Spanish Judicial Decisions in Public International Law, 2006

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. – Execution of Judgement of the European Court of Human Rights.
Decision of the Constitutional Court (Sentencia del Tribunal Constitucional – STC) *194/2006 of 5 July*

Subject matter of the appeal: Appeal for legal protection: against the decision of 20 November 2001 handed down by the Chamber for Social and Labour Matters of the Supreme Court in an appeal for judicial review; and against the decision of 5 October 1995 handed down by the Chamber for Social and Labour Matters of the Madrid High Court of Justice in an appeal for reversal of the judgement of Madrid Labour Court No. 4 holding the Appellant's disciplinary dismissal from TVE S.A. (Spanish television) to be lawful. Plea for review based on the Judgement of the European Court of Human Rights (ECHR) of 29 February 2002, which held the penalty to be in infringement of the fundamental right to freedom of expression, and ordered the Spanish State to pay the Plaintiff compensation for pecuniary and non-pecuniary damage plus legal costs and expenses.

"II. Legal Grounds

1. As outlined above, this appeal for legal protection was brought against the decision handed down by the Chamber for Social and Labour Matters of the Supreme Court of 20 November 2001, which dismissed the appeal for judicial review filed by the Plaintiff against the final judgement issued by the Chamber for Social and Labour Matters of the Madrid High Court of Justice of 5 October 1995, holding that his disciplinary dismissal from TVE S.A. [Spanish television] had been lawful. The plea for judicial review was based on the Judgement of the European Court of Human Rights of 29 February 2000, which held that

Spanish Yearbook of International Law, Volume XII, 2008

the penalty of dismissal violated Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (CPHR: right to freedom of expression) and which, under the terms of Article 41 of the CPHR, ordered the Spanish State to pay the Plaintiff the sum of one million pesetas by way of compensation for pecuniary and non-pecuniary damage plus a further 750,000 pesetas to cover legal costs and expenses.

In his plea for legal protection, the Appellant argues that it is the above decision dismissing his appeal for judicial review which is in violation of his right to effective judicial protection (Article 24.1 of the Spanish Constitution), insofar as his right of freedom of expression is concerned [Article 20.1 a) of the Spanish Constitution]. Hence, it is his contention that, to reject the judicial review sought, amounts to arbitrarily denying enforcement of the ECHR's judgement of 29 February 2000. The Appellant concludes that restoration in full of his right of freedom of expression demands that we, not only annul the Madrid High Court's judgement of 5 June 1995, but also declare his dismissal to be null and void, with all the legal consequences inherent therein.

(…)

4. (…) However, unlike the case decided by the oft-cited Constitutional Court Decision 245/1991, in the present appeal for legal protection there is no evidence to support the current or persistent nature of the violation of the Appellant's right to freedom of expression, claimed by the Judgement of the European Court of Human Rights of 29 February 2000. In effect, this Judgement held there to be a violation of Article 10 of the CPHR, inasmuch as the European Court deemed that, "despite the offensiveness of the terms used" by the Plaintiff in his remarks during radio programmes about the alleged management failings in Spanish Television, employing "rude and impolite" expressions (in the course of a lively and spontaneous exchange of views between the Plaintiff and radio-show hosts), "basically considering the Plaintiff's seniority in the company and his age, the penalty of dismissal was extremely severe, when other disciplinary penalties, less serious and more appropriate to the case, could have been envisaged". In brief, the European Court of Human Rights deemed there to be a violation of Article 10 of the CPHR on finding that, in the light of the circumstances of the case, "the relation between the penalty and the legitimate aim pursued was not reasonably proportionate".

This view led the European Court of Human Rights, on applying Article 41 CPHR ("just satisfaction") and responding to the Plaintiff's plea for compensation – in the terms already outlined in the recital of the background facts leading up to this Decision – to award him, by way of pecuniary and non-pecuniary damage, compensation of one million pesetas (plus 750,000 pesetas for legal costs and expenses) payable by the Spanish State, on finding that "having regard to the precariousness of the applicant's position at TVE (even before the disciplinary proceedings had begun), the applicant had not shown that he had used reasonable endeavours to find work, in spite of the fact that his abilities and experience in the audiovisual field constituted a trump card in his favour"; and, finally "the

fact that, in view of the applicant's celebrity it was difficult to dissociate the pecuniary damage from the non-pecuniary damage".

It is thus impossible to share the contention of the Plaintiff, who is indeed seeking that we declare his dismissal from TVE to be null and void – so ordering his immediate reinstatement, with payment of unpaid salaries – on the premiss that the Judgement of the European Court of Human Rights of 29 February 2000 has failed to provide perfect redress in respect of the right to freedom of expression which it states to be violated, inasmuch as the penalty of dismissal imposed by TVE, S.A., has not been annulled, and the Plaintiff has not been compensated in the manner envisaged under Spanish law.

This plea cannot be allowed: on the one hand, because the material nature of the infringement of the Appellant's fundamental right to freedom of expression, occasioned by his being dismissed from his post at TVE as of 15 April 1994, no longer exists at the present time (in contrast to what was found by this court in the case of sanctions involving deprivation of liberty which were still being served), in that the effects deriving from loss of work as a result of dismissal do not amount to maintenance of the violation of said fundamental right (refuted by us in Constitutional Court Decision 313/2005, in the case of a criminal sentence which, among other effects, led to loss of employment by a career soldier); and, on the other hand, because, at all events, any damage that such infringement could cause the Appellant is no longer present, inasmuch as it was the European Court of Human Rights itself in its Judgement of 29 February 2000, the execution of which was supervised in a timely and satisfactory manner by the Committee of Ministers of the Council of Europe [Resolution DH (2002) 106], which, having declared there to be a violation of the freedom of expression, proceeded to redress this by setting the corresponding just satisfaction to be awarded to the Appellant for pecuniary and non-pecuniary damage caused by the dismissal, as explained above.

(…)

5. (…) Indeed, as has been indicated, the European Convention on Human Rights imposes no obligation to give internal effect to Judgements of the European Court of Human Rights, by annulling the authority of *res judicata* and the executory force of any national judicial decision that said Court may have deemed to run counter to the Convention. Nor does it confer upon the justiciable cause of action a right to enlarge the grounds envisaged under domestic law for the reopening of judicial proceedings that have led to a final and enforceable decision (Constitutional Court Decision 245/1991, Ground 2). (…) Thus, in the case now before the Court – unlike the situation referred to in Constitutional Court Decision 240/2005 – the appeal for judicial review, rather than being ruled inadmissible was instead dismissed, and the ground of judicial review pleaded by the Appellant was, as stated above, that envisaged under Article 1796.1 of the 1881 Civil Procedure Act (*Ley de Enjuiciamiento Civil-LEC*) (i.e., if, after the final decision has been issued "decisive documents should be recovered, which may have been withheld either by *force majeur* or by the action of the party in whose favour the court has found"), with the Supreme Court cogently reasoning

that one cannot properly speak of a "recovered" document in the case of a Judgement of the European Court of Human Rights (Decision of 29 February 2000) that did not exist at the date on which the Decision of 5 October 1995 was handed down by the Chamber for Social and Labour Matters of the Madrid High Court of Justice, the review of which is now being sought.

