Spanish Judicial Decisions in Public International Law, 2001 and 2002

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. *Enforcement in Spanish law of foreign judicial decisions*

– *STS* 20 November 2001. Civil Division Appeal for judicial review n. 3325/2000

The plaintiff, Mr F.B. was dismissed by Televisión Española, SA on 8 April 1994. Having exhausted all the means provided by the Spanish legal system for appealing against this decision, on 5 January 1998 Mr F.B. filed a suit with the former European Commission of Human Rights against the Kingdom of Spain for violating article 10 of the European Convention on Human Rights. In its judgment of 29 February 2000, the European Court of Human Rights confirmed the existence of a violation of article 10 of the Convention and declared that the Spanish State should pay the plaintiff one million pesetas' compensation for material damages and pain and suffering and 750,000 pesetas in court costs and expenses. On 5 September 2000 Mr F.B. lodged an appeal for a review of the 5 October 1995 decision of the Madrid Superior Court of Justice (TS Madrid) which had declared the dismissal to be fair. The plaintiff specifically asked for his dismissal to be declared null and void and to be immediately reinstated, and paid the wages he ceased to receive as from the date of his dismissal. He also asked for the dismissal to be declared unfair. The TS dismissed his appeal in a judgment dated 20 November 2001.

Reporting judge: Mr. Jesús Gullón Rodríguez

"Legal grounds:

(. . .)

Second: . . . [T]he core issue is to determine, for the purpose of applying article 1796.1 *LECiv*, whether the Eur. Court HR, which found there to be a violation of

article 10 of the European Convention on Human Rights in the case of the plaintiff, can be interpreted as a 'recovered' decisive document that was withheld due to force majeure or by the action one of the parties.

Many judgments delivered by this Court refer to this precept in relation to the legal concept of recovered document, such as those of 20 May 1986 (*RJ* 1986\2584), 15 April 1987 (*RJ* 1987\2778), 28 March 1988 (*RJ* 1988\2386), 22 January (*RJ* 1990\171), 27 April (*RJ* 1990\3503) and 14 May (*RJ* 1990\4311) 1990 and 22 October (*RJ* 1990\8778) and 12 November (*RJ* 1991\8213) 1991. These maintain that the recovery of documents that are 'decisive' to the resolution of the case applies to documents already existing when the contested decision was delivered, and not to documents that are subsequent to the decision. This interpretation should be followed, not only in view of the restrictive nature of the admission of an appeal for judicial review, but also bearing in mind the clarity of the wording of the legal text. It is not correct to talk of 'recovered' documents and, less still, of 'documents withheld due to force majeure or to the action . . . of one of the parties' in relation to a document that does not yet exist.

In the present appeal, it is obvious that, contrary to the sole ground for appeal, a judgment delivered by the Eur. Court HR or by any other court does not fall within the scope of the aforesaid requirement of the Civil Procedure Law (*LECiv*) as it is not within the legal capabilities of this Court to shun fulfilment of the aforesaid rule as laid down in article 117 *CE* (*RCL* 1978\2836; *Ap.NDL* 2875).

In order for a judgment of the Eur. Court HR to constitute a reason for or means of overturning final decisions, the current legal system would have to be modified, as has occurred in Norway, Luxembourg, Malta and the Swiss canton of Appenzell, to establish for this purpose new legal grounds for judicial review, bearing in mind that article 510 of the new Civil Procedure Law 1/2000, of 7 January (*RCL* 2000\34, 962 and *RCL* 2001\1892), regulates appeals for judicial review and grounds for such appeals in a similar manner to the previous law, according to which the ground claimed in this case would not be admissible either.

Furthermore, it is not appropriate to carry out an extensive interpretation of the grounds for review provided for in the *LECiv*, as the appellant demands, invoking article 7 of the *LOPJ* (*RCL* 1985\1578, 2635; *Ap.NDL* 8375), since, as we shall see, the Eur. Court HR itself, applying article 10 of the Convention, which is similar in scope to article 20 of the *CE*, determines the existence of a violation of this right with specific compensatory effects, thereby granting the protection that the appellant is now requesting through another channel that is legally inadmissible.

