Spanish Judicial Decisions in Public International Law, 2003

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1. The State

a) Universal jurisdiction for international crimes

– *STS* 25 February 2003. Criminal Division. Appeal in cassation n. 803/2001

In this decision, the Supreme Court gives a restrictive interpretation of article 23.4. a) of the Organic Law on the Judiciary, which refers to universal jurisdiction.

The facts reported in the main proceedings took place in Guatemala during the period 1978–1990, and were described by the complainants as constituting crimes of genocide, terrorism and torture. An appeal was lodged in cassation with the Supreme Court against a decision of the National Court ruling that Spanish criminal jurisdiction may not be exercised in order to prosecute the aforementioned crimes.

The Supreme Court allows the appeal only partly, as in relation to the torture reported it considers that Spanish criminal jurisdiction may only be exercised where the torture victims are of Spanish nationality.

It rules that Spanish courts and tribunals lack jurisdiction to prosecute the reported crimes of genocide and terrorism and considers that in such cases the establishment of Spanish jurisdiction requires:

a) *That at least one of the alleged guilty parties be located in Spanish territory and that Spain has refused to grant their extradition*

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b) *Or that there be a link with a Spanish interest in relation to the crime. This link could be determined by the Spanish nationality of the victims.*

Reporting judge: Mr. Miguel Colmenero Menéndez de Luarca

"Legal Grounds:

First: . . . This is therefore an exceptional case, not expressly regulated by the legislator, which goes beyond a question of competence between national courts and tribunals and differs from the aforementioned conflicts in that it involves determining the scope of a power of the Spanish State, the Judiciary, over acts committed in territories subject to the sovereignty of another State, the decision being final as it is not possible to consider a negative conflict of jurisdiction.

(. . .)

Fifth: The contested decision establishes as a limit to the principle of universal prosecution the criterion of subsidiarity; the intervention of Spanish jurisdiction in prosecuting genocide committed in a foreign country would therefore only be justified in the absence of jurisdictions initially competent according to the Convention, that is, the courts and tribunals of the State in whose territory the act was committed or a competent international criminal court with respect to those contracting parties which have recognised its jurisdiction – a criminal court which has not been established in respect of the reported acts committed in Guatemala, and the International Criminal Court lacks jurisdiction under article 11 of the Statute of Rome (*RCL* 2002\1367, 1906).

The appellants claim that article 6 of the Convention (*RCL* 1969\248) and article 17 of the Statute of the International Criminal Court have been erroneously interpreted, as the subsidiarity of Spanish jurisdiction cannot be inferred therefrom.

The Convention does not establish universal jurisdiction, but nor does it exclude it. Nor does it exclude other criteria. If we recognize the possibility that more than one national jurisdiction may be involved, given the existence of various criteria for the attribution of jurisdiction, we must establish some priority criterion in order to settle cases of effective and real concurrence of active jurisdictions, and therefore it must be considered natural that the action of the courts and tribunals of the place where the act was committed should, in principle, exclude that of the courts and tribunals of another State.

From the perspective of current Guatemalan law, we do not find any legislative impediments or obstacles to prosecuting the reported facts. The appellants deduce this from their interpretation of the Guatemalan legislation they consider applicable to the case. Their reasoning, independently of other reasons derived from this Decision, cannot be accepted as we have no evidence that this is precisely the interpretation of the Guatemalan courts and tribunals competent to prosecute the facts. On the contrary, there is documentary proof that the Law on National Reconciliation of 1996, passed in Guatemala after the peace agreements, expressly excludes from the amnesty the crimes of genocide, and therefore what the appellants maintain is nothing other than their own interpretation of the current laws of that country. Such an interpretation cannot be a substitute for that which it befits

the relevant courts and tribunals to give of an interpretative problem posed by their own country's legislation, of which there is currently no proof.

Be that as it may, the criterion of subsidiarity, in addition to not being expressly or implicitly enshrined in the Convention on the Prevention and Punishment of the Crime of Genocide, is not satisfactory in the manner in which it has been applied by the court in question. Determining when it is appropriate to intervene in a subsidiary manner in the prosecution of concrete facts on the basis of the real or apparent inactivity of the jurisdiction of that country implies a judgement by the courts and tribunals of another sovereign State's courts' ability to administer justice.

First of all, in this case we are dealing with a sovereign State with which Spain enjoys normal diplomatic relations. It is not for the courts of the State to issue a statement of this kind, which could be of enormous importance in the sphere of international relations. Article 97 of the Spanish Constitution (*RCL* 1978\2836) states that the government directs foreign policy, and the repercussions that such a declaration could provoke in this ambit cannot be ignored.

Furthermore, article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide establishes the procedure the contracting parties should follow in these cases. This article states that 'Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3'; it would not be appropriate for the Spanish courts and tribunals to take such action. However, this provision, which binds Spain as a party to the Convention, allows for an international reaction aimed at preventing this type of conduct from going unpunished.

This is without prejudice to the resolutions which the international community may adopt on its own initiative. In this respect, the record of the proceedings includes several reports by the United Nations Mission (MINUGUA), which verifies compliance with respect for and protection of human rights in Guatemala; these reports refer to the current difficulties in that country, underlining the United Nations organs' awareness of that situation. We cannot fail to take into account the fact that those reports have not triggered a similar response from the United Nations to that of the cases of Rwanda and the 'former' Yugoslavia.

Sixth: The appellants maintain that the reported facts constitute a crime of genocide. Only for the purpose of this decision can it be admitted, and only very provisionally, without this implying any prejudice whatsoever with respect to the substance of the matter, that the reported facts may constitute a crime of genocide insofar as they affect the Mayan people as an ethnic group.

The Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 (*RCL* 1969\248), to which Spain acceded on 13 September 1968, was published in the *BOE* on 8 February 1969. In this Convention the contracting parties confirm that genocide is a crime under international law which they undertake to prevent and punish. Although it translates into law the international

feeling about the crime of genocide, this Convention cannot be interpreted in the sense claimed by the appellants, according to whom it signifies the enshrinement of universal jurisdiction. Such an interpretation would contradict article 6, which subsequently grants jurisdiction to a court of the State in question or an international criminal tribunal ('Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction').

Seventh: However, as already stated, although the Convention does not expressly establish universal jurisdiction, nor does it prohibit it. It would not be correct to interpret its provisions in such as way as to prevent the international prosecution of this crime according to other criteria or principles other than those of territory.

Organic Law 6/1985, of 1 July (*RCL* 1985\1578, 2635), on the Judiciary, which repealed the previous Law of 1870, establishes in article 23.4 that Spanish jurisdiction shall be competent to try acts committed by Spanish or foreign nationals outside Spanish territory that may be classified under Spanish criminal law, such as the crime of genocide, among others; terrorism; piracy and the unlawful seizure of aircraft; counterfeiting of foreign currency; crimes relating to prostitution and the corruption of minors or unfit persons (the latter under Organic Law 11/1999 [*RCL* 1999\1115]); illicit trafficking in psychotropic, toxic and narcotic substances; and any other which, according to the international treaties or conventions, should be prosecuted in Spain. Without prejudice to the appreciable differences between these crimes, it does not specify a system for their extraterritorial prosecution.

Such a general provision as the one contained in this precept raises certain questions . . .

The extraterritorial scope of criminal law is therefore justified by the existence of particular interests of each State; this explains why international recognition of the capacity to prosecute the authors of crimes committed outside national territory is currently indisputable, on the basis of the real principle of defence or protection of interests and of active or passive personality. In these cases the unilateral establishment of jurisdiction is based mainly, though not exclusively, on the need for the State to protect these interests.

When the extraterritorial scope of criminal law is based on the nature of the crime, insofar as it affects judicial values that pertain to the international community, the question arises of compatibility between the principle of universal justice and other principles of public international law.

In this respect, it is necessary to bear in mind that in the doctrine of public international criminal law there is no objection to the principle of universal justice when its stems from a recognised source of international law, particularly when it has been contractually accepted by States parties to a treaty. In such cases the principle is considered undoubtedly justified. On the contrary, where it has only been recognized in national criminal law, in practice, the scope of the said

principle has been limited by the application of others that are equally recognised in international law. In this respect, it has been understood that the exercise of jurisdiction cannot – as already stated – contravene other principles of public international law or operate when there is no direct connection with national interests. Both limitations have been expressly accepted by the German courts (*cf.* German Supreme Federal Court, *BGHSt* 27,30: 34,340; decision of 13–2–1994 [1 *BGs* 100/1994]).

Eighth: As stated previously, nowadays doctrine significantly backs the idea that it befalls no State in particular to engage unilaterally in stabilizing order by resorting to criminal law against all and worldwide, but rather that a link is necessary to legitimate the extraterritorial scope of its jurisdiction. There is undoubtedly an international consensus on the need to prosecute this type of crime, but the agreements between States do not grant any of them unlimited jurisdiction over acts committed in the territory of another State; on the contrary, they resort to other solutions.

Ninth: . . . Although the attribution criteria used display certain variations depending on the characteristics and nature of the crime, none of these treaties expressly establishes universal jurisdiction.

Going beyond the effects of the principles of territoriality, defence and active or passive personality, the established means of cooperation between each State for the prosecution of the crimes specified in each Treaty is the obligation to prosecute persons who have allegedly committed a crime when they are in a State's territory and it has not agreed to the extradition requested by one of the other States with jurisdiction under the respective Convention. In the opinion of a large sector of doctrine, this stems from the so-called principle of supplementary justice, at least in a broad sense. Interpreted in this way or, as another doctrinal sector maintains, as an element of connection in the sphere of the principle of universal jurisdiction, the State in which a person who is allegedly guilty of any of these crimes is found is entitled to take action against him.