In effect, there is no debate in the present case as to whether a judgement of the European Court of Human Rights may be regarded as a "new fact" (or if preferred, in the terms employed by the Appellant himself, a "new document"). Instead, the determining factor is that the European Court's Judgement of 29 February 2000 cannot be deemed to be a recovered document, for the purpose of the ground of review established at that time under Article 1796.1 of the 1881 Civil Procedure Act, corresponding to Article 510.1 of the current Civil Procedure Act. Accordingly, it is in no way unreasonable to hold – as did the Chamber for Social and Labour Matters of the Supreme Court – that to recover a document is to retrieve a document which was already possessed or existed before delivery of the judgement whose rescission is sought, and which could not be produced to the court on the day owing to *force majeur* or wrongful action by the other side, it being obvious that such circumstances are not present in the case now under examination.

Hence, to hold, as has the Supreme Court in the decision challenged in this appeal for legal protection, that the ECHR's Judgement of 29 February 2000, on which the Plaintiff's appeal for judicial review was based, does not come within the ground stipulated by Article 1796.1 of the 1881 Civil Procedure Act (or within any of the remaining grounds of review), and that, for a judgement of the European Court of Human Rights to be a ground of review of final decisions, the current statutory rules would have to be amended by establishing a new *ad hoc* legal ground of review, is an answer that cannot be deemed to run counter to the right to effective judicial protection (Article 24.1 of the Spanish Constitution). Moreover, Article 510.1 of the prevailing 2000 Civil Procedure Act reproduces – with slight changes of nuance in the wording – Article 1796 of the 1881 Civil Procedure Act and, indeed, Spanish lawmakers have enacted no provision that obliges judges and courts to review final decisions on the grounds of an ECHR judgement which has declared there to be a violation of a fundamental right recognised by the European Human Rights Convention. Accordingly, the Appellant's complaint must be disallowed and, along with it, his appeal for legal protection".

2. – Application under Spanish law of a "View" issued by the Human Rights Committee of the International Covenant on Civil and Political Rights.

Decision of the Chamber for Administrative Proceedings of the National High Court (Sentencia Audiencia Nacional – SAN) *of 20 April 2006.*

"Legal Grounds

(…)

TWO: The above-mentioned Views issued by the Human Rights Committee contain the following facts outlined by the Appellant in this case. The latter was

intercepted by two local police officers from the town of Yecla on 21–9–1990 when he, together with other persons, was writing graffiti (*pintadas*) in favour of the right to refuse to perform military service. At the time of his detention, a struggle ensued and the Appellant accidentally struck the policeman in one eye, causing a contusion. The author was held in custody on 21 September 1990 and released the following day, 22 September 1990. The hearing took place on 14 June 1995 and, on 16 June 1995, Criminal Court No. 3 of Murcia sentenced him for the offence of attacking a law enforcement officer, to a penalty of six months' and one day's imprisonment and to pay a given sum by way of compensation in favour of the injured policeman. This decision was confirmed on 20 November 1995 by the Murcia Provincial High Court. Finally, after a series of procedural vicissitudes in the Constitutional Court, on 5–3–1997 this court dismissed an appeal for legal protection for alleged undue delays in bringing him to trial, deeming that there were insufficient grounds to justify a decision.

Said Committee's Views, approved on 30–10–2003, concluded that Article 14 subsection 3 c) of the Covenant (Chronological List of Statutory Instruments: *Repertorio Cronológico de Legislación – RCL* 1977, 893) [right to a speedy trial without undue delay] had been violated. The Committee accordingly reminded the Spanish State of the commitment undertaken in its capacity as a State Party to guarantee the Complainant the possibility of seeking an effective remedy, and at the same time indicated its wish to receive information from the State Party within 90 days about the measures taken to give effect to the Committee's Views.

(…)

FIVE (…) The basic claim running through these proceedings entrenches the above Views of the Human Rights Committee as an essential point of reference for invoking the right to an effective remedy envisaged under Article 2.3.a) of the International Covenant of reference (RCL 1977, 893), as well as the right to trial without undue delay, thereby raising both such rights to the category of fundamental rights in terms of Article 24.2 of the Constitution (RCL 1978, 2836). In the light of the above, it is essential to determine the act, action or provision pivotal to this trial, to which the Plaintiff connects the infringement of fundamental rights whose redress he now seeks. We saw above the content of the written submission addressed by the Claimant to the Ministry of Justice on 30–12–2003 and the Administration's answer of 25–3–2004. Accordingly, deeming the Claimant's said written submission of 30–12–2003 to be a claim (albeit for dialectic purposes, on application of the principle of *pro actione*, and because it seems that the Public Prosecutor's Office and the State Counsel have also regarded it as such), the act taken on appeal must be assumed to flow from the administrative dismissal of the aforesaid claim (presumed or express, according to the nature to be attributed to the answer given by the Administration on 25–3–2004). In view of the fact that the violation of fundamental rights pleaded by the Appellant cannot, as we shall see, be attributed to the said dismissal, the present appeal can therefore end in no way other than in being dismissed.

The Plaintiff is seeking the re-establishment or effectiveness of the right to an effective remedy envisaged under Article 2.3.a) of the International Covenant cited above, as well as the right to trial without undue delay. For dialectic purposes, we are going to accept the Appellant's contention that the right to said effective remedy comes within the ambit of Article 24 of the Constitution (RCL 1978, 2836), which must be construed in accordance with the terms of Article 10.2 of the Constitution, it being evident, on the other hand, that the right to trial without undue delay forms part of the content of Article 24 subsection 2 of our supreme law. As stated above, however, the administrative action that underlies this action does not violate said rights.