Third: Nonetheless, in view of the claims made by the appellant, the following should be added:

1) In principle, as maintained by the case-law of the *TS* (Judgments of the second division, 4 April 1990 [*RJ* 1990\3157] and of the first division, 20 November 1996 [*RJ* 1996\8641]), the decisions of the Eur. Court HR are binding, final and non-enforceable. This Court, given its international nature, merely decides on the international responsibility of the State, there being

no need to determine which national authority is to held responsible for violating the right. Moreover, it cannot be inferred that the Convention has the authority to repeal a regulation, render void an administrative action or overturn a judicial decision it considers contrary to the Convention. The very case-law of the Eur. Court HR has stated on many occasions that its decisions are 'essentially declaratory' (A. 31. Marckx [ECHR 1979\2] and A. 64 Pakelli [ECHR 1983\6]).

2) But furthermore, it so happens that in this case the suit that the dismissed worker filed with the Eur. Court HR not only asked for recognition of the violation of his freedom of expression protected by article 10 of the Convention but also the payment of 279,519,584 pesetas, the estimated total amount of the various types of damages suffered as a result. The Eur. Court HR judgment is thus the culmination of a procedural process, the last of the rulings of a Court, albeit of a special nature, but which fully heard the plaintiff's claim – essentially the same as that which was settled by the national courts, as the significant fact is that the international court applied article 41 of the Convention containing a provision for remedy that endows that court's judgment with a complex nature insofar as is not directly enforceable but not merely declaratory either, as the most authoritative doctrine states.

The precept in question, formerly art. 50 of the Convention, states that 'If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party'. On the basis of this provision, the Eur. Court HR examines at length the circumstances that concurred in the dismissal of the plaintiff, arriving at the conclusion that his claims were indeed based on the right contained in the aforesaid article 10 of the Convention. However, immediately, departing from the premise that it is impossible to make perfect reparation for the consequences of this violation (the only circumstances under which article 41 of the Convention can be applied), the Court goes on to analyze in point 57 of the decision all the circumstances affecting the scope of the requested compensation and reaches the conclusion, taking into account various factors and applying the principle of equity, that the financial compensation for the violation of this right should amount to one million pesetas, plus legal costs, expenses and interest. Therefore, the recognition of the plaintiff's rights deriving from the dismissal he suffered at one point ended definitively with the decision of the Eur. Court HR. From this perspective, the parties to this suit would be bound by the negative effect of the *res judicata*, and this prevents the claims relating to the effects of the infringement of the right to freedom of expression as a determining element of the dismissal of the appellant from being brought again.

Fourth: Therefore, as the public prosecutor requests in his report, the appeal for judicial review must be dismissed, though it is not proper for the appellant to

bear the legal costs owing to his status as a worker who is granted the benefit of free legal aid by law".

2. *Application of international treaties in Spanish law*

– *ATS* 20 February 2001. Civil Division. Declaration of enforceability of a foreign judgment (exequatur) n. 1768/1998

The representative of Mr. Goran U., applied for a declaration of enforceability of a judgment of 28 November 1995, delivered by the Supreme Court of Gibraltar, discharging the contract entered into in August 1990 on the transaction of shares owing to the failure of the purchaser, Mr Anders D., to satisfy the deferred payment.

Reporting judge: Mr. Ignacio Sierra Gil de la Cuesta

"Legal grounds:

First: The first issue that needs to be examined in order to reach a decision on the application for a declaration of enforceability of the judgment delivered by the Supreme Court of Gibraltar on 28 November 1995 is to determine the applicable laws under which the claim should be examined; this is an issue of paramount importance as it conditions not only the presuppositions on which the effectiveness of the foreign decision depends but also the objective powers of the authority that is to deliver judgment on the recognition of the decision.