Furthermore, a considerable part of doctrine and some national courts have been inclined to recognise the significance for these purposes of the existence of a connection with a national interest as a legitimizing element in the framework of the principle of universal justice, modifying its scope pursuant to criteria of rationality and with respect to the principle of non-intervention. In these cases a minimal link with national interest could be appreciated when the connected fact attains a significance equivalent to that which is granted to other facts which, according to national law and treaties, give rise to the application of the other criteria for extraterritorial attribution of criminal jurisdiction. The common interest in preventing the impunity of crimes against Humanity is thus linked to the specific interest of a State in protecting certain values.

This connection should be found to be directly related to the crime that is used as a basis for affirming the attribution of jurisdiction and not to other crimes, although related, for only in this manner can the aforesaid attribution of jurisdiction be justified. In this regard, the existence of a connection in relation to a specific

crime or crimes does not authorize extending jurisdiction to other different crimes in which such a connection cannot be found.

Tenth: When applying the foregoing with respect to the crime of genocide, the jurisdiction of the Spanish courts, on the basis of the principle of universal justice, cannot be inferred from the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (*RCL* 1969\248), or from those of any other convention or treaty signed by Spain.

Furthermore, there is no record of any of the suspected offenders being found on Spanish territory or of Spain having refused their extradition. The exercise of jurisdiction over the reported crimes could not be based on this information. No connection is found with a Spanish national interest directly related to this crime, as although the nationality of the victims could provide a possible connection, a crime of genocide against Spanish nationals has not been reported or found. Nor is there a direct connection with other significant Spanish interests, even though they have been seriously affected by facts that could be classified as different crimes committed in the same historical context.

Similar conclusions are reached regarding the possible commission of a crime of terrorism. The European Convention of 27 January 1977 (*RCL* 1980\2212 and *RCL* 1982\2262) on the suppression of terrorism already provided for the presence of the suspected offender in a State's territory as an element or criterion for establishing jurisdiction in cases where extradition is requested and denied. This is without prejudice to issues which could arise from the classification of the facts under Spanish law in force at the time they were committed.

Eleventh: As for the classification of the facts as constituting a crime of torture, there is a very broad international consensus on its prohibition and punishment as a crime under international law. This consensus is enshrined, among others, in the Universal Declaration of Human Rights (*LEG* 1948\1), article 5; in the Convention for the Protection of Human Rights and Fundamental Freedoms (*RCL* 1999\1190, 1572), article 3; in the International Covenant on Civil and Political Rights (*RCL* 1977\893), article 7; and even in the Geneva Conventions, which also establish the duty of each State to seek out [in its territory] the offenders and subject them to the jurisdiction of its courts. This prohibition is also found in article 15 of the Spanish Constitution (*RCL* 1978\2836). This international consensus finds expression in the Convention against torture and other cruel, inhuman or degrading treatment, done at New York on 10 December 1984 (*RCL* 1987\2405), to which both Spain and Guatemala are parties and which, as pointed out earlier, lays down in addition to the obligation to try the suspected offender when he is found in the State's territory and extradition is refused, other criteria for establishing jurisdiction, including that of passive personality, which allows the crimes to be tried when the victim is a national of that State and the State finds it appropriate.

The complaints refer to events that affect persons of Spanish nationality. Regarding the events that occurred at the Spanish Embassy on 31 January 1980, including the death of several Spanish citizens, the Spanish and Guatemalan governments issued a joint communiqué on 22 September 1984 agreeing to re-establish diplo-

matic relations; the Guatemalan government expressly recognized that the events constituted a violation of articles 22 and 29 of the Vienna Convention on Diplomatic Relations (*RCL* 1968\155, 641) and therefore accepted, with respect to Spain, the effects and legal consequences of the foregoing. The complaints also refer to the deaths of the Spanish priests Faustino V., José María G. C., Juan A. F. and Carlos P. A. The commission of these crimes, which affect Spanish citizens, is attributed by the complainants to civil servants or other persons exercising public posts or instigated by them or with their consent, which entitles the Spanish courts initially to jurisdiction, on the basis of article 23.4.g) of the Organic Law on the Judiciary (*RCL* 1985\1578, 2635) and the provisions of the Convention against torture (*RCL* 1987\2405), without prejudice to matters of classification or others that could arise and which should be settled at the appropriate stage of the proceedings, after duly hearing the public prosecutor and the parties.

The Court therefore rules that, in the cases of the murder of the aforementioned Spanish priests, and in the case of the attack on the Spanish Embassy in Guatemala, in respect of the victims of Spanish nationality, having duly verified the points required by article 5 of the Convention against torture, the Spanish courts have jurisdiction to investigate and try the suspected offenders".

b) Diplomatic immunity

– *STSJ* Madrid, 25 February 2003. Contentious-Administrative Division. Appeal n. 24/2000. Jurisdiction for suits under administrative law.

The Division of Contentious Administrative Proceedings of the Superior Court of Justice (TSJ) of Madrid allows the appeal lodged against a decision of the Madrid Regional Economic Administrative Court of 20 October 1999 dismissing economic-administrative complaint no. 2818/98 against the calculation of the amount of Personal Income Tax for the year 1995. The calculation results from a rejection of the adjustment to the gross base carried out by the appellant, who renders her services at the Japanese Embassy in Spain. The contested decision maintains that the Embassy in Spain is foreign territory not subject to Spanish tax law. The legal issue involves establishing whether the embassies of foreign States in Spain (or their departments) are obliged to withhold and pay the Spanish Treasury the appropriate amounts from income that is subject to this tax as laid down by the Law on Personal Income Tax.

"Legal Grounds:

(. . .)

Third: In the Court's opinion, Law 18/1991 (*RCL* 1991\1452, 2388) marked a major change in the scheme of the Law of 1978 (*RCL* 1978\1936) and supported its earlier decisions. Art. 98.2 of the aforementioned law establishes the general obligation to withhold tax for all 'legal persons' who pay wages as mentioned in the previous ground and is, as neither party has questioned, the issue disputed in the case in hand. The reference to legal persons, an expression that includes all persons, other than natural persons, regarded by law as capable of maintaining legal relationships, must necessarily include foreign States, whether they operate in their own right or through a specific office such as an Embassy. The correlate

of the condition of legal person, exercise of personality, is furthermore clearly evidenced by the very hiring of employees to which the wages relate. The consideration of a foreign State as a legal person in the eyes of domestic law is but the primary and most obvious consequence of the recognition of the said State through the protocols whereby formal diplomatic relations are accredited. And therefore, the answer to the question of whether the Embassy should be subject to Spanish laws should be affirmative.

Embassies, or their governments through them, operate in Spain and are therefore subject to Spanish laws and pursuant to article 13 of the Civil Code (*LEG* 1889\27), the regulations laid down in the Preliminary Title, including the enforceability of its legal regulations, are applicable throughout Spain. On the basis of the foregoing, the only possibility of exclusion would be through the existence of specific rules such as international treaties. But on the contrary, article 41.1 of the Vienna Convention of 18 April 1961 (*RCL* 1968\155, 641), to which Spain acceded on 21 November 1969, establishes the obligation of States to respect the laws and regulations of the receiving State. Therefore, it is difficult to understand how the contested decision ruled, without citing any precepts, that they are exempt from statutory obligations.

Fourth: From the foregoing arguments it is inferred that foreign States when operating in Spain are fully subject to Spanish law unless a specific regulation states otherwise and that, therefore, they are obliged to withhold taxes as established in article 98.1 of the Law of 18/1991 (*RCL* 1991\1452, 2388). This conclusion is furthermore corroborated by many administrative precedents that are quoted by the claimant, and even, we might add, by subsequent decisions by the same court that issued the decision that is being contested (decision of 26 November 1998 issued in respect of claim 203/97 allowing a question like the one we are dealing with). Now, although this is not strictly the question in the case in hand, it is nonetheless appropriate to clarify a few points regarding the criterion used both in some of the inquiries answered by the tax office and in the decision I have just quoted (even though as a matter of fact I dismiss the latter) on the application to adjustment to the gross base of the impediment laid down in art. 98.2 of Law 18/1991 for the case of legally established earned income, a circumstance which would hypothetically be applicable had the paid wages been envisaged in a foreign regulation. This Court vigorously rejects such an interpretation as it is clearly contrary to art. 1 of the Civil Code (*LEG* 1889\27). According to the Spanish regulations legality is defined in the aforementioned precept as a source of law and completely excludes any foreign regulation not incorporated into an international treaty that is in turn incorporated into Spanish law in the manner provided in paragraph 5 of the aforementioned precept. Therefore, as far as the dispute is concerned, it is irrelevant whether the wages stem from the application of an American regulation, from a contract or from any other formal or material reason which may even be binding for the payers".

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human rights and fundamental freedoms

a) Right to effective protection of the court

– *STC* 95/2003, of 22 May. Claim of unconstitutionality n. 1555/1996

In this decision the Constitutional Court rules on the claim of unconstitutionality lodged by the Ombudsman against the subparagraph 'who are legally resident in Spain' of paragraph a) art. 2 of Law 1/1996, of 10 January, on Free Legal Aid. The claim is partially allowed and the inclusion of the word 'legally' in section a) of art. 2 of the Law is declared unconstitutional. The Court likewise rules that the term 'resident' is only constitutional if it is understood in the sense laid down in legal ground 7.