It should be recalled here that under Article 2.3.a) of the International Covenant on Civil and Political Rights (RCL 1977, 893), each State Party undertakes to ensure that "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy". This being so, the possibility of seeking the aforesaid remedy thus existed under domestic Spanish law even before the Human Rights Committee issued the Views that the Appellant brandishes as essential title to his right. Indeed, in this suit the Plaintiff could have had recourse: to channels envisaged for administrative proceedings under Article 292 and successive provisions of the 1985 Judiciary Act (*Ley Orgánica del Poder Judicial – LOPJ*: RCL 1985, 1578, 2635); and subsequently, where applicable, to the courts of law in the event of a possible adverse response from the Administration. The Appellant, in contrast, forswore the domestic remedies he had at his disposal for redress of what he perceived as an infringement of his right to trial without undue delay, and had recourse instead to the Human Rights Committee, which issued its Views couched in the terms now known, views that permitted him to invoke a right (the possibility of calling for an effective remedy) that, in reality, was already recognised under Spanish law. Accordingly, the administrative action forming the subject matter of this case (whether one considers the challenged Administration's answer of 25–3–2004 or the alleged dismissal of the claim) does not deny the right to file an effective remedy alluded to in the Views expressed by the Human Rights Committee. It should be noted at this point that the communication sent by the Administration to the Claimant on 25–3–2004 precisely advises him on the proper and fitting form for lodging his claim, from which the conclusion must be drawn that the administrative action lying at the centre of this case did not violate the above-mentioned right which has been invoked by the Plaintiff and whose merits have been discussed here.

The claim in respect of the other right relating to trial without undue delay can hope for no better fate. We must stress the fact that the limited scope of the verification which the Court is able to undertake here is confined to the administrative action forming the subject of this case, and this is in turn confined to examining whether or not the latter amounted to infringement of the right to trial without undue delay. Although the very opening sentence of this paragraph is evidence enough of a negative response, we shall nonetheless add the following: in the first place, it should be pointed out that it was not the

Administration which incurred delay, but rather the Claimant who acted ahead of time. We refer here to what was stated above on addressing the aspect of the premature filing of this administrative appeal and the six-month time limit enjoyed by the Administration to settle it. Furthermore, exploring this point in greater depth, it is no mere idle matter to recall that the Committee's Views were approved on 30–10–2003 and that the Claimant's request claiming an effective remedy and the relevant compensation was sent to the Administration on 30–12–2003, i.e., before the elapse of the ninety-day period during which the Committee wished to receive information from the State Party on the measures adopted for implementing its Views. In the second place, it should be noted that the undue delay is attributable to the substantiation of the criminal trial in question, meaning that said delay falls outside the administrative action forming the subject of the administrative appeal before this Court. It therefore follows that this appeal must likewise fail on this point, since it is evident that the above-mentioned administrative action did not violate the invoked fundamental right to trial without undue delay.

Accordingly, for the reasons set forth in detail above, this appeal is duly dismissed, the Court failing to find any violation by the administrative action in question of the aforesaid rights pleaded by the Appellant pursuant to Article 24.2 of the Constitution (RCL 1978, 2836), thereby causing the plea for compensation to fall away".

IV. SUBJECTS OF INTERNATIONAL LAW

1. Universal criminal jurisdiction of the State

Supreme Court Decision (Sentencia del Tribunal Supremo – STS) *1240/2006 of 11 June*

Subject matter of the appeal: Central Criminal Court No. 1 issued Court Order dated 19–10–2005, ordering the search for, capture and detention of US military personnel for the purposes of extradition, for an alleged crime of homicide, confirmed on review by Court Order dated 28–10–2005, which was taken on appeal by the Public Prosecutor's Office before the Criminal Chamber of the National High Court. Section Two of the latter court handed down Court Order dated 08–03–2006 upholding said appeal, declaring lack of jurisdiction, revoking the Court Orders referred to above, and ruling that the preliminary enquiries be shelved. The Complainants then lodged an appeal against this last-mentioned Court Order in the Supreme Court. The Supreme Court gave leave to hear this appeal, setting aside and quashing the previous Court Order, and declaring that Spanish Courts do enjoy jurisdiction to hear the facts pleaded in this case.

"Legal Grounds

(…)

TWO: The court order brought on appeal here (JUR 2006, 126471) commences by making reference to "the factual evidence which is the basis for the

court order brought on appeal" (the underlining is ours) [in brief: that in the course the war in Iraq, waged by United States and British troops, with the bulk of the international press being lodged at the Palestine Hotel in Baghdad at the behest of the U.S. Pentagon, on 8 April 2003 a shell fired by a U.S. tank against the 15th storey of the hotel, hit Spanish "*Telecinco*" television journalist, Rogelio, and "Reuters" reporter, Taras Protsyuk, killing them both]; stressing: 1) that such facts, in the opinion of the Court, warrant the definition of a crime against the international community under Article 611.1, in conjunction with Article 608.3, and a crime of murder under Article 139 of the Penal Code (RCL 1995, 3170 and RCL 1996, 777); 2) that the Public Prosecutor's Office and privately brought accusations respectively focus the discussion of this appeal on the following aspects, the absence of jurisdiction in the case of the former, and the existence of jurisdiction on the part of the Spanish courts in the case of the latter; and, 3) that "only if jurisdiction is found to exist can the remaining pleas be examined".

THREE: After taking this as the point of departure and ruling that the facts heard in these proceedings could not constitute a crime of terrorism under Article 577 of the Penal Code (RCL 1995, 3170 and RCL 1996, 777), as sought by another of the accusations, the Court of First Instance examines the constituent elements of the facts pleaded, underscoring that, both for the offence of "crime of war" under Article 611 of the Penal Code (in conjunction with Articles 146 and 147 of the 4th Geneva Convention [RCL 1952, 1244] and Article 79 of Additional Protocol I [RCL 1989, 1646, 2187, 2197]), and for the crime of murder pursuant to Article 139 of the Penal Code, there must be "malice aforethought", which, in its opinion, is not present in the facts before the court. In this respect, the Court holds that "it is a widely known fact disseminated by all manner of news media" (the underlining is ours), that we are not confronted here by an "act committed with malice aforethought" but rather an "act of war carried out against an apparent enemy, mistakenly identified", bearing in mind that "the intervention of the Iraqi communications alerted the American army to the fact that there was an Iraqi unit firing artillery shell from the Palestine Hotel against the US units (…)", from which it is to be concluded that "the typical elements required to constitute the criminal offence envisaged under Article 611.1 in conjunction with Article 608.3 of the Penal Code, are not present".

(…)

TEN: (…) It has to be acknowledged that the Appellants are in the right. Indeed, though it is true that the Court of First Instance has explained the reason why it held that the Spanish courts lacked jurisdiction to take cognisance of the facts pleaded here, deeming them to be penally atypical due to the absence of *mens rea* (declaring it to be "a widely known fact disseminated by all manner of news media" that the shell fired from a US army tank against the Hotel Palestine was "an act of war carried out against an apparent enemy, mistakenly identified", inasmuch as "the intervention of the Iraqi communications alerted the American army to the fact that there was an Iraqi unit firing artillery shell from the Palestine Hotel against the US units (…)") [v. Legal Grounds 6, 7

and 9 of the Court Order taken on appeal], it is nevertheless evident that said declaration cannot be made without having previously defined the scope of Spanish jurisdiction, attributing the cognisance of these facts to our Courts.