Second: The application of the Brussels Convention of 27 September 1968 (*LCEur.* 1972\178) on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version following the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, done at Brussels on 29 November 1996; *RCL* 1999\825 and *LCEur.* 1997\134) should be ruled out *ab initio* and outright. . . . The reason for ruling out the application of the convention lies in its spatial scope. Art. 60 of the Convention indeed establishes that it shall apply to the European territory of the contracting States, including Greenland, and to the French overseas departments and territories, and to Mayotte, and empowers the Kingdom of the Netherlands to extend its scope of application to the Netherlands Antilles. When the Kingdom of Denmark, Ireland and the United Kingdom acceded to the Convention through the Luxembourg Convention of 9 October 1978 (*LCEur.* 1978\371) art. 60 was modified; the new wording stated that it shall not apply to any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the contrary in respect of any such territory. This precept remained unaltered and no such declarations were made until the aforementioned San Sebastian Convention of 1989 whereby the content of art. 60 was withdrawn, thereby annulling the United Kingdom's powers to extend the application of the Convention unilaterally to any European territory for the international relations of which it assumes responsibility. The precept was also stripped of its content following the accession of Austria,

Finland and Sweden, whose Convention of 29 November 1996 was ratified by Spain by means of an instrument dated 23 December 1998.

Under these circumstances the United Kingdom of Great Britain and Northern Ireland formulated a declaration on 30 July 1998 – even before Spain ratified the Convention of accession – extending the application of the Brussels Convention unilaterally to Gibraltar, for whose international relations it assumes responsibility, making use of the powers conferred to it by the wording of art. 60 following the Luxembourg Convention of 1978. This declaration prompted an immediate response from Spain, which, in a declaration formulated on 11 September 1998, expressed its opposition to this attempt at unilaterally extending the Convention without the consent of the other contracting parties. It is therefore in this light that we should examine the application of a supranational regulation to the recognition and enforceability of the decision delivered by the Gibraltar court. Since the article regulating the spatial scope of application of the Convention became stripped of content – and it should be noted that the United Kingdom ratified the Convention of accession stripping it of content – the power accorded by the Luxembourg Convention to extend it to European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible was accordingly lost. In view of the foregoing, the attempt to extend the Convention unilaterally evidently comes up against the lack of the necessary consent or acceptance of the other states party and shall not be taken into account as it contradicts the letter of the Convention and the rules of International Law, specifically those pertaining to the Law of Treaties.

Third: Having thus ruled out the application of the Brussels Convention, we must now examine whether the foreign judgment meets the conditions for recognition under the rules of the Civil Procedure Law of 1881 – arts. 951 and following – applicable to the case, in accordance with the second interim provision of Law 1/2000, of 7 January (*RCL* 2000\34 and 962), and, in any event, with the sole abrogative provision, point 1, paragraph 3.

Fourth: Art. 951 of the *LECiv.* 1881 establishes that final judgments passed in foreign countries will have the force established in the respective treaties. In the absence of treaties, this is governed by the system of reciprocity, as the following articles state or, in the absence of either, by a set of conditions established by this very law. The articles regulating this issue are found in Section Two of Title VIII of Book II entitled 'Concerning judgments delivered by foreign courts'.

A foreign element is therefore the basis for a declaration of enforceability of a foreign judgment; this foreign element must stem from the judgment and from the country of provenance, which must enjoy jurisdictional sovereignty over a particular territory in order to settle disputes arising in it between its own nationals, between its nationals and foreign citizens, or between foreign citizens, pursuant to uniform or autonomous rules determining the scope and limits of its jurisdiction. Its jurisdiction is thus linked to the territorial sovereignty of the state, of which it is an expression; in the case of decisions delivered by a Gibraltar Court

it is necessary to go back into history to the law from which the current situation derives. Article X of the Treaty of Utrecht of 13 July 1713, states literally:

'The Catholic King does hereby, for himself, his heirs and successors, yield to the Crown of Great Britain the full and entire propriety of the town and castle of Gibraltar, together with the port, fortifications and forts thereunto belonging; and he gives up the said propriety to be held and enjoyed absolutely with all manner of right for ever, without any exception or impediment whatsoever'.

(. . .)

Fifth: The meaning of the rule has led a significant sector of particularly authorized scientific doctrine to maintain that the cession granted by means of the Treaty was simply territorial, pertaining to domain, and that its attributes therefore lacked sovereignty. This interpretation is backed not only by the article, which refers to Gibraltar being yielded 'without any territorial jurisdiction' and grants the Spanish crown preference should Great Britain grant, sell or by any means alienate the propriety of the town of Gibraltar, but also, in particular, by the historical background to the Treaty, namely the Peace Treaty of 24 October 1648 signed between Ferdinand III and the Empire during the Congress of Münster, the Treaty of Versailles of 9 March 1701 between France and the elector of Bavaria and, especially, the preliminary Hispano-British treaty of peace and amity signed at Madrid on 27 March 1713, in which there is no mention whatsoever of sovereignty.