Reporting Judge: Mr. Guillermo Jiménez Sánchez

"Legal Grounds:

First: In the present unconstitutionality proceedings the Ombudsman challenges the wording 'who are legally resident in Spain' of subparagraph a) of article 2 of Law 1/1996, of 10 January (*RCL* 1996\89), on free legal aid (*LAJG*), in that it excludes from such a right foreign nationals residing illegally in Spain, thus violating art. 24 *CE* (*RCL* 1978\2836) by failing to respect the essential content of the fundamental right to effective protection of the courts.

(. . .)

Third: Having focused the question on whether or not it is contrary to the right to effective protection of the courts enshrined in art. 24.1 *CE* (*RCL* 1978\2836) to deny the right to free legal aid (to which the Ombudsman refers, but which constitutes a service included in the broad legal concept of free legal aid) of foreign nationals not residing legally in Spain, we shall begin by recalling our case-law on the instrumental connection between the right to free legal aid and the right to the effective protection of the courts. This clarification is necessary as the Ombudsman's complaint of unconstitutionality refers to the right to effective protection of courts, without making express allusion to art. 119 *CE* which enshrines the right to free legal aid where the law so provides and, in any event, in respect of those who prove they have insufficient means to litigate. However, the claimant's arguments revolve around the repercussions that failure to recognise the aforementioned foreign nationals' right to free legal aid has on their right to effective protection of the courts and therefore, without quoting art. 119 *CE*, it is clear that the regulatory content of this constitutional precept is also being introduced as an element that contrasts with the contested legal regulation.

The existing relationship between the right to free legal aid of those who lack sufficient means to litigate (art. 119 *CE*) and the right to the effective protection of the courts (art. 24.1 *CE*) has been underlined by this Court on various occasions.

(. . .)

Fourth: In view of the foregoing we must now ask ourselves whether the legislator has respected the unalienable content of the Constitution guaranteed by art. 119 *CE* (*RCL* 1978\2836), by defining the right to free legal aid in such a manner that foreign nationals who are not legally resident in Spain, despite proving they have insufficient means to litigate, are excluded from the right to free justice. Had he not respected it, the contested rule would not only violate art. 119 of the Constitution but would also amount to an infringement of the right to effective protection of the courts recognized in art. 24.1 *CE*.

The keys to settling this question were already pointed out in *STC* 16/1994, of 20 January (*RTC* 1994\16), which settles a question of unconstitutionality in relation to arts. 14 and 15 *LECiv* (*LEG* 1881\1), as worded according to Law 34/1984 (*RCL* 1984\2040 and *RCL* 1985\39) (precepts which have now been repealed). The criteria given on that occasion later led explicitly in *STC* 117/1998, of 2 June (*RTC* 1998\117), to a ruling of this Court which limits to individuals the inalienable right to free legal aid; therefore the legislator's decision to acknowledge the aforementioned right only to certain legal persons is compatible with the effective protection of the court. In the first of these decisions, the Plenary of this Court considered that the inalienable content of art. 119 *CE*: 'without having to define it thoroughly, undoubtedly signifies that free justice should be available to those unable to meet the expenses deriving from the proceedings (including the fees of the Lawyers and the schedule of legal fees, when their involvement is compulsory or necessary in view of the characteristics of the case) without ceasing to meet their vital needs and those of their family, in order that nobody is deprived of access to justice owing to lack of financial means. In other words, the court costs should be met of those who, if required to pay, would be faced with the choice of not litigating or endangering their own minimum level of subsistence or that of their family' (*STC* 16/1994 [*RTC* 1994\16], *F.* 3).

(. . .)

Fifth: With respect to the fundamental right that is claimed to be violated in the present appeal, it should be pointed out that this Court, since *STC* 99/1985, of 30 September (*RTC* 1985\99), which was quoted in *STC* 115/1987, of 7 July (*RTC* 1987\115), has acknowledged foreign nationals' right to the effective protection of the courts, irrespective of their legal situation.

Indeed, in the first of the aforementioned Decisions we stated that foreign nationality was irrelevant to the then debated constitutional right, which was the fundamental right to effective protection of the courts. We thus pointed out that (2nd legal ground of this decision), with certain exceptions expressly pointed out in the constitutional text, foreign nationals enjoy the rights and freedoms enshrined in Title I of the Constitution (*RCL* 1978\2836), though adapting their content to international treaties and Spanish law. 'But not even this modification or adaptation is possible with respect to all the rights, as 'there are rights to which Spanish and foreign nationals are entitled equally and the regulation of which must be equal for both' (*STC* 107/1984, of 23 November [*RTC* 1984\107], Second Chamber, *F.* 4, *BOE* of 21 December); this is the case of those fundamental rights 'which

pertain to the person as such and not as a citizen' or, in other words, of 'those which are essential to safeguarding human dignity which, in accordance with art. 10.1 of our Constitution, constitutes the basis of the Spanish political system' (*ibid.*, *F.* 3). One of these rights is that which 'every person has . . . to obtain the effective protection of the Judges and Courts', as laid down in art. 24.1 of our Constitution; this is inferred not only from the literal wording of the aforesaid article ('every person . . .'), but because that same conclusion is reached by interpreting it, as required by art. 10.2 *CE*, according to art. 10 of the Universal Declaration of Human Rights, art. 6.1 of the Rome Convention of 4 November 1950 (*RCL* 1979\2421) and art. 14.1 of the International Covenant on Civil and Political Rights done at New York on 19 December 1966 (*RCL* 1977\893), in all of which the right equivalent to that which our Constitution calls effective protection of the courts is acknowledged to 'every person' or to 'all people', regardless of their nationality' (*STC* 99/1985, of 30 September [*RTC* 1985\99], *F.* 2).

(. . .)".

b) Fundamental right to be informed of charges

– *STC* 33/2003, of 13 February. Appeal for a declaration of fundamental rights n. 45/2001

In this decision the Constitutional Court passes judgment on an appeal for a declaration of fundamental rights against a decision of 26 October 1999 of the Criminal Division of the National Court (Third Section), against a decision of 30 October 2000 issued by the Criminal Division of the Supreme Court confirming the latter, and against a Decision of 25 April 2001 of the Supreme Court dismissing the petition for annulment of proceedings. The appellant had been found guilty of an offence against public health. In this decision the Constitutional Court considers that the appellant's fundamental rights to be informed of the charges, to defence and to legal aid and to use the relevant means of proof for his defence have been violated and accordingly allows the appeal.

Reporting judge: Mrs. María Emilia Casas Baamonde

"Legal Grounds:

First: This appeal for a declaration of fundamental rights is lodged against the judgment of the Third Chamber of the Criminal Division of the National Court of 26 October 1999 and against the judgment of the Criminal Division of the Supreme Court of 30 October 2000 (*RJA* 2000\9517) allowing the latter, whereby the appellant was found guilty of a substantial offence against public health involving serious harm to health caused by a person belonging to an organization [arts. 344 and 344 bis a) ns. 3 and 6 of the Penal Code of 1973 (*RCL* 1973\2255)] in concurrence with extreme seriousness [art. 344 bis b) *CP*/1973], considered together with an offence of attempted smuggling – arts. 1.4, 2.1 and 3.2 of Organic Law 7/1982, of 13 July (*RCL* 1982\2029) – being sentenced to seventeen years, four months and one day's imprisonment, absolute disqualification and a fine of 225 million pesetas. The appeal is also lodged against the Decision of the Criminal Division

of the Supreme Court of 25 April 2001 dismissing the petition for annulment of proceedings filed by the appellant.

As explained in detail, the claim refers to various breaches of the appellant's fundamental rights to a trial with full guarantees (art. 24.2 *CE* [*RCL* 1978\2836]), to defence and the use of evidence pertinent to his defence (art. 24.2 *CE*), to the presumption of innocence (art. 24.2 *CE*), to effective court protection and not to go undefended (art. 24.1 *CE*), to secrecy of communications (art. 18.3 *CE*) and to the proper application of penal law (art. 25.1 *CE*), attributing these breaches primarily to the Judgment issued by the National Court and secondarily, in that it failed to redress them, to the Judgement in cassation, though adding in this respect the specific breaches of the right to obtain a legally grounded judgment that is coherent with his claims (art. 24.1 *CE*) and of the accused's right to a review of his plea of guilty and of the verdict of guilty (art. 24.2 *CE*); in order to prevent unnecessary repetitions, these claims will be specified when we come to analyze them.

(. . .)

Third: Our examination of this claim should begin by recalling that since *STC* 12/1981, of 12 April (*RTC* 1981\12), this Court has recognized that the guarantees which constitute the right to a fair trial (art. 24.2 *CE* [*RCL* 1978\2836]) include the right to be informed of the charges and that this is linked to the right to defence. Specifically, since then we have stated that the information to which the accused is entitled concerns the facts considered punishable, in order that 'the charges, and the contradictory hearing in the oral proceedings be based primarily on them', but also the legal description of the offence, as 'it is not unrelated to the contrary debate' (*F.* 4). However, on that first occasion we pointed out that, although this principle establishes a necessary coherence between charge and conviction, it is nonetheless possible for the courts to stray away from the legal description of the offence established by the charges without this automatically amounting to a breach of the accused's right to defence, provided that two conditions are met: 'the identity of the punishable offence, so that the same offence described in the charges, which was debated in the contradictory hearing and was declared to be proved in the Judgment in question, constitutes the factual basis of the new description', and 'that both offences . . . be 'homogenous', that is, of the same nature, insofar as the offence that configures the corresponding types is substantially the same'; all things considered, we stated that, 'if the accused had the chance to defend himself against each and every one of the elements that constitute the type of offence established in the Judgment . . . there is no defencelessness', as the new description is not based on any new element (*F.* 5).