Notwithstanding this, it is also undeniable that the Court Order brought on appeal starts out from "the factual evidence which is the basis for the Court Order brought on appeal", in which nothing is specified as to the cause of the shot responsible for the death of the two journalists, one Spanish and one Ukrainian (v. Ground 2 of said Order), and then goes on to say that the version of same to which we have already referred constitutes "a widely known fact disseminated by all manner of news media" (v. Ground 6). All of this, without any special reason and without subjecting to critical scrutiny the evidentiary elements on which the Appellants in this case seek to base their accusation.

From the above it is clear that there has been a violation of the Appellants' right to effective judicial protection and to a trial with all due guarantees, thereby bringing about the defencelessness of the parties bringing the charge against those liable for the shell that caused the death of the Spanish journalist, Rogelio, and the Reuters Agency reporter.

It is therefore fitting and proper that rulings two and three of the Court Order taken on appeal should be set aside, as should Court Order of 19 October 2005, and that preliminary enquiries No. 99/03 should be shelved.

(…)

TWELVE: (…) Turning specifically now to the interpretation of the rule that attributes jurisdiction under Article 23.4 of the 1985 Judiciary Act (*Ley Orgánica del Poder Judicial – LOPJ*: RCL 1985, 1578, 2635), the Constitutional Court states that "the ultimate ground of the rule whereby jurisdiction is attributed resides in the universalisation of the jurisdictional competence of states and their organs to take cognisance of certain facts in which all states have an interest in bringing to trial and prosecuting…". In this respect, the Court has stated that "in principle, Article 23.4 of the LOPJ vests the principle of universal justice with a very full scope, since the sole express limitation which it introduces in this respect is that of *res judicata*". The Constitutional Court, which has the last word in matters of constitutional guarantees (v. Article 123 of the Spanish Constitution), comes to the conclusion that "the LOPJ establishes an absolute principle of universal jurisdiction" (v. Supreme Court Decision 237/2005; Ground 3).

The forcefulness of the above conclusion reached by the Constitutional Court and the irregular legal ground of the contested ruling vis-à-vis the specific problem of the scope of Spanish jurisdiction in the matter, more than justify the alleged statutory infringement being upheld for the reasons especially cited, despite the well-founded comments made in the initial legal grounds set forth in this decision.

Moreover, it has to be said that, in the case in question, there is a legitimate nexus that would also justify the extraterritorial extension of Spanish jurisdiction, in line with the doctrine expounded in the Decision of the Supreme Court of 25 February 2003 (RJ 2003, 2147) [(Ground 8), Guatemala Case], inasmuch as one of the victims, the journalist Rogelio, was a Spanish citizen.

At all events, as a final point, it would also seem appropriate to emphasize that, as is obvious, this ruling does not enter into any legal assessment of the facts alleged, beyond the essential, most provisional type of acknowledgement that same could constitute offences which, for the reasons outlined above, would justify the intervention of the competent Spanish courts in the matter. Hence, it is for the pre-trial hearings to put together the items of evidence needed to render subsequent legal definition of such facts possible.
(…)

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human Rights and fundamental freedoms

a) Non-discrimination by reason of gender

Constitutional Court Decision 214/2006 of 3 July.

Subject matter of the appeal: Appeal for legal protection against: the decision of the National Employment Institute (Instituto Nacional de Empleo – INEM) to suspend a female worker on leave of absence from her job due to maternity; and, the decision of 21 July 2003 of the Chamber for Administrative Proceedings of the Andalusian High Court of Justice, reversing the Decision of 25 April 2001 on appeal.

"II. Legal Grounds

1. The matter raised in this appeal for legal protection amounts to ascertaining whether the decision of the National Employment Institute to suspend a job application by the Appellant female worker, after presentation by the latter of a note of leave of absence for maternity, and by so doing, omit to include her in the list of candidates selected to compete for a job offer, the requirements of which she met in principle, and the subsequent decision handed down by the Chamber for Administrative Proceedings of the Andalusian High Court of Justice (Granada) of 21 July 2003 (JUR 2003, 241692), which held the National Employment Institute's action to be in keeping with the law, have violated the Appellant's right not to be discriminated by reason of sex (Article 14 of the Spanish Constitution [RCL 1978, 2836]).
(…)

2. Our judgement must therefore focus on determining whether the party seeking legal protection has been the subject of conduct running counter to the fundamental right of non-discrimination embodied in Article 14 of the Spanish Constitution (RCL 1978, 2836).
(…)

3. Insofar as the prohibition on discrimination by reason of sex is specifically concerned – a prohibition that finds its *raison d'être* in the desire to put an end to the historical situation of inferiority in the social and legal life of women (exemplified by Constitutional Court Decision 17/2003 of 30 January [RTC

2003, 17], Ground 3) – we have stated that discriminatory conduct is defined by the pejorative result for the woman who: suffers it; and finds her rights or legitimate expectations limited by the presence of a factor whose justificatory virtuality has been expressly repudiated by the Constitution, inasmuch as its very nature poses a threat to the dignity of the human being (Article 10.1 of the Spanish Constitution [RCL 1978, 2836]). Consequently, the specific constitutional prohibition on discriminatory acts by reason of sex means that a direct violation of Article 14 of the Spanish Constitution is to be assumed to have taken place, where it is shown that the prohibited factor represented the ground of occupational disparagement or damage, bearing in mind here that the co-existence of other reasons that might have justified the measure despite its discriminatory result, has no legitimatory value in such cases.

Discrimination of this type doubtless embraces pejorative treatments that are based, not only on the pure and simple corroboration of the victim's sex, but also on the coexistence of reasons or circumstances that have a direct and unequivocal connection with the person's sex, as happens with pregnancy, a differential element or factor that, for obvious reasons, exclusively impinges upon women (Constitutional Court Decisions 173/1994 of 7 June [RTC 1994, 173], Ground 2; 136/1996 of 23 July [RTC 1996, 136], Ground 5; 20/2001 of 29 January [RTC 2001, 20], Ground 4; 41/2002 of 25 February [RTC 2002, 41], Ground 3; or 17/2003 of 30 January [RTC 2003, 17], Ground 3). In this regard, we have also stated that "the protection of working women's biological status and health must be compatible with the preservation of their professional rights, so that any disparagement or damage caused by the pregnancy or ensuing maternity constitutes a case of direct discrimination by reason of sex" (Constitutional Court Decision 182/2005 of 4 July [RTC 2005, 182], Ground 4).

