Permanent debarment from holding a seat in the Senate following removal from office
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to due process; right to have a conviction and sentence reviewed by a higher tribunal; right to take part in the conduct of public affairs; and right to stand for election
Articles of the Covenant:	14 (5) and 25
Articles of the Optional Protocol:	3 and 5 (2) (b)

1. The author of the communication is H.J.A.L, a Colombian citizen. He claims that the State party has violated his rights under articles 14 and 25 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 23 March 1976.

* Adopted by the Committee at its 127th session (14 October–8 November 2019).

** The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laky Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany and Hélène Tigroudja.

The facts as submitted by the author

2.1 According to the official declaration of election results issued pursuant to Resolution No. 1787 of 18 July 2010 of the National Electoral Council, the author was elected senator of Colombia for the 2010–2014 congressional term.

2.2 At the time that he held his seat in the Senate, the author was a shareholder in the company Aposucre S.A., whose main line of business is gambling and betting, and in Unicat S.A., a related company of Aposucre S.A. The author sold his shares in these companies in July 2013.

2.3 Aposucre S.A. signed a concession contract with the company Emcoazar[1] to operate gambling establishments in the Department of Sucre for a period of five years, from 1 September 2008 to 31 August 2013. In June 2013, Emcoazar opened a tender for a new concession for the operation of gaming activities in the Department of Sucre. Aposucre S.A. was the only company to submit a bid.

Proceedings for the author's removal from office

2.4 R.M.M.A filed a petition[2] for the removal of the author from his seat in the Senate[3] on the grounds that, by repurchasing the shares in the company in which the author had previously held an interest, and given that shares were also held by his brother and by the company Unicat S.A. (founded by the author's mother), the author had acquired a controlling interest in Aposucre S.A. (which had a gaming concession contract with Emcoazar and which had submitted a bid in another tender for the same type of concession).

2.5 The Administrative Chamber of the Council of State,[4] sitting in plenary session, issued a decision on 28 July 2015 in which it ordered the author's removal from office in the following terms:

> In the view of this Court, the actions taken immediately before the award of the exclusive gaming concession, the steps taken within the company Aposucre S.A. to consolidate the defendant's direct equity holdings and the stock under his control as a shareholder in the company Unicat S.A. with the shares held by his close family members, and the manner in which the ensuing shareholder negotiations unfolded demonstrate that Senator […] was fully aware that he had placed himself in a situation that would make him subject to disqualification […] The fact that he played an active part as a major shareholder in the discussion held in the meeting of stockholders and that he voted in favour of having Aposucre S.A. enter a bid in the open tender for the aforementioned concession contract with a government agency warrants his removal from office, inasmuch as such actions are sufficient grounds for a finding that he has engaged in conduct that is incompatible with his public office.
>
> The foregoing allows this Court to conclude, without need for additional consideration, that there is sufficient reason for removing […] from his position as senator of the Republic for the period 2010–2014 on the grounds that he has violated article 180 (2) of the Constitution.[5]

2.6 As a result, the author lost his political right to stand for election and is barred from doing so for life.

[1] Emcoazar is a decentralized industrial and commercial company at the departmental level which holds a monopoly on games of chance in the Department of Sucre. In contractual matters it is subject to the regulations governing State entities.

[2] The procedure for removal from office is established in articles 182 and 183 of the Constitution and in Act No. 144 of 1994.

[3] The author does not provide the exact date of the petition.

[4] The country's highest administrative court.

[5] Members of Congress may not "enter into arrangements, on their own behalf or behalf of others, with public entities or officials in charge of matters of taxation, act as their representatives or enter into any contract with them, either directly or through an intermediary. Any exceptions to this provision shall be established by law."

2.7 The author adds that he has exhausted all domestic remedies, since the decision of the Council of State of 28 July 2015 cannot be appealed.

The complaint

3.1 The author claims that his rights under articles 14 (5) and 25 of the Covenant have been violated.

3.2 Specifically, the author considers that his right under article 14 (5) of the Covenant to have "his conviction and sentence … reviewed by a higher tribunal" has been violated. While it is not a matter of punishable acts of the sort that would be tried in a criminal court, his case was heard by an administrative court with the power to impose sanctions and that, as such, is the "embodiment of the *ius puniendi* of the State". The author argues that the fact that he was not guaranteed the right to appeal a judgment that entailed such a severe penalty constitutes a violation of the principle of due process.