This doctrine has been reiterated until now (particularly, *SSTC* 104/1986, of 17 July [*RTC* 1986\104], *F.* 4; 161/1994, of 23 May [*RTC* 1994\161], *F.* 2; 95/1995, of 19 June [*RTC* 1995\95], *F.* 3; 225/1997, of 15 December [*RTC* 1997\225], *F.* 3; 278/2000, of 27 November [*RTC* 2000\278], *F.* 14; 302/2000, of 11 December [*RTC* 2000\302], *F.* 2; 174/2001, of 26 July [*RTC* 2001\174], *F.* 5; 4/2002, of 14 January [*RTC* 2002\4], *F.* 3; 228/2002, of 9 December [*RTC* 2002\228], *F.* 5),

notwithstanding the fact that we have made important clarifications which, irrespective of those that affect the need for charges to previously made in the investigative stage (in particular, *STC* 19/2000, of 31 January [*RTC* 2000\19], *F.* 5), can be summed up as follows:

a) Nobody can be convicted without having previously been charged (in particular, *STC* 54/1985, of 18 April [*RTC* 1985\54]), or, as *STC* 104/1986, of 17 July (*RTC* 1986\104) (*F.* 3) states, 'somebody who has not been charged cannot be convicted or even tried', for, on the one hand, the Constitution distinguishes between the function of judging and that of charging, preventing the Judge from acting successively as accuser and judge (among many others, *SSTC* 54/1985, of 18 April [*RTC* 1985\54], *FF.* 4, 5 and 6; and 225/1988, of 28 November [*RTC* 1988\225], *F.* 1), and, on the other, the right to be informed of the charges brought against him is consubstantial to the right to defence, as an essential part thereof is the right to contradict the charges (*STC* 105/1983, of 23 November [*RTC* 1983\105], *F.* 3) and nobody can defend himself from that which he does not know (in particular, *SSTC* 141/1986, of 12 November [*RTC* 1986\141], *F.* 1; 36/1996, of 11 March [*RTC* 1996\36], *F.* 4; 19/2000, of 31 January [*RTC* 2000\19], *F.* 4; and 182/2001, of 17 September [*RTC* 2001\182], *F.* 4).

b) An implicit or tacit charge cannot be allowed; rather, the charge must be brought expressly (*SSTC* 163/1986, of 17 December [*RTC* 1986\163], *F.* 2; 17/1989, of 30 January [*RTC* 1989\17], *F.* 7; 358/1993, of 29 November [*RTC* 1993\358], *F.* 2) and in terms that must by no means be vague or indeterminate (*SSTC* 9/1982, of 10 March [*RTC* 1982\9], *F.* 1; 36/1996, of 11 March [*RTC* 1996\36], *F.* 5; 87/2001, of 2 April [*RTC* 2001\87], *F.* 5), save in a summary trial in which the requirements deriving from the accusatory principle are more flexible (in particular, *SSTC* 141/1986, of 12 November [*RTC* 1986\141], *F.* 1; 358/1993, of 29 November [*RTC* 1993\358], *F.* 2).

c) The coherence between charge and decision is established on the basis of the written pleadings of the prosecution, that is, in the final pleadings (in particular, *SSTC* 20/1987, of 19 February [*RTC* 1987\20], *F.* 5; 62/1998, of 17 March [*RTC* 1998\62], *F.* 5).

d) Informing of the charge at second instance does not remedy the breach of the right to be informed of the charges brought at first instance, since 'the end result of the whole proceedings would be that the accused had had only one occasion to be informed of and defend himself against the charge . . . and, consequently, he would effectively have been deprived of a first instance with full guarantees' (*STC* 17/1988, of 16 February [*RTC* 1988\17], *F.* 4; similarly, in particular, *SSTC* 18/1989, of 30 January [*RTC* 1989\18], *F.* 2; 95/1995, of 19 June [*RTC* 1995\95], *F.* 2).

Fourth: From the foregoing it may be concluded that the appellant is right to place in the context of guarantees connected with the accusatory principle the irregularities allegedly committed by the court which, as he claims in his appeal, attest to its lack of impartiality as, indeed, one of the substantial guarantees of a fair trial consists of the impossibility of convicting without a charge being brought

by a court different from the one that delivers the judgment (in particular, *SSTC* 54/1985, of 18 April [*RTC* 1985\54], *FF.* 5 and 6; 104/1986, of 17 July [*RTC* 1986\104], *F.* 3; 134/1986, of 29 October [*RTC* 1986\134], *F.* 4; 186/1990, of 15 November [*RTC* 1990\186], *F.* 5; 302/2000, of 11 December [*RTC* 2000\302], *F.* 2). Indeed, a court which introduces factual elements that establish a new description of the offence or simply a new description and convicts on the basis thereof may be violating this guarantee, as it is convicting without charges being brought previously. The principle of the necessary coherence between charges and judgment reflects this guarantee, and we have therefore pointed out that the decisive moment for establishing the charges is in the final pleadings (*SSTC* 20/1987, of 19 February [*RTC* 1987\20], *F.* 5; 62/1998, of 17 March [*RTC* 1998\62], *F.* 5).

We must also accept the appellant's claim for protection with respect to the fact that a modification of the offences and legal description thereof in the provisional written pleadings when establishing the final charges may cause a breach of the right to defence since, as we have pointed out, if that which is unknown cannot be contradicted and defence is exercised primarily in the oral proceedings, the plaintiff will not have been able to fully exercise his defence in respect of the factual and legal modifications made to the final description of the offence, at the end of the oral proceedings. A different matter is the fact that, in order to declare the right to defence to have been breached in these cases where the provisional pleadings are altered when establishing the final pleadings, we have required that the plaintiff exercise the powers granted by arts. 746.6 and 747 *LECrim.* (*LEG* 1882\16), by requesting the adjournment of the hearing and proposing new evidence or a supplementary pre-trial hearing (*SSTC* 20/1987, of 19 February [*RTC* 1987\20], *F.* 5; 278/2000, of 27 November [*RTC* 2000\278], *F.* 16); for this requirement is no more than the application of the general doctrine that going undefended, as prohibited by the Constitution, derives from the action of the court and does not stem from a lack of procedural diligence on the part of the plaintiff in defending his interests.

(. . .)

We should also underline that the European Court of Human Rights, on the basis that guarantees inherent in a fair hearing are not necessarily the same in a civil and criminal proceedings, has recognized that even in a civil proceedings the required equity and equality of arms 'implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.' (Judgment of 27 October 1993 ECHR 1993\50], Dombo Beheer B.V. v. the Netherlands). As for the rights of the plaintiff, art. 6.3.d) ECMO (*RCL* 1999\1190) expressly recognizes not only his right to examine witnesses against him but also to 'obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. And although the European Court of Human Rights has considered, when interpreting this particular subparagraph, that art. 6.3 ECMO 'does not require the attendance and examination of every witness

on the accused's behalf', it nonetheless States that 'its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter (Judgments Engel and others v. the Netherlands, 8 June 1976 [ECHR 1976\3], series A n. 22, pp. 38–39, § 91, and Bricmont v. Belgium [ECHR 1989\14], previously quoted, series A n. 158, p. 31, § 89)' [Judgment of 22 April 1992 (ECHR 1992\48), Vidal v. Belgium, § 33].

Furthermore, we should stress that in the case in hand, the recharacterisation of the offences affected essential facts that underpinned the application of the aggravating circumstances, and that since *STC* 12/1981, of 12 April (*RTC* 1981\12) (*F.* 4), we have stated that the right to defence includes not only the right to claim and contradict the facts of the charge, but also the possibility to claim and contradict the essential elements of the legal description of the offence. As the European Court of Human Rights ruled in its Judgment of 25 March 1999 (ECHR 1999\10), Pelissier and Sassi v. France (§ 62) – repeated in a Judgment of 17 July 2001 (ECHR 2001\469), Sadak v. Turkey, § 57 – when the unquestionable right to recharacterise the offence is exercised, the court 'should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner.

(. . .)".

c) Right to non-discrimination on the grounds of gender

– *STC* 17/2003, of 30 January. Application for a declaration of fundamental rights n. 1150/1999

In this judgment the Constitutional Court rules on an application for legal protection against a Judgment of the Social Affairs Division of the Superior Court of Justice of Catalonia, of 8 February 1999, issued in an appeal for reversal lodged against a Judgment of Social Affairs Court n. 1 of Barcelona, of 24 April 1998, on dismissal, and partially reversing it. The Constitutional Court recognizes that the fundamental right to equality in the eyes of the law has been violated and decides to allow the appeal.

Reporting Judge: Mr. Roberto García Calvo

"Legal Grounds:

First: The matter to be judged in this appeal for legal protection has been set forth in detail in the precedents, namely: the aforementioned Judgment of the Social Affairs Division of the Superior Court of Justice of Catalonia is contested on the grounds that it allegedly violates the principle of non-discrimination enshrined in art. 14 *CE* (*RCL* 1978\2836), given that, in the applicant's opinion, termination of the employment relationship due to expiration of the established period disguised the true reason: her pregnancy.