(…)

6. (…) Nevertheless, we have also indicated that protection of women and their health by reason of their sex must be examined with the utmost caution and even with distrust, due to the negative repercussions that this may have, directly or indirectly, on the achievement of effective equality between men and women (Constitutional Court Decision 229/1992 of 14 December [RTC 1992, 229], Ground 3). Hence, with regard to situations deriving from pregnancy or maternity, we have maintained that Article 14 of the Spanish Constitution (RCL 1978, 2836) bars those circumstances which for obvious biological reasons exclusively affect women and may be used to set obstacles in the way of women's access to or permanence in the job market, thereby perpetuating the serious discrimination that women have historically suffered in the society and the workplace (Constitutional Court Decisions 166/1988 of 26 September [RTC 1988, 166], Ground 2; and 240/1999 of 20 December [RTC 1999, 240], Ground 7). In contrast, to determine the scope of the requirements that Article 14 of the Spanish Constitution lays down to render equality of women in the job market effective, we have sounded a reminder, advising: that it is essential to attend to circumstances such as "the singular impact which is had by maternity and breastfeeding on women's work status, when it comes to offsetting the real

disadvantages that woman – as compared to men – have to tolerate in order to keep their jobs, and which is even borne out by data revealed by the statistics (such as the number of women who – unlike men – are forced to quit work for this reason)" (Constitutional Court Decision 109/1993 of 25 of March [RTC 1993, 109], Ground 6); and that "women with young children have undeniable and greater difficulty in joining or remaining in the workforce" (Constitutional Court Decision 128/1987 of 16 July [RTC 1987, 128], Ground 10).

There can be no doubt that the institution envisaged under Article 48.4 of the Worker's Charter (*Ley del Estatuto de los Trabajadores – LET*) (RCL 1995, 997) governing suspension of contracts of employment in the event of the maternity of working women, seeks this goal. Without prejudice to the fact that, within the framework of its regulation, a greater link can be perceived between a part of maternity leave and aims relating to the protection of working women's health, particularly the possible periods of rest prior to and six weeks after birth, whereas the remainder of its duration would instead seem to be geared, as a matter of priority, to goals linked to the care of the newborn, it is nonetheless true that the institution as a whole constitutes an instrument of protection of the working woman, targeted at facilitating the compatibility of professional and family life and, by extension, promoting the insertion of women into the job market and favouring the preservation of employment. The progress experienced over the course of time by the institution as a result of successive legal reforms, whether through increasing the duration of the rest period in certain specific cases, extending their application to cases such as the adoption or fostering of minors, or, in particular, enlarging the possibilities of a more balanced division of family responsibilities between the two partners making up the couple in cases where both are workers, up to the limit of six weeks compulsory postpartum rest for female workers, has if anything served to reinforce this structuring of suspension of the work contract in the event of maternity as a measure aimed at favouring women's access to and permanence in the job market.

7. With the legal institution under review being structured in this way, it becomes immediately obvious that the first point to be made about the matter analysed is that its application by the National Employment Institute, i.e., extending this ground of suspension of the work relationship to the relationship existing between unemployed job seekers and job-placement bodies, has resulted in an effect diametrically opposed to that sought by the institution applied. Indeed, if suspension of the work relationship for reasons of maternity is intended to favour the incorporation of women into the job market and prevent loss of employment in cases of maternity, the suspension of an unemployed female worker's job application actually hampers or hinders access to the job market of the woman to whom it is applied, to the extent that she is barred from being taken into consideration for the coverage of job offers handled by the body.

It is true that an identical technique is, apparently, applied in both cases, formally targeted at protecting the female worker's previous legal status by preventing her from being affected by the fact of maternity. Hence, suspen-

sion of the work contract seeks to preserve employment, by ensuring that any possible difficulties posed by maternity to the fulfilling of work obligations are prevented from determining the loss of same. Similarly, it may be surmised that suspension of job applications seeks the protection of the job-seeker status of the female worker affected, by ensuring that any possible difficulties in attending to the requirements peculiar to said status (acceptance of suitable offers of employment, participation in training courses or job programmes, etc.) are prevented, not merely from bringing about the loss of job-seeker status, but also from even bringing about the loss of the benefits associated therewith. Yet, this equivalence between both solutions is merely formal and does not extend, as indicated above, to the sphere of their effects, particularly with regard to those that precisely constitute the measure's ultimate goal. The female worker who suspends her work relationship as a consequence of maternity, retains her work rights in their totality, and is entitled to be reincorporated into her job once the suspension has come to an end without this have caused her any damage whatsoever. In contrast, when an unemployed female worker's job application is suspended, the goals pursued by the job seeker on submitting her application are definitively and irretrievably impaired, barring her from access to any suitable job offers that may be received in the indicated period.

This is exactly the situation that has been brought about in the case submitted to this Court, in which the decision to regard the female worker's job application as suspended, has meant the impossibility of her taking part in the established selection process for a job offer whose educational and professional requirements she met, thereby causing her to lose a job opportunity definitively and irreversibly. Moreover, this pejorative effect is totally alien to the measure of suspension of the work contract envisaged under Article 48.4 of the Worker's Charter (RCL 1995, 997), which seeks precisely to prevent any damage whatsoever to the work relationship deriving from the fact of maternity. We thus see how application to the sphere of the relationship existing between the National Employment Institute and job seekers of a suspension measure envisaged under the Act for application to the sphere of work relationships, through a formally neutral interpretation of the statutory provision, has nevertheless brought about a pejorative effect on the female job seeker, an effect contrary to that sought by the very institution whose application is involved.

(…)

9. Accordingly, we must conclude that the National Employment Institute's decision to suspend the job application of the female worker now seeking legal protection, during the mandatory period of her maternity leave, thereby barring her from inclusion in the list of candidates selected to cover a job offer whose requirements she met, and so prejudicing her possibilities of access to the job market, was devoid of any reasonable justification, proved discriminatory to the Complainant by reason of her status as woman, and violated Article 14 of the Spanish Constitution (RCL 1978, 2836).

(…)"

b) Non-discrimination by reason of sexual orientation

Constitutional Court Decision 41/2006 de 13 February

Subject of the appeal for legal protection: Appeal for legal protection against the decision of the Chamber for Social and Labour Matters of the Catalonian High Court of Justice on 27 June 2003, handed down on Appeal for Reversal in a job dismissal action.

"II. Legal Grounds

1. This appeal for legal protection sought to challenge the Decision handed down by the Chamber for Social and Labour Matters of the Catalonian High Court of Justice on 27 June 2003 (JUR 2003, 184704), upholding an appeal for reversal against the Decision of Barcelona Labour Court No. 24 of 12 November 2002, which had declared the Appellant's dismissal null and void on the grounds of its being discriminatory.