3.3 The author also alleges a violation of article 25 of the Covenant, since his removal from office permanently disqualifies him from standing for election to Congress or for election as the President or Vice-President of the State party at any time in the future.[6] The author contends that the limitation of his right to stand for election is disproportionate. He adds that his debarment is the result of political disciplinary proceedings in which his personal responsibility was not analysed, he was not found to be guilty of any specific offence, the sentence was not proportionate to the alleged transgression and there was no possibility of appealing the decision. Consequently, the author contends that he is the victim of a political sanction that prevents him from exercising his right to stand for election for the rest of his life.

3.4 With regard to the matter of redress, the author requests the Committee to recommend that the State party: (a) restore his political rights by revoking the Council of State's judgment of 28 July 2014; (b) modify its domestic legal system so as to guarantee the right to appeal judgments entailing removal from office and require judges presiding over such proceedings to determine the degree of guilt and ensure the proportionality of the sanction imposed so that a respondent will not be permanently barred from exercising his or her right to stand for election; (c) award monetary compensation to the author for non-pecuniary and moral damages and for the damage done to his ability to realize his goals in life; and (d) publicly apologize to the author for the harm done to him and acknowledge its responsibility in the case at the international level.

State party's observations on admissibility and the merits

4.1 In its observations of 3 April 2017, the State party asserts that the communication is inadmissible because the author has not exhausted all available domestic remedies. The State party argues that there are available in Colombia effective remedies which the author has failed to use in order to challenge the violation of his political rights (article 25 of the Covenant) and of his right to appeal the judgment against him (article 14 (5) of the Covenant) that he claims to have occurred in the proceedings concerning his removal from office.

4.2 The State party contends that the author could have filed an application for reconsideration and a petition for review but did not make use of those remedies. Furthermore, the State party is also of the view that it would have been perfectly feasible for the author to have filed a petition for a writ of *amparo* for the protection of his constitutional rights as provided for in article 86 of the Constitution and set out in Decree No. 2591 of 1991. It adds that the effectiveness of *amparo* actions in challenging Council

[6] The author explains that removal from office is a constitutional sanction imposed on officials holding seats on representative bodies for violations of the rules on ineligibility and disqualification or on conflicts of interest emanating from article 183 of the Constitution. The sanction is dismissal and permanent debarment from standing for election, as expressly provided for by the Constitution. Article 179 of the Constitution establishes that no one may become a member of Congress who has ever been removed from his or her congressional seat. Article 197 provides that no person who has been disqualified from holding office may become President or Vice-President.

of State judgments entailing removal from office is demonstrated by the fact that the Second Section (Subsection B) of the Council heard the petition for a writ of *amparo* for protection of the right to due process lodged by William Villamizar Laguada and reversed his removal from office.

4.3 With regard to the merits, the State party reports that the nature and purpose of proceedings concerning removal from office are specified in Colombian jurisprudence. The State party refers specifically to Judgment C-254A/12 of the Constitutional Court, which provides guidance on the nature of such proceedings. The State party also refers to articles 179, 180, 183 and 184 of the Constitution and observes that the Constitution itself sets out the rules on the ineligibility and disqualification of members of Congress and those governing proceedings on removal from office. It adds that those proceedings are governed in Colombia by Act No. 144 of 1994 and by article 11 (6) of the Code of Administrative Procedure and Administrative Litigation (Act No. 1437 of 2011).[7]

4.4 The State party refers to general comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service, which states:

> Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable.[8]

In the light of the foregoing, the State party asserts that, in accordance with the Colombian Constitution, Colombian law and its jurisprudence, it is clear that the principles of legality, reasonableness and objectivity required by the Covenant and by the Committee in relation to the imposition of conditions for the exercise of civil and political rights have been upheld.

4.5 The State party maintains that the provision of the Constitution which establishes that former members of Congress who have been removed from office may not be re-elected to Congress (art. 179) is nothing more than "a legal penalty for having violated the code of conduct that members of Congress must observe by reason of the exceedingly important social and political role played by their offices in upholding the prestige and respectability of Congress".[9] The aforementioned is a legal, reasonable and objective precept that conditions the exercise of civil and political rights by legislators when they betray the trust placed in them by the voters. The State party therefore concludes that the exercise of the rights protected by article 25 of the Covenant may be suspended or denied on reasonable and objective grounds established by law. Consequently, the State party asserts that the author is in error when he argues that the State party may not limit the exercise of his political rights, especially when such a limitation takes the form of a court-ordered penalty whose purpose is to support and safeguard the constitutionality of the legislature.