However, this Court is not unaware of the various interpretations – which are perhaps more concerned with the principles and technique of Public International Law – according to which the transfer of sovereignty is admissible, given the light shed by the Law of Treaties, particularly arts. 31 and 32 of the Vienna Convention of 1969 (*RCL* 1980\1295 and *Ap.NDL* 13520), the preparatory work for the Treaty of Utrecht itself and a few precedents in the judgments of the International Court of Justice, such as that of 12 April 1960 ('Right of passage of Portugal over Indian territory'). Now, several points need to be clarified regarding such a claim. First, to agree to the transfer of sovereignty because under Public International Law it is not possible to conceive of a cession as being limited exclusively to territorial control amounts to converting the Treaty of Utrecht, specifically art. X, into the law that defines the spatial boundaries of the ceded territory, which is limited exclusively to the town and castle of Gibraltar together with its port, fortifications and ports; that is, the Rock of Gibraltar. The cession does not therefore encompass other physical, terrestrial or maritime spaces, just as the waters adjacent to the Rock are excluded. Second, the current territorial possession, which has overstepped these limits, is not properly justified in the acquisitive prescription from which the sovereign right over the territory of the isthmus and adjacent waters is seen to be derived. Were Public International Law to admit that this treaty grants powers to acquire territorial sovereignty and that the necessary period time has expired, the claim of legitimacy comes up against the insuperable stumbling block that the effective exercise of sovereign powers over the territory was not peaceful, as it is well known that Spain fails to agree with the exercise of such powers and expresses this categorically, actively and positively. Third, above Gibraltar's

recognized colonial status hover the effects of the current decolonization process, which in this particular dispute is marked by various resolutions of the United Nations General Assembly – from n. 2070 of 1965, to 2331 of 1966 and 2353 of 1967 and 2429 of 1968 – which defend the principle of territorial integrity in favour of Spain, as the inhabitants of Gibraltar cannot be considered a people with a right to free determination. The very same process and right of decolonization, insofar as it reveals the shift away from the concept of a colonial relationship as one of sovereignty and towards the current notion of an administration under international supervision, delegitimizes British sovereignty over the Gibraltar territories in favour of the state whose territorial claim is identified with the decolonization process; and this also extends to the maritime areas that bathe these territories, given the acceptance of the decolonizing principles at the United Nations Conference on the Law of the Sea in 1982. Fourth, principles pertaining to intertemporal law in International Law, particularly the Law of Treaties, cast a shadow on the validity of the British rights deriving from the Treaty of Utrecht insofar as they allow their rules to be interpreted in the light of contemporary facts; and even the provisions of the Vienna Convention of 1969 cast doubts on this validity, as art. 64 provides for the termination of treaties that clash with a new imperative rule of International Law, and art. 71.2 provides exemption from compliance with the treaty and maintains the rights, duties and legal situations provided that their maintenance does not oppose a new imperative rule of International Law; the cession of sovereignty as a result of use of force and, as such, lacking legitimacy today would only be respected in its effects insofar as it did not violate the principle of territorial integrity that underpins the process and right of decolonization.

Sixth: Given this state of affairs, it is not appropriate to declare the decision of the Gibraltar Courts to be enforceable. There are sufficient arguments to at least cast doubts upon the legitimacy of the territorial sovereignty from which the exercise of jurisdiction by these Courts is derived: for, either the territorial cession carried out in 1714 lacked sovereignty and, therefore, jurisdiction; or if this cession did involve territorial sovereignty, its current legitimacy is questionable in the light of the rules of the Law of Treaties, of the current law on decolonization and the fact that Gibraltar's current status derives from the use of force and its effects and consequences contradict the principles of territorial integrity and free determination which constitute the backbone of this process of decolonization. In any case, this questioned territorial sovereignty should refer exclusively to spaces delimited in the document of concession, and shall never extend to others, whether terrestrial or maritime, in respect of which by no means is it appropriate to recognize sovereign power or jurisdiction of any kind based on prescriptive instruments.