(...)

3. (...) With reference to the above, it must be stressed that homosexual orientation, albeit not expressly mentioned in Article 14 of the Spanish Constitution as one of the specific cases in which discriminatory treatment is prohibited, is indubitably a circumstance included in the clause "any other condition or personal or social circumstance" to which the prohibition on discrimination must be referred. This conclusion is arrived at, based: on the one hand, upon it being evident that, in common with remaining cases mentioned in Article 14 of the Spanish Constitution, homosexual orientation is an historically deep-seated difference which, due both to the action of the public authorities and to social practice, has placed homosexuals at a disadvantage, in positions contrary to the personal dignity recognised by Article 10.1 of the Spanish Constitution, because of the deeply-rooted legal and social prejudices against this minority; and, on the other hand, upon perusal of the rule which, *ex* Article 10.2 of the Spanish Constitution, should serve as an interpretative source of Article 14 of the Spanish Constitution.

Indeed, insofar as the former is concerned, the position of social disadvantage and, in essence, of substantial inequality and marginalisation which persons of homosexual orientation have historically suffered, is well known. Insofar as the latter is concerned, reference might be made by way of example to the fact that, on analysing the scope of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (CPHR) (RCL 1999, 1190, 1572), the European Court of Human Rights has emphasised that sexual orientation is a notion that is undoubtedly envisaged in said Article, duly noting that the list covered by the provision is indicative and not delimiting in nature (Judgement of the ECHR of 21 December 1999 [ECHR 1999, 72], *Salgueiro Da Silva Mouta v. Portugal*, § 28). Stress has been expressly laid on the fact that, to the extent that sexual orientation – like differences based on sex – is a concept covered by Article 14 of the CPHR, differences based on sexual orientation call for particularly important reasons to be justified (judgements of the ECHR of 9 January 2003, L. and V. v. Austria [ECHR 2003, 2], § 48,

and, SL v. Austria [JUR 2003, 14875], § 37, and 24 July 2003 [ECHR 2003, 50], *Karner v. Austria*, § 37, to which reference has been made by a number of subsequent decisions, such as the judgements of the ECHR of 10 February 2004 [ECHR 2004, 9], *B. B. v. Reino Unido*, 21 October 2004, *Woditschka and Wilfing v. Austria*, 3 February 2005 [ECHR 2005, 12], *Ladner v. Austria*, 26 May 2005 [ECHR 2005, 57], *Wolfmeyer v. Austria*, and 2 June 2005, *H. G. and G. B. v. Austria*).

Similarly, in connection with Article 26 of the Covenant on Civil and Political Rights (RCL 1977, 893), which lays down the clause governing equality of treatment and prohibition of discrimination for grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other social status, the United Nations Human Rights Committee has stressed that the prohibition against discrimination for reasons of sex (Article 26) includes discrimination based on sexual orientation (notably, Views of 4 April 1994, Communication No. 488/1992, *Toonen v. Australia*, § 8.7, and Views of 18 September 2003, Communication No. 941/2000, *Young v. Australia*, § 10.4).

Finally, it is essential to cite Article 13 of the Treaty establishing the European Community (RCL 1999, 1205 three), which contains sexual orientation as one of the causes of discrimination where it provides that, "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*".

In view of the references made, whether to this provision or to the protection of sexual orientation which they contain, mention should be made, *inter alia*, of the following: Council Directive 2005/71/EC of 12 October 2005 (LCEur 2005, 2463), relating to a specific procedure for admitting third-country nationals for the purposes of scientific research; Council Directive 2004/114/EC of 13 December 2004 (LCEur 2004, 3586), relating to the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; Council Directive 2004/83/EC of 29 April 2004 (LCEur 2004, 3082), which lays down minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; Council Directive 2004/81/EC of 29 April 2004 (LCEur 2004, 2637), on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; Council Directive 2003/109/CE of 25 November 2003 (LCEur 2004, 155), concerning the status of third-country nationals who are long-term residents; Council Directive 2003/86/CE of 22 September 2003 (LCEur 2003, 3124), on the right to family reunification; or Council Directive 2000/78/CE of 27 November 2000 (LCEur 2000, 3383), establishing a general framework for equal treatment in employment

and occupation. Furthermore, Article 21.1 of the Charter of Fundamental Rights of the European Union (LCEur 2000, 3480), approved in Nice on 7 December 2000, expressly envisages "sexual orientation" as one of the grounds on which the exercise of any type of discrimination is prohibited.

Indeed, unfavourable treatment by reason of homosexual orientation, including treatment in the workplace, constitutes discrimination prohibited by Article 14 read in conjunction with Article 10.2 of the Spanish Constitution.
(…)"

c) Right of asylum and refuge

a) Genital mutilation

National High Court Decision (Chamber for Administrative Proceedings of the National High Court) of 21 June 2006.

"Legal Grounds
(…)

TWO. The Constitution defers to an Act of Parliament to lay down the terms on which citizens of other countries and stateless persons may enjoy the right of asylum in Spain. Act 5/84 of 26 March, as amended by Act 9/94 of 19 May (Article 3), in turn recognises refugee status and, so, grants asylum to all aliens who meet the requirements envisaged under international instruments ratified by Spain, in particular, the Geneva Convention relating to the Status of Refugees of 28 June 1951 and the New York Protocol relating to the Status of Refugees of 31 January 1967.

Article 33 of the above-mentioned Convention prohibits the expulsion and repatriation of refugees by Contracting States to territories where said refugees' lives or freedom may be in danger by reason of their race, religion, nationality, membership of a particular social group or political opinion.

Under the law referred to above, asylum is thus conceived and devised as a legal mechanism of protection for the defence of citizens of other States who find themselves in a situation of possible violation of their rights for the reasons enumerated by said enactment.

Female genital mutilation is a brutal practice which takes place in certain societies or groups and which affects a given group, namely, women. In those societies or settings in which this practice is widespread, it is regarded as a normal custom. This is why awareness of its unlawfulness is absent and, as a consequence, the physical and psychological harm suffered by the young persons affected tends to be minimised, despite the fact that in many cases the practice causes irreparable harm to the health of the women and girls who suffer it, and can even cause their death.

As indicated by previous decisions of the Chamber for Administrative Proceedings of the National High Court (in this respect, National High Court Decision, Section One of 12 January 2005, rec. 540/2003), "female genital mutilation is in reality a manifestation of sexual violence specifically targeted at 'women' or the 'female gender'." In addition, the Court states that, "while it is true

neither sex – nor gender-based violence is listed among the causes of persecution envisaged under Article 1.2 of the Geneva Convention, it can nevertheless be categorised as coming within the persecution envisaged under said provision by reason of membership of a particular "social group". It is this residual category that is applied to reasons for persecution which cannot be catalogued among the remaining statutorily stipulated grounds (whether by reason of race, religion, nationality or political opinion) applied by us on earlier occasions, e.g., to Romanian homosexuals (Decision of 24 September 1996) or Algerian journalists (Decision of 25 November 1997), and into which the Complainant's situation fits perfectly, inasmuch as the persecution reported by her stems directly and innately from her being a member of the female gender".