4.6 Furthermore, with regard to the alleged violation of article 14 (5) of the Covenant, the State party argues that, as the proceedings on which the communication is based are not related to a criminal case, this article does not apply to the author's allegations or to the situation in question.

---

[7] "Conflicts of interest and grounds for debarment and disqualification. When there is a conflict between the general interest of the public service and the direct personal interest of a public servant, the latter shall recuse himself or herself. Any public servant who is required to carry out administrative actions, conduct investigations, examine evidence or issue final decisions may be recused if he or she does not declare that he or she is prevented from acting in the matter by reason of: [...] 6. The lodging by one of the persons concerned by the administrative action, his or her representative or agent, of a criminal complaint against the public servant, his or her spouse, partner, or relative up to the second degree of consanguinity, second degree of affinity, or first degree of a civil relationship, before the administrative action is initiated or thereafter, provided that the complaint concerns acts unrelated to the action and that the subject of the complaint has a connection to the criminal investigation."

[8] Para. 4.

[9] Judgment C-254A/12 of the Constitutional Court.

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

5. In his comments of 3 September 2017, the author submits that, pursuant to both the Constitution and statutory law (article 1 of Act No. 144 of 1991), proceedings to decide whether a legislator is to be removed from office are a single-instance procedure. The author claims that the State party therefore has no grounds for maintaining that the author did not appeal against the Council of State's judgment, which was reached in a single-instance procedure and issued by one of the highest-ranking judicial authorities in the Colombian legal system. The author submits that there is no reason why he would have to exhaust domestic remedies given that the use of such remedies, such as a petition for a writ of *amparo* or a petition for review, which are extraordinary remedies, would in no way have improved his situation.

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 to the Covenant.

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

6.3 The Committee takes note of the author's claim based on article 14 (5) of the Covenant relating to the impossibility of appealing the judgment of the Council of State. Without prejudice to the serious consequences for the author of the decision of the Council of State, the Committee recalls that article 14 (5) of the Covenant "does not apply to procedures for determining rights and obligations in a suit at law or any other procedure not being part of a criminal appeal process".[10] The Committee notes that the proceedings concerning removal from office that are the subject of this communication are not criminal proceedings but are rather of an administrative nature. Accordingly, the Committee finds that this claim is incompatible *ratione materiae* with article 14 (5) of the Covenant and declares it inadmissible under article 3 of the Optional Protocol.

6.4 As to the author's complaint based on the alleged violation of article 25 of the Covenant owing to the consequences of the Council of State's judgment in terms of the author's participation in political affairs, the Committee notes that this complaint was never brought before the domestic courts. The Committee takes note of the State party's argument concerning the availability of the remedies of a petition for review and a petition for a writ of *amparo*, which the author did not use. Nevertheless, the Committee also recalls its established jurisprudence that it is necessary to exhaust only those remedies that have a reasonable prospect of success.[11] The Committee takes note of the author's argument that neither a writ of *amparo* nor a petition for review would have improved his situation. However, the Committee considers that the author has not demonstrated that such remedies had no prospect of success with respect to the alleged violation of article 25 of the Covenant, especially in the light of the precedent cited by the State party, in which a writ of *amparo* was granted in a similar case in which the Council of State had issued an order for an elected official's removal from office. Accordingly, the Committee finds that the author has failed to exhaust the domestic remedies available to him in relation to the present complaint and that the communication is thus inadmissible under article 5 (2) (b) of the Optional Protocol.

[10] General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 46.

[11] See, for example, *Gómez Vázquez v. Spain* (CCPR/C/69/D/701/1996), para. 10.1; *Semey v. Spain* (CCPR/C/78/D/986/2001), para. 8.2; *Alba Cabriada v. Spain* (CCPR/C/82/D/1101/2002), para. 6.5; *De Dios Prieto v. Spain*, (CCPR/C/87/D/1293/2004), para. 6.3; and *Villamón Ventura v. Spain* (CCPR/C/88/D/1305/2004), para. 6.3.

6.5 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 3 and 5 (2) (b) of the Optional Protocol;

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