(. . .)

As stated in the contested judgment, which denies the existence of evidence of discrimination, the principal constitutional aspect consists of establishing whether the applicant met the onus of proof, as the 'a quo' court understood, or whether, on the contrary, as argued in the contested judgment, she failed to prove

the existence of the discriminatory factor amounting to violation of the principle enshrined in art. 14 *CE* that is the basis of her petition for protection.

(. . .)

Therefore, protection of women is not limited to protecting their biological condition during and after pregnancy, nor to relations between mother and child during the period that follows pregnancy and childbirth, but also, in the strict sphere of the development and vicissitudes of the employment relationship, it conditions the organizational and disciplinary powers of the employer by preventing the physical and psychological consequences that discriminatory measures could have on the health of the worker and at the same time safeguards all the employment rights to which she is entitled as an employee, as any damage deriving from her state is prohibited.

An examination of the regulations which, 'ex' art. 10.2 *CE*, provide a source for interpreting art. 14 *CE*, corroborates the scope of that protection, as we pointed out in our recent *STC* 41/2002, of 25 February (*RTC* 2002\41). Indeed, art. 5 d) of Convention n. 158 of the International Labour Organization (ILO) (*RCL* 1985\1548) concerning termination of employment, of 1982, states that pregnancy shall not justify the termination of employment. Community law provides similar solutions. From Directive 76/207/EEC (*LCEur.* 1976\44) one infers that the dismissal of a female worker on the grounds of her pregnancy constitutes a direct discrimination on the grounds of sex (ECJ Judgment of 8 November 1990, *Hertz* case, and ECJ Judgment of 14 July 1994 [ECJ 1994\133], *Webb* case), even if the employer has not been expressly informed of the pregnancy (ECJ Judgment of 4 October 2001 [ECJ 2001\265], *Tele Danmark* case). The protection this Directive provides against damage caused on the grounds of pregnancy includes, as is known, many other situations that bear less of a connection than the case in hand. For example, it protects against termination of employment for reasons of absence due to unfitness for work caused by pregnancy-related disorders (ECJ Judgment of 30 June 1998 [ECJ 1998\159], *Brown* case); it protects the employee, provided that these are the grounds for termination, whether the contract is temporary or indefinite (ECJ Judgment of 4 October 2001 [ECJ 2001\265], *Tele Danmark* case); it prohibits failure to hire a woman due to pregnancy (ECJ Judgment of 8 November 1990 [ECJ 1991\73], *Dekker* case) and failure to renew a contract for the same reason (ECJ Judgment of 4 October 2001 [ECJ 2001\260], *Jiménez Melgar* case), even if a woman's pregnancy prevents her from starting the job (ECJ Judgment of 3 February 2000 [ECJ 2000\14], *Mahlburg* case), and establishes that it is equally discriminatory to terminate a contract on the grounds of a legal prohibition, imposed by pregnancy, which temporarily prevents the worker from performing a job (in respect of night work, ECJ Judgment of 5 May 1994 [ECJ 1994\69], *Habermann-Beltermann* case).

Art. 10.1 of Directive 92/85/EEC (*LCEur.* 1992\3598) – which has direct effect when a Member State has not taken measures to adapt its national law within the established period (ECJ Judgment of 4 October 2001 [ECJ 2001\260], *Jiménez Melgar* case), a fact which was not taken into consideration in the case in hand –

establishes the prohibition to dismiss a pregnant worker who has notified the employer of her condition during the period from the beginning of pregnancy to the end of maternity leave (protection extends to the whole of this period, ECJ Judgment of 30 June 1998 [ECJ 1998\159], *Brown* case), save in exceptional cases that are not related to the condition of the woman in question. Spanish legislation, through Law 39/1999, of 5 November [*RCL* 1999\2800], has recently incorporated these provisions, and does not expressly require the employer to have been formally notified.

Protection from termination of employment on the grounds of pregnancy is thus enshrined in the Constitution, reflected in the rules of law and underpinned, 'ex' art. 10.2 *CE* (*RCL* 1978\2836), by the interpretative sources of art. 14 *CE*.

Fourth: When it is proved with evidence that termination of an employment contract may conceal a breach of fundamental rights, this Court has stated, since *STC* 38/1981, of 23 November (*RTC* 1981\38), that it falls to the employer to prove that their decision stems from reasonable motives unrelated to any intention to violate the right in question. The need to guarantee that the worker's fundamental rights are not unknown to the employer through the latter's formal coverage of the worker's exercise of the rights and powers laid down by labour laws, involves considering the special difficulty that is often entailed by the operation of unmasking, in the related court proceedings, a constitutional breach concealed beneath the apparent legality of the employer's action – a difficulty of proof on which our case-law has been based since its first rulings, which has been dealt with in our procedural legislation and has been considered in the most diverse spheres of lawmaking, as borne out, for example, by Council Directive 97/80/EC of 15 December 1997 (*LCEur.* 1998\123).

(. . .)

The key factor in the contested decision is different. In the facts as found the court does not mention whether the employer was aware of the pregnancy, merely stating that the worker told her colleagues about her state, without explicitly stating whether the news was public knowledge nor whether there were other facts from which it may be inferred that such news had reached the directors of the institution who made the decision to dismiss her. Knowledge of the pregnancy by those who made the decision to terminate the contract has therefore not been declared to be expressly proven, even though the fact that persons with high-ranking positions within the organisation admitted knowing about it is highly indicative. Whatever the case, the lack of facts regarding this circumstance is not in itself sufficient to dismiss the existence of evidence, as other information enables us to deduce the likelihood of the breach, particularly as the employer did not claim to be unaware of the pregnancy (unlike, for example, our *STC* 41/2002, of 25 February [*RTC* 2002\41]) and as the female employee is not obliged to notify the employee as this is a private matter (art. 18.1 *CE*). In this respect, the aforementioned ECJ Judgment of 4 October 2001 (ECJ 2001\260), *Tele Danmark* case, stated that the employee is not under obligation to inform the employer of her state when the latter has no need for such information in order to meet its obligations.

In addition, at the time the events occurred, the regulations applied did not specify notification of the pregnancy as a requirement of protection, and this should have been taken into consideration by the Superior Court of Justice.

In short, that the employer knew about the pregnancy is beyond doubt, as is the temporal correlation and proximity between employer's knowledge of this fact and termination of employment (a significant circumstance according to our *SSTC* 87/1998, of 21 April [*RTC* 1998\87]; 101/2000, of 10 April [*RTC* 2000\101]; 214/2001, of 29 October [*RTC* 2001\214]; 84/2002, of 22 April [*RTC* 2002\84], and 114/2002, of 20 May [*RTC* 2002\114]), and the lack of a time relationship is indisputable between the dismissal (agreed in 1998) and the moment of verification of the legal cause that would have authorized the termination of the contract – much earlier, in 1996, when it became known that the funding of the NOW programme whereby Mrs. N. was hired would end. The first two factors strongly support the likelihood of the breach, whereas the last of the aforementioned factors merely reinforces the doubt regarding the time relationship, given that, as the termination of the contract did not take place during this previous period (between 1996 and 1998), the fact that the termination was concurrent with the pregnancy, around the time that it became known in the workplace, implies a powerful indication of a possible breach of the fundamental right. While it is true that the fact that the dismissal is unfair, as it lacks a cause, does not necessarily mean that it is discriminatory, as its unlawfulness does not automatically constitute a violation of the Constitution (*SSTC* 135/1990, of 19 July [*RTC* 1990\135], or 41/2002, of 25 February [*RTC* 2002\41]), there is no doubt that such an element adds weight to the evidence given by the employee.

(. . .)".

d) Right of a foreign national not to be extradited to a prosecuting country

– *STC* 32/2003, of 13 February. Appeal for a declaration of fundamental rights n. 179/1999.

In this judgment the Constitutional Court rules on an appeal for legal protection against Decisions of 30–07–1998, of the Criminal Division of the National Court (First Section), and of 04–12–1998, of the Plenary of the aforementioned division of that Court, which deemed fit the extradition of the applicant, as requested by the Turkish authorities for the enforcement of the penalties imposed on him, provided that the judicial authorities guaranteed that the applicant would not be tortured in any way. The applicant claims that the court failed to clarify the alleged circumstances of the risk of being subjected to torture and that the decisions granting his extradition are insufficiently grounded and lacking in guarantees. The Constitutional Court finds that there has been a violation of the fundamental rights to obtain the effective protection of the judges and courts and to a public trial with full guarantees, and decides to allow the appeal.

Reporting judge: Mr. Pablo García Manzano

"Legal Grounds:

First: In the present appeal for legal protection, the appellant, Mr. Nejat D.,

contests the Decision of the Plenary of the Criminal Division of the National Court of 4 December 1998, which dismissed the appeal for reversal lodged against a Decision of the First Section of that Criminal Division of 30 July 1998 (which should also be considered to be contested in this constitutional proceedings, even though it is not mentioned in the heading or in the petition of the appeal for protection, in accordance with repeated statements of this Court – particularly *STC* 187/2002, of 14 October [*RTC* 2002\187] –, *F.* 1) – agreeing to his extradition to the Republic of Turkey, in order to serve the punishments imposed in two judgments delivered in that State, provided that the latter guaranteed that its judicial authorities would scrupulously ensure that the applicant were not subjected to torture of any kind. As is explained in greater detail in the precedents, Mr. D. claims that the aforementioned judicial decisions violate various fundamental rights owing to different reasons, specifically, and following the order in which they are listed in the appeal for protection, the fundamental rights to the effective protection of the courts (art. 24.1 *CE* [*RCL* 1978\2836]), to life and physical and moral integrity, with the prohibition of torture and inhuman or degrading treatment or punishment (art. 15 *CE*), to a trial with full guarantees (art. 24.2 *CE*), to access to the ordinary judge predetermined by law, and to the latter's impartiality (art. 24.2 *CE*), not to go undefended (art. 24.1 *CE*), to freedom (art. 17.1 *CE*), and legitimacy of punishment (art. 25.1 *CE*), occasionally linking some to others and to other principles, values or prohibitions in fundamental law.