It should be added here that the prohibition and persecution of these types of practices have been requested in numerous resolutions and reports of international bodies, precisely for being deemed to be acts of gender violence, which in many cases are intent on humiliation and seek the prolongation of such practices and which, at all events, cannot be held to be justified for cultural reasons or defence of traditions (*inter alia*, the International Conference on Population and Development held in Cairo in 1994; the 1995 Beijing Declaration and Platform for Action; and the Report of the Council of Europe's Parliamentary Assembly of 3 May 2001). Lastly, the Proposed Resolution of the European Parliament of 17 July 2001 requests Member States to recognise the right of asylum of women, adolescents and girls who are at risk of being genitally mutilated.

It must thus be concluded that these types of practices are sufficiently serious: to be compared to torture or to inhuman or degrading treatment, and to imply a serious violation of human rights, expressly prohibited by Article 3 of the European Rome Convention on Human Rights and the principles and rights contained in the Charter of Fundamental Rights of the European Union; and to therefore come within the institution of asylum regulated by our laws.

(…)

b) Non-state persecutor

Supreme Court Decision of 10 February 2006. Supreme Court Appeal no. 7838/2002

Subject matter of the appeal: Section 1 of the Chamber for Administrative Proceedings of the National High Court delivered Judgement on 04–10–2002, dismissing the Administrative Appeal filed against the Ruling of the Ministry of the Interior of 10–05–2002, which dismissed an application for review of an earlier Ruling of 08–05–2002 that refused leave for a request for asylum.

"Legal Grounds

(…)

THREE. Based on the sole ground for setting aside its decision, submitted pursuant to the provisions of Article 88.1.d) of the Jurisdiction Act (*Ley de la Jurisdicción*: RCL 1998, 1741), the Court of First Instance is said to have violated Articles 3 and 8 of the Asylum Act (*Ley de Asilo*: RCL 1984, 843).

The Appellant argues that the facts set out are constitutive of persecution of a type which is eligible for protection by asylum and which forced him to flee his country, contending that a more in-depth study of the case is called for, by giving leave for the relevant asylum case-file to be heard in court.

The ground must be upheld.

FOUR. Both in his request for asylum and in his subsequent plea for review, the Applicant described persecution stemming from his membership of a civic organisation for the defence of human rights, which took shape in the form of constant threats, including death threats, levelled against the Applicant and his family; to the point where he was assaulted in public. Even though he failed to identify the persecutors accurately in his initial account of the facts, he subsequently provided more details in the review application, to the extent of furnishing the name of a terrorist organisation and its alleged leader, so that, at this initial stage of admission of his request to court, it cannot be said that the persecution might have been attributable to mere common criminals. In the light of his account of the facts, the Court therefore finds evidence of exposure to persecution for political reasons, which comes within the grounds of asylum envisaged under the Geneva Convention (RCL 1978, 2290, 2464) and the Asylum Act 5/1984 (RCL 1984, 843) and is set forth in terms that warrant leave being given for said request to be heard, so that it may be properly examined.

The fact that the persecutors might not be not state authorities or agents in no way detracts from this conclusion because, as the very decision of the lower court points out, it is settled and consistent jurisprudential doctrine that refugee status and the ensuing right of asylum should be granted to anyone who harbours well-founded fears of being persecuted in his/her home country for reasons of race, religion, nationality or membership of a particular social group or political opinion, where such persecution emanates from population sectors whose conduct is deliberately tolerated by the authorities or where said authorities show themselves incapable of providing effective protection.

The Lower Court rightly centres the dispute on this point, holding that there is no evidence whatsoever to show that the Applicant complained of the facts to the Colombian Authorities, or that, even if he had done so, said Authorities remained impotent or inactive in the face of his complaints. To reach this conclusion, however, it read part of his account, leaving aside precisely that part of it which refers to the various complaints that he lodged. Indeed, if his account – on record in the dossier, in accordance with the possibility provided for by Article 88.3 of the Jurisdiction Act (RCL 1998, 1741) – is read in its entirety, it will be seen that the Applicant states that, after being threatened, he reported the facts to the Chairman of the Foundation in which he was politically active, who then in turn reported the facts to the police. Nevertheless, the threats continued and were even intensified.

It can thus be concluded that, in order to secure the grant of the right of asylum, the party requesting this right has adduced a ground envisaged in the above-mentioned international instruments ratified by Spain for his refugee status to be recognised, a decisive circumstance for leave to be granted for

his request to be heard. However, it is not fitting for opinions regarding the subject matter of the dispute to be advanced during the admission phase of the proceedings. Such opinions can only be formed once the case-file under review has been heard in its totality. It will be on termination of the proceedings held for the purpose, once the necessary reports have been duly gathered, the pertinent enquiries made and evidence examined, when it can be decided whether, according to the nature of the case, sufficient evidence does or does not exist to determine whether or not the requirements referred to in subsection one of Article 3 of the Asylum Act (RCL 1984, 843) have been met.

FIVE. For the reasons duly outlined above, it now behoves the Court to give leave for the Supreme Court appeal, uphold the Administrative appeal, rule the decision challenged null and void, and declare that the Applicant is entitled to have his request for asylum duly heard in court.

(…)"

c) Forced marriage

Supreme Court Decision of 15 September 2006. Supreme Court Appeal 6627/2003

Subject matter of the appeal: The Chamber for Administrative Proceedings of the National High Court – Section One – handed down judgement on 03–07–2003, dismissing the appeal brought against the Ministry of the Interior's decision of 21–09–2000, whereby a request for asylum was not given leave to proceed. The Supreme Court rules that the Supreme Court Appeal filed by the Appellant may proceed, sets aside the challenged decision and upholds the Administrative Appeal.