(. . .)

Third: It should furthermore be pointed out that such peculiarities of proceedings conducted in a State in order to determine whether a person should be expelled from its territory irrespective of the specific reason or purpose of this expulsion, including requests for extradition filed by a third State, have been frequently stressed by the European Court of Human Rights. For example the Judgment of 7 July 1989 (ECHR 1989\13) (Soering case) stated that when a decision to extradite entails, owing to its consequences, an infringement of the exercise of a right guaranteed by the European Convention on Human Rights (*RCL* 1979\2421), if the repercussions are not very distant, the court can invoke the obligations of a contracting State pursuant to the related provision, so that although article 1 of the Convention, which states that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention, this should not be interpreted as a general principle according to which a Contracting State, despite its obligations in respect of extradition matters, cannot surrender an individual unless it is sure that the conditions of the receiving country fully comply with each of the guarantees provided by the Convention; such considerations should not, however, relieve the Contracting States of their responsibility for all or part of the foreseeable consequences stemming from an extradition outside their jurisdiction (§§ 85 and 86). This Judgment of the European Court of Human Rights was precisely taken into consideration by the *STC* 13/1994 (*RTC* 1994\13) when it affirmed the expansive territorial framework of extradition cases and the necessary care that must be exercised by the authorities of the

requested State in order to ensure that the fundamental rights of the extradited person are respected.

In the framework of article 3 of the European Convention on Human Rights (*RCL* 1999\1190, 1572) (which prohibits torture or inhuman and degrading punishment or treatment), the European Court of Human Rights has required the State that is to expel a person from its territory to conduct a thorough and proper examination of the latter's complaints (Judgment of 11 July 2000 [ECHR 2000\151], Jabari v. Turkey, §§ 39 and 40) and to guarantee to that person availability of a remedy to enforce the substance of his rights under the Convention (Judgment of 11 July 2000 [ECHR 2000\387], G.H.H and others v. Turkey, § 36), even stating that the European Court of Human Rights must necessarily conduct a rigorous examination of a real risk of ill-treatment to the person, and may obtain of its own motion the material or elements it deems necessary for this purpose (Judgment of 15 November 1996 [ECHR 1996\61], Chahal v. the United Kingdom, §§ 96 and 97), and that assessing the existence of a risk of ill-treatment should not only be carried out on the basis of the circumstances that the State in question knew but also circumstances that it should have known when making its decision (Judgment of 20 March 1991 [ECHR 1991\27], Cruz Varas and others v. Sweden, § 76).

The European Court of Human Rights has furthermore pointed out (Judgment of 28 March 2000 [ECHR 2000\113], Mahmut Kaya v. Turkey, §§ 85 and 115) that all States must take appropriate means to safeguard the lives of persons under their jurisdiction to ensure they are not subjected to torture or inhuman or degrading treatment, adopting reasonable measures to prevent the risk of ill-treatment which they knew or should have known, and the related positive obligation of the State (§ 86) arises from the circumstance that the authorities knew or should have known of the existence of a real and immediate risk to the individual's life (a doctrine which should certainly be applicable when the risk stems from another State). Similarly, this Constitutional Court has stated (*STC* 120/1990, of 27 June [*RTC* 1990\120], *F.* 7) that the public authorities are obliged to take necessary measures to protect the life or physical integrity of those under their jurisdiction.

But furthermore, bearing in mind all the circumstances surrounding proceedings that can end with a person's expulsion from a State, neither this Constitutional Court nor the European Court of Human Rights requires such a person to prove fully and absolutely the violation of his rights abroad, which will have adverse consequences for that person, or that this violation is going to take place in the future, since, bearing in mind those specific circumstances, this would normally be an excessive burden for the person in question, particularly taking into account the aforementioned risk stemming from the national courts' failure to repair the damage in the event that this violation were subsequently proven to take place before or after the expulsion or surrender. In *STC* 13/1994 (*RTC* 1994\13) (*F.* 5) we thus state that the protection of the right claimed by the applicant should be granted if there were a reasonable and grounded fear of it being breached, and in *STC* 91/2000 (*RTC* 2000\91) we refer (*F.* 6) to the significant risk of breach of rights by the authorities of a foreign State, or the foreseeable consequences entailed

by an extradition outside the jurisdiction of the State (*F.* 6 'in fine', with reference to the Judgment of the European Court of Human Rights on the aforementioned Soering case), stressing in *ATC* 23/1997, of 27 January (*RTC* 1997\23) (*F.* 1) the need to refuse the expulsion of subjects who, presumably, with considerable certainty, may suffer substantial violations owing to the existence of a reasonable and grounded fear.

For its part, the European Court of Human Rights, in relation to the right to life and the right not to suffer torture or inhuman and degrading punishment and treatment, has also taken into account, as we have pointed out, the particular circumstances in the case of proceedings that may end in the expulsion of a foreign national from the territory of one of the Contracting States, by not requiring proof that the breach has occurred or is going to occur, but by establishing other criteria that undoubtedly attempt to prevent the irreparability of the damages caused to the person in question if he is surrendered and take into account the specific circumstances the difficulty of proof entail for that person. The aforementioned Judgment on the Soering case (ECHR 1989\3) thus refers to (§ 88) the existence of serious reasons to suppose he is in danger of being tortured or runs the risk of suffering inhuman or degrading punishment or treatment in the State to which he is extradited, mentioning in § 89 the existence of serious and proven reasons to believe that if the subject is surrendered to the State he runs a real risk of being subjected to torture or inhuman or degrading punishment and treatment. Similarly, subsequent Judgments refer repeatedly to substantial grounds having been shown to believe that in the receiving State the interested party would run a real risk of being subjected to the aforementioned treatment prohibited by the Convention (Judgment of 17 December 1996 [ECHR 1996\69], Ahmed v. Austria, § 39; Judgment of 11 July 2000 [ECHR 2000\387], G.H.H. and others v. Turkey, § 35).

The aforementioned rulings both of this Constitutional Court and of the European Court of Human Rights in relation to the characteristics of proof of violation of the person's rights in the receiving State refer essentially – and the expressions used basically adapt to that case – to future violations, but the circumstances described concerning the reasons on which they would be based (difficulty of proof and irreparability of the damage, essentially) indicate that they should also be applicable to violations that have already occurred. Whatever the case, and it is important to remember this, it is all the circumstances involved in every case in relation to the various aspects that may be significant which shall determine in each case what is required of the judicial authorities concerning the activities they should perform in the extradition procedure to ensure an appropriate decision, and in respect of the specific criteria on which this decision must be based in each case and for each controversial issue.

(. . .)

In this connection, it should be remembered that, on the basis of various documents, the applicant pointed out the alleged murder of his father and attempts to murder several members of his family, and the existence of complaints and

investigations in relation to these facts, and also concerning the circumstances of the conduct for which he was tried. He also maintained that he had been tortured in Turkey, requesting a forensic medical report from the National Court which did not rule out the existence of such torture, and even supplied a report by the Turkish services drawn up in the period in which he claimed to have been tortured, which did not rule out their existence either. Finally, as mentioned, he provided diverse documentation on the current human rights situation in Turkey. And he argued legally, on the basis of the doctrine of the European Court of Human Rights concerning the nature of the courts that convicted him in Turkey. In addition, it cannot be forgotten that such claims were stated from the outset of the extradition proceedings, and there is even earlier record of them in the asylum proceedings, and also from the outset the applicant pointed out the limitations on his right to defence stemming from what he considered an unintelligible translation into Spanish of the Judgments convicting him in Turkey and from their structure and content, as they did not allow the charges against him, the punishment imposed and the legal grounds for the latter to be clearly known.

(. . .)

As for the complaint that, if surrendered, the applicant could be subjected to torture in Turkey, it should be remembered, above all, that since we are dealing with future damage that could be significant, neither this Constitutional Court nor the European Court of Human Rights requires full proof thereof, owing undoubtedly to the difficulty or even impossibility of providing it precisely because of the future nature of the damages in question. For this reason, this Court, in Judgment 13/1994, of 17 January (*RTC* 1994\13) (*F.* 5), despite dealing with rights of undoubtedly lesser significance than those enshrined in art. 15 *CE* (*RCL* 1978\2836), referred to the reasonable and grounded fear of violation of the right as grounds for granting protection and, similarly, *STC* 91/2000, of 30 March (*RTC* 2000\91), refers to significant risk of violation of fundamental rights or the foreseeable consequences of extraditing a person outside Spanish jurisdiction (*F.* 6), while *ATC* 23/1997, of 27 January (*RTC* 1997\23), concerning inhuman and degrading treatment, also refers to reasonable and grounded fear and that subjects likely to suffer such treatment in the requesting State should not be surrendered. The European Court of Human Rights has repeatedly stated that a person should not be expelled from the territory of a State when there are shown to be substantial grounds for believing he faces a real risk of being subjected to a treatment contrary to article 4 of the European Convention on Human Rights (*RCL* 1999\1190, 1572) in the receiving country (in particular, Judgment of 11 July 2000 [ECHR 2000\151], Jabari v. Turkey, § 38).

It should furthermore be borne in mind that when there is a specific precept that engages the responsibility of the Spanish courts in this matter, namely article 3 of the Convention against torture and other cruel, inhuman or degrading treatment (*RCL* 1987\2405) (New York, 10 December 1984), which in paragraph 1 prohibits extradition where there are substantial grounds for believing that the person would be in danger of being subjected to torture in the receiving State, going

on to state in paragraph 2 that for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Now, if we examine the Decisions against which the appeal has been lodged, we will find that none of these circumstances has been considered, despite the express recognition of evidence that the applicant may have been subjected to torture. This shows that the courts, as regards the specific characteristics of the extradition proceedings, have failed to provide effective protection of the applicant's related rights.

Finally, the contested Decisions consider that the condition on which the extradition is based, that is, that the Turkish judicial authorities take utmost care or scrupulously ensure that the applicant is not subjected to torture, averts any type of risk and requires no further clarifications. However, it is highly doubtful that the mere reference to the Turkish judicial authorities taking utmost care to ensure torture does not take place, without specifying the procedures to be used for this purpose or even expressing which could be used, will avert the risk of torture, especially when there is no appropriate reference, as stated previously, to the current circumstances in Turkey regarding torture, and, very particularly, regarding the situation of the investigations aimed at clarifying related issues. But following the procedure of the European Court of Human Rights, which states that in order to adopt a decision, even when it is necessary to consider the situation existing at a previous date, the court is not precluded from having regard to information which comes to light subsequently and proves significant (Judgment of 30 October 1991 [ECHR 1991\49], Vilvarajah and others v. the United Kingdom, § 107), it should be pointed out, as we have stated, even in the case of circumstances that come to light after the decisions contested in this appeal, and in order to confirm their correctness from a constitutional point of view, that the record of the proceedings shows that by means of a note verbale of 16 March 1999 the Turkisb Embassy, in relation to the requirement of guarantees for the extradition of Mr. D., informed that 'under current legislation and the international agreements signed by Turkey, the aforementioned guarantees are provided'. The decision of the First Section of the Criminal Division of the National Court of 15 June 1999 considers that tbese guarantees are sufficient, from which one infers that the guarantee has been reduced to the mere correct application of current Turkish legislation, the existence of which the applicant never denied, and the non-fulfilment of which was precisely what he complained could occur as the basis for refusing the extradition.

(. . .)".

2. Right of foreign nationals

a) Right to apply for a work permit

– *STSJ* Valencia, 15 April 2003. Contentious-Administrative Division. Jurisdiction for suits under administrative law n. 531/2003.

Court of Contentious Administrative Proceedings n. 2 of Valencia delivered a Judgment on 16–10–2002, allowing the appeal against a Decision of the Government Office in Valencia of 22–02–2002 rejecting the application for a type-B work and residence permit for a job offer. The Superior Court of Justice of the Valencia region dismisses the appeal lodged by the counsel for the State.

Reporting Judge: Mr. Lorenzo Cotino Hueso

"Legal Grounds:

First: In the action brought with the Court of Contentious Administrative Proceedings n. 2 of Valencia, the appellant asked for the reversal of the Decision issued on 22.2.02 by the Government Office in the Valencia region. In this decision the Government Office rejected the application for a type-B work and residence permit filed by Mr. . . . in connection with a job offer from the company . . . *SL*. The rejected was based on point 9.3 of the Ministerial Agreement of 21–12–2001 (*RCL* 2002\109, 706) establishing the quota of foreign workers for the year 2002 (*BOE* 12–01–2002), according to which it was appropriate to reject applications such as the one in question under article 84.6 of the Rules on Aliens (*RD* 864/2001 [*RCL* 2001\1808, 2468]): 'application filed using inappropriate procedures as laid down by the present Rules'.

Second:

(. . .)

In other words, any application filed by an employer or foreign national for a permit for foreign workers with a job offer, whether they reside abroad or in Spain, should be rejected if it could have been filed through the quota procedure (procedure 2), and the individual job offer procedure has not been established to make up the quota (procedure 3, article 70.1.1.3). Such is the case at hand.

(. . .)

Returning to the reasoning used in the contested decision, rejection of the application for a work permit using procedure 1 (general) implies that paragraphs 2 and 3 of point 9 of the Agreement modify the Rules (specifically articles 65.10 and 11 and 70.1.1.3), rendering ineffective the general rules of procedure laid down in Section 5, Chapter II, according to which a foreign national in Spain may apply for a work and residence permit pursuant to articles 80, 83.6 and 81.1.1 which regulate legitimate subjects and the documentation required. Accordingly, as the decision states, the quota procedure is the only manner of applying for a work and residence permit, as even procedure three is subsumed into the quota procedure which is the only compulsory procedure for all work permit applications, whatever the job offer in question.

(. . .)

Tenth: The last claim of the counsel for the State is worth considering separately; as pointed out, the appellant disagrees with the claim made by the decision that the Agreement (*RCL* 2002\109, 706) deprives foreign nationals in Spain of the right to regularize their situation by channelling everything through the quota procedure. In this connection the counsel for the State considers that, depending on their circumstances, foreign nationals who enter Spain legally may opt for various procedures, although the purpose of the Agreement is not to regularize aliens and cannot cater to the situation of foreign nationals who have entered the country illegally.

It appears to be based on the premise of the existence of a right of irregular immigrants to regularize their situation underpinned by the legal system, and this assertion requires a special analysis. It should be stated in this respect that the provisions relative to irregular immigrant works are not excessive from an international point of view. On the contrary, the starting point of all international conventions is precisely the treatment of legal immigration and, only as an exception, the recognition of some rights to illegal immigrants, without prejudice to the fundamental rights to which they are deemed to be entitled for the sake of their own dignity. In this connection the European Convention on Human Rights (*RCL* 1979\2421) establishes the minimum rights which, with a different albeit not discriminatory treatment, should be guaranteed to all people in European territory, irrespective of their administrative situation.

At this point we should cite the provision made by Recommendation n. 151 of 1975 on migrant workers, point 8.1 of which states that 'Without prejudice to measures designed to ensure that migrant workers and their families enter the country and are employed in accordance with the relevant legislation, a decision should be made as soon as possible if that legislation has not been respected, in order that the migrant worker may know whether his situation can be regularized'.

Mention should be made of the yet to be ratified International convention on the protection of the rights of all migrant workers and their families, adopted by the General Assembly in Resolution 45/158, of 18 December 1990, as it stresses a series of rights to which illegal immigrants should also be entitled. Point 8.3 likewise mentions, in accordance with the ILO Convention of 1975 (which Spain has not ratified), some specific aspects in which illegal immigrants enjoy equality (wages, social security and other benefits), and their unionisation and exercise of trade union rights. Point 34 also makes a number of provisions (payment pending for work performed, accident benefit, etc.).

The position observed in the Community sphere focuses on the return of illegal immigrants, as borne out by the Green Paper on a community return policy on illegal residents, COM (2002) 175 final, of 10 April 2002, which describes the elements to be considered when establishing common policies to be pursued towards irregular residents. The Commission believes that they should be encouraged to leave the country of their own will and, if not, their forced return must be organized, bearing in mind the supranational regulatory framework (the related provisions of the Treaty on European Union [*LCEur.* 1986\8], the Geneva Convention

of 1951 [*RCL* 1978\2290, 2464] and the Protocol of 1967, the European Convention on Human Rights [*RCL* 1979\2421] and the case-law of the Strasbourg Court, and the European Union Charter of Fundamental Rights [*LCEur.* 2000\3480]).

In accordance with the international situation, in Spanish legislation Organic Law 4/2000 (*RCL* 2000\72, 209), when recognizing foreign nationals' rights, specifies a first group of rights to which all people are entitled, both Spanish and foreign nationals in a legal or irregular situation, owing to their close links with human dignity; on occasions they go considerably further than established by international regulations and, in some cases, by the Constitution (*RCL* 1978\2836).

Every foreign national (regular or irregular) is thus entitled to the right to documentation (art. 4), the right to urgent public healthcare in the event of serious illness or accident, whatever the cause, and to continue receiving this care until his discharge (art. 12); the right to basic social services and benefits (art. 12); the right to transfer his income and savings earned in Spain to his own country or any other, in accordance with the procedure established in Spanish legislation and with the international agreements applicable (art. 15); the right to effective protection of the courts (art. 20) and the right to free legal aid if he meets the general requirements in respect of certain procedures relating to his status as foreign national (art. 22). Likewise, persons younger than 18 years are entitled to basic education with access to scholarships and grants (art. 9) and the right to healthcare under the same conditions as Spanish nationals (art. 12). Finally, with the only requirement of being recorded on the municipal register, all foreign nationals have the right of political participation as laid down in local legislation (art. 6) and, basically, the right to healthcare under the same conditions as Spanish nationals (art. 12).

With respect to the present case, the Law does not imply recognition of the presumed right to regularize their situation, nor to be able to apply for a work permit pursuant to article 38 of the Law.

Without prejudice to the foregoing, the same text of the Law gives reason to believe that foreign nationals in Spain are entitled to apply for a work permit as referred to in article 38. This stems from an interpretation 'a sensu contrario' of article 39, relating to the quota procedure, which excludes this procedure for those residing in Spain.