"Legal Grounds

(…)

In effect, a review of the account of the facts by the asylum-seeker will suffice to show that it indicates persecution by reason of sex, in the form of family harassment to enter into an unwanted marriage, something that, in principle, is of a nature warranting statutory protection (due to the fact that it undeniably falls within the ambit of social persecutions). Indeed, this Third Chamber has already had occasion to declare in a number of decisions: that a situation of social, political and legal vulnerability and marginalisation of women in their country of origin, which evidently and seriously violates their human rights, is ground of asylum (Supreme Court Decisions of 7 July 2005, rec. No. 2107/2002 [RJ 2005, 5167]); that persecution by reason of sex doubtless comes within the ambit of social persecutions (Supreme Court Decisions of 31 May 2005 rec. No. 1836/2002 [RJ 2005, 4295], 9 September 2005 No. 3428/2002 [RJ 2005, 7051] and 10 November 2005 No. 3930/2002 [RJ 2005, 9506]); and more specifically, that a situation of harassment of and threats against a woman to force her into a marriage is of a nature warranting statutory protection since it undeniably falls within the ambit of social persecutions (Supreme Court Decisions of 28 February and 23 June 2006, recs. No. 735/2003 and 4881/2003). In these latter decisions, we transcribed a report of the United Nations High Commissioner

for Refugees (UNHCR) which is highly eloquent of the situation of women in Nigeria and which it would be likewise appropriate to transcribe here. This report states that "according to the NGO, Human Rights Watch, the rights of women in Nigeria were routinely violated. The Penal Code (RCL 1995, 3170 and RCL 1996, 777) explicitly stated that assaults committed by a man on his wife were not an offence, if permitted by customary law and if 'grievous hurt' was not inflicted. Marital rape was not a crime. Child marriages remained common, especially in northern Nigeria. Women were denied equal rights in the inheritance of property. It was estimated that about 60 percent of Nigerian women were subjected to female genital cutting." These assertions are to be found, listed in even greater detail, in a report of the UNHCR itself, which was entered into the proceedings of the lower court during the evidentiary period and is headed by a communication from this body indicating that "this Office wishes to place on record that forced marriage is a practice that could constitute gender-related persecution if the requirements of the definition of Article 1 of the 1951 Geneva Convention (RCL 1978, 2290, 2464) are met, bearing in mind that forced marriage constitutes a practice in violation of Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 23.3 of the International Covenant of Civil and Political Rights (RCL 1977, 893), among others".

Having made the above observations concerning the case now before the court, one cannot conclude otherwise but that, in her account of the facts, the Appellant described a persecution eligible for protection, in terms that, at the very least, are sufficient to warrant leave being given for her request to be heard. It will be on termination of the proceedings, once the necessary reports have been duly gathered, the pertinent enquiries made and evidence examined, when it can be concluded whether, according to the nature of the case, sufficient evidence does or does not exist to determine whether or not the requirements referred to in subsection one of Article 3 of the Asylum Act (RCL 1984, 843) have been met.

FIVE. For the reasons duly outlined above, it must be concluded that Article 5.6–b) of Act 5/84, (RCL 1984, 843) was wrongfully applied by both the Authorities and the lower court, so that it now behoves the Court to give leave for the Supreme Court appeal, uphold the Administrative appeal, rule the decision challenged null and void, and declare that the Applicant is entitled to have her request for asylum duly heard in court
(…)"

d) Membership of a particular social group

Supreme Court Decision of 14 December 2006. Supreme Court Appeal No. 8233/2003

Subject matter of the appeal: The Chamber for Administrative Proceedings of the National High Court – Section One – handed down judgement on 28–03–2003, dismissing the appeal brought against the Ministry of the Interior's decision of 14–12–2000, relating to denial of a request for asylum.

"Legal Grounds
(…)
THREE:
(…)

In this decision, we have stated and must now reiterate:

"FOUR. We shall thus proceed to address the first part of the ground of cassation, for the purpose of which the following two points must be established:

Firstly, the statement by the lower court to the effect that the version offered to us by the Appellant is totally credible, must be construed in the sense: either that this version is regarded as accredited; or, expressed in other words, that it goes as far as is required by the provisions of Article 8 of Act 5/1984 (RCL 1984, 843), and that this version is therefore backed by sufficient evidence.
(…)

FIVE. The 1951 Geneva Convention (RCL 1978, 2290, 2464) – and thus by extension Article 3.1 of Act 5/1984 (RCL 1984, 843) which expressly makes reference to it – deems the "grounds" of persecution that ought to lead to recognition of refugee status as "reasons of race, religion, nationality, membership of a particular social group or political opinion".

Confining ourselves now to the ground referring to "membership of a particular social group", it is clear that, due to its being considered parallel to – yet separate and differentiated from – others, it is not necessary for the common element of the social group, the element which identifies it as such, to be that of race, religion, nationality or the political opinions of its members. In order to pinpoint the reason for persecution, the common element must be something else, without, in principle, excluding any from the text, spirit and aim of the rules applicable, provided that: a) said element has the ability to be the definer of a group, and of a group that is perceptible, distinguishable and susceptible to being persecuted in the specific politico-social situation being experienced by a country at a given moment, and of being so with or through acts that are sufficiently serious by their nature or repetition to constitute a serious violation of fundamental human rights, so that the group's members, or what amounts to the same thing, the persons to whom the common element or note is attributed, may, in such a socio-political situation, feel a well-founded fear, not only of being persecuted with or through such acts, but also of not receiving the appropriate protection in the country of their nationality or habitual residence; and b) said common element is not one of those that exclude the application of the provisions of the 1951 Geneva Convention (RCL 1978, 2290, 2464), such as commission of crimes of aggression, war crimes, crimes against humanity, serious common crimes or acts counter to the aims and principles of the United Nations.

In addition to referring to the text of the Article 1 of said Geneva Convention, we should say at this point that Council Directive 2004/83/CE of 29 April (LCEur 2004, 3082), targeted at establishing minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, offers at Article 10 d) the defining elements of the concept

of "particular social group" on terms that support what has been explained above, in stating that:

> a group shall be considered to form a particular social group where in particular:
>
> members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Subsection 2 of this same Article adds:

> When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

Prior to this, Article 9.1 of said Directive reads as follows:

> Acts of persecution within the meaning of Article 1 A of the Geneva Convention (RCL 1978, 2290, 2464) must:
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (RCL 1979, 2421); or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

SIX. Accordingly, in the context of the socio-political situation of Colombia, and confining ourselves to what is the subject of discussion in the case before the court, there is indeed an element, note or feature which, by fulfilling the requirements laid down in the transcribed provisions, is susceptible to defining and identifying a particular social group that is perceived as different in that society and whose members are exposed to acts of persecution of the gravity indicated. This element, note or feature is the status of land owner (*hacendado*), to whom a privileged financial situation is attributed. Hence, because there is no discussion in this action as to the dimension of the persecution suffered or as to the fact that the asylum-seeker shares the above status by reason of the family to which he belongs, the Supreme Court and Administrative Appeals must hereby be upheld, so that the asylum-seeker is duly recognised as having an improperly denied right of asylum.

These same reasons, applied to the case before the court, lead to the Supreme Court Appeal being upheld.

(…)".