According to this understanding, the regulatory development of the Law shapes the system of work permits previously analysed and develops it in such a way as to make the procedure laid down in article 38 the general procedure. The regulatory system thus establishes as general procedure a procedure available to foreign nationals whether or not they are in Spain (regularly or irregularly). Consequently, if the Agreement distorts the system by deactivating the general system established by the Rules (*RCL* 2001\1808, 2468), it affects the legal position of those who, pursuant to the Rules, were entitled to apply for a work permit through the general procedure. The application of the Agreement contravening the general system established by the regulations is particularly clear insofar as the general procedure is intended, as stated, as a general manner, including the possibility that the applicant is residing in Spain and, specifically, is in an irregular situation in Spain.

Article 83, paragraph six thus states: 'When the foreign worker is not legally resident in Spain . . .'. This merely confirms that the general procedure is intended as a general means, which includes applicants for work permits from foreign nationals in an irregular situation in Spain.

By no means can we infer from the foregoing that illegal foreign nationals are entitled to regularize their situation nor to obtain an initial work permit. Nonetheless, as previously stated, pursuant to the application of objective Law – and the non-application of the Agreement insofar as it is contrary to the Rules – an application filed under the general procedure cannot be automatically rejected, and, as stated, refused, without applying the procedure established in the Rules, even if the application is filed by a person in an irregular situation.

This by no means constrains the possibilities of the State in its regulatory policy of preventing illegal residence in the country, when precisely as we have seen, the framework is very broad; rather it is in accordance with the Rules which make the procedure laid down in article 38 of the Law the general procedure.

Eleventh: In view of the foregoing, it should be considered that the Agreement of the Council of Ministers of 21–12–2001 (*RCL* 2002\109, 706) is indeed contrary to the Rules on Aliens (*RCL* 2001\1808, 2468), as it distorts the system of work permits for employees established in those Rules, regulating it on the basis of the authorization granted by article 65.10 of the Rules which is contrary thereto, and not allowed by article 65.11, insofar as it is based on an interpretation of this paragraph that is contrary to the proper systematic interpretation that obliges us not to invert the system laid down by the Rules.

As a result, as stated in the previous legal grounds, we should consider the Agreement illegal as it is contrary to article 9.3 of the Constitution (*RCL* 1978\2836), article 51 of Law 30/1992 (*RCL* 1992\2512, 2775 and *RCL* 1993\246) and fully annuls article 62.2 of that same Law.

Ruling

We hereby dismiss the appeal lodged by the counsel for the State on behalf of the Government Office in the Valencia region against judgment n. 296 of 16 October 2002 delivered by Court of Contentious Administrative Proceedings n. 2 in Valencia, in appeal n. 167/2002, expressly ordering the costs of this second proceedings to be paid by the appellant".

VI. STATE ORGANS

VII. TERRITORY

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

XII. INTERNATIONAL ORGANIZATIONS

XIII. EUROPEAN COMMUNITIES

1. Rights of European citizens

– *STSJ* Andalusia (Málaga), 29 September. Contentious-Administrative Division. Appeal n. 2887/1998

The solicitor Mr. Manosalbas Gómez, acting on behalf of Mr. Augusto, lodged an appeal against the decision of the Deputy Government Office in Málaga of 15 September 1997; the appeal was recorded as n. 2.887 of the year 1998 and for an unspecified sum. Having been given leave, its commencement announced and the administrative enquiry received, notification was given to the petitioner allowing him to file a claim, which he did in the specified time and manner in writing, and which is reproduced below, and in which he requested the delivery of a judgement 'declaring: a) The reversal of the decision of the Deputy Government Office in Málaga which refused to grant a Community residence permit to my client. b) And the right of my client to be granted renewal of the Community residence permit for which he has applied'. The respondent was notified and answered in writing, basically requesting a decision 'dismissing the petition and confirming the contested decision as it is in accordance with the Law' The admission of evidence having been refused, and there being no need for a public hearing, the court proceeded to request findings, which the parties delivered in the established time and manner in statements attached to the record of the proceedings, and a date was set for the decision.

Reporting Judge: Mrs María del Rosario Cardenal Gómez

"Legal Grounds:

The present appeal contests the decision of the Deputy Government Office in Málaga of 15 September 1997 refusing to issue a Community Residence Card applied for by a British citizen, the appellant . . .

As stated in the Preamble to Royal Decree 766/1992, of 26 June (*RCL* 1992\1469, 2450), on the entry and stay in Spain of nationals of Member States of the European Communities: 'Organic Law 7/1985, of 1 July (*RCL* 1985\1591), on the rights and freedoms of foreign nationals in Spain, which regulates the entry, stay, work and establishment of aliens, states in article three that its rules are to be interpreted without prejudice to the international treaties to which Spain is party.

Pursuant to the obligations imposed on Spain by the Treaty of Accession to the European Communities, Royal Decree 1.099/1986, of 26 May (*RCL* 1986\1885), was passed on the entry, stay and work in Spain of citizens of Member States of the European Communities, regulating the administrative procedures for the exercise by nationals of European Community Member States of the rights to enter and stay in Spain, for the performance of paid or non-paid activities, and for the rendering or receiving of services, pursuant to the provisions of arts. 48, 52 and 59 of the EEC Treaty (*LCEur.* 1986\2) .

Subsequently the Council of the European Communities passed EEC Regulation 2194/1991, of 25 June (*LCEur.* 1991\920), on the interim period applicable to the free movement of workers between Spain and Portugal on the one hand, and the other Member States on the other, bringing forward the end of this interim period to 31 December 1991 and to 31 December 1992 for the case of Luxembourg. The Council likewise passed Directives 90/364/EEC (*LCEur.* 1990\728) concerning the right of residence; 90/365/EEC (*LCEur.* 1990\729) on the right of employees and self-employed persons who have ceased their occupational activity; and 90/366/EEC (*LCEur.* 1990\729) on students' right of residence, all dated 28 June 1990 and whose provisions were to be incorporated into national law by 30 June 1992 at the latest.

The consequent modification of the previous situation called for the adoption of new legislation on the entry and stay in Spain of nationals of European Community Member States which incorporated the changes advised by the experience of the implementation of Royal Decree 1.099/1986'.

(. . .) The only negative conduct with which the appellant is charged is having been convicted in the terms expressed above. It should be considered that the problem arises in relation to a Community citizen. As regards the fact that the appellant is a Community national, we should point out that the question boils down to an analysis of the charges against the appellant in order to determine whether they are contrary to public policy.

In this connection it should also be borne in mind that the concept of public order applicable to the present case is a restrictive, 'European' concept, as the Luxembourg court has pointed out; it is an indeterminate legal concept of which it may be said that anyone who performs activities that prevent the free exercise of individual, social or collective rights and freedoms or prevents or hinders the normal working of the institutions would be contravening public policy.

This courtroom (in particular Judgment of 18 July 1997 on appeal n. 3676/94) has applied the doctrine of the European Court of Justice on the legal concept of 'public policy' as limiting the right recognized in article 48 of the Treaty of Rome (*LCEur.* 1986\8), as expressed in the judgments.

The indeterminate legal concept of 'public policy' in the Community context and insofar as it restricts the fundamental principle of the free movement of workers, must be strictly integrated, though allowing a margin of appreciation in the limits imposed by the Treaty on each country in the provisions adopted for its implementation (ECJ Judgment of 4 December 1974). In any rate, 'in so far as it

may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society' (ECJ Judgment of 27 October 1977).

In accordance with the foregoing, we must bear in mind that 'public policy' is not a clause that authorizes the exercise of an all-embracing, limitless sanctioning power; on the contrary, it is a specific sanctioning power which as such has a clear and precisely defined content, the appreciation and integration of which calls for a definition that is not general but legal and it should be applied only after carrying out a minimal gathering of evidence capable of refuting the principle of presumption of innocence which is always taken as a basis. This same requirement of proof is equally applicable to cases in which the reason for expulsion is a lack of lawful means of subsistence.

(. . .) Although article 22.2 of Royal Decree 1099/86 (*RCL* 1986\1899, 2401) has been replaced by 15.1 and 2 of Royal Decree 766/92, of 26 June, neither authorizes the expulsion from Spanish territory of a citizen of a European Union Member State merely on the grounds of having been convicted in a criminal trial; rather, in order for him to be expelled, the citizen must have engaged in conduct contrary to public policy and, contrary to the opinion of the Court of First Instance, lack of social integration or a conflictive nature should not be considered as such, since, as the European Court of Justice stated in its Judgment of 19 March 1999 (C-348/96, *Donatella Calfa*) (ECJ 1999\2), under the Court's case-law (Judgment of 27 October 1977, *Bouchereau* 30/77), the concept of public policy may be relied upon in the event of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society; the existence of previous criminal convictions shall not themselves constitute grounds for such measures, and can, therefore, only be taken as such when the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy should the residence of a national of another Member State be restricted (article 1, paragraphs 1, and 3 of Directive 64/221 [*LCEur.* 1964\4]).

Obviously, if we apply this doctrine to the case in hand, in which there is merely a previous criminal conviction for an offence against industrial property, we must allow the appeal for the reason expressed above.

It has not been proven why the conduct of the appellant constitutes a threat to public policy.

Ruling

We hereby allow the present appeal, with the reversal of the contested decision referred to in the first Legal Ground of this Judgment, as it does not comply with the law, declaring that the appellant is entitled to renew the Community Residence Card for which he had applied provided no other reasons prevent this".