The application of all these considerations to the grounds of the application for a request for exequatur leads to the conclusion that there is no evidence for the existence of the most basic of them all – a judgment delivered by the courts of a foreign country and, as such, foreign courts – in the exercise of jurisdiction deriving from the sovereignty unquestionably exercised over a particular territory (. . .).

The Court rules:

1. We deny the application for a declaration of enforceability of the judgment handed down on 28 November 1995 by the Supreme Court of Gibraltar, made by the *Procuradora* Mrs A.-P. L., representing Mr Goran U.
2. The documentation shall be returned to the petitioner".

– *ATS* 14 June 2002. Criminal Division. Appeal for reversal n. 29/2002

In this judgment the TS dismisses the appeal for reversal lodged by the public prosecutor against the judgment of 23 May 2002 dismissing the action brought against the member of the Basque regional parliament Arnaldo O.M. for possible apology of terrorism. According to press agencies, Mr Arnaldo O.M. had uttered the expression "Gora Euskadi ta askatasuna" during a rally held on French territory.

Reporting judge: Mr. Perfecto Andrés Ibáñez

"Legal grounds:

(. . .)

Second: The scope of decision of the judgment against which the appeal is directed and, therefore, of the current decision, is limited – exclusively – to ascertaining whether, in view of what has just been said, such conduct abroad can be prosecuted in Spain pursuant to art. 23.4 b) *LOPJ* (*RCL* 1985\1578, 2635; *Ap.NDL* 8375) in connection with the Penal Code article that has been quoted.

In this respect there is no doubt that the prosecution of actions that constitute crimes of terrorism and of those that may constitute genocide or torture are necessarily subject to the principle of universal jurisdiction, a question which as such is not applicable to this case. For in the matter in hand it is simply a case of determining how to treat the action brought by the prosecutor in accordance with the legal nature of the conduct in question.

Fourth: . . . This is clear when turning, as is necessary in universally prosecuted actions, to the rnles of International Law with the status of national law (art. 96.1 *CE* [*RCL* 1978\2836; *Ap.NDL* 2875]), in order to establish the semantic scope of the syntagm 'terrorist offences'.

In this connection it is necessary, first of all, to quote the European Convention on the Suppression of Terrorism of 27 January 1977 (*RCL* 1980\2212; *RCL* 1992\2262; *Ap.NDL* 13317), which Spain has ratified. Art. 1 states that, for the purpose of extradition between Contracting States, the following offences shall not be regarded as a political offence – and therefore may be classified as terrorist offences: 'c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention; e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons; f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence'. And art. 2 allows the same treat-

ment to be given to 'an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person'.

The Spanish Constitution reflects this same criterion by clearly distinguishing, for the purpose of extradition, between political offences and 'terrorist offences' (art. 13.3).

According to the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 (*RCL* 2001\1401), which Spain has also ratified, 'Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: a) With the intent to cause death or serious bodily injury; or; b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss'. According to the same article, anyone who 'attempts' to commit an offence, 'participates as an accomplice' or 'organizes or directs others to commit an offence . . . or in any other way contributes to the commission' of the aforementioned offences shall also be considered to commit an offence (art. 2.1).

Also enlightening is the Council of the European Union's proposal for a framework decision approved on 7 December 2001 (*RCL* 1999\1205 bis and *LCEur.* 1997\3694). The proposal states that each member state shall take measures to ensure that international acts *by their nature and context, which may be seriously damaging to a country or to an international organization shall be deemed to be terrorist offences*: 'a) attacks on a person's life which may cause death; b) attacks on the physical integrity of a person; c) kidnapping or hostage taking . . . e) extensive destruction . . .'.

The EU Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism is also relevant to the decision in hand. According to the position, '"terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organization, as defined as an offence under national law, where committed with the aim of: a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking . . .' (art. 1.3).

And it is well known that art. 15 of the Treaty on European Union states that 'common positions [adopted by the Council] shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions'.

These detailed references to various legal texts are crystal clear and coincide in their precise definition of the expression 'terrorist offences', which, without a doubt, denotes exclusively the practice of those who resort to violence against persons or things in order to provoke alarm or panic, and generally do so in an organized fashion and invoking political aims. It is therefore clear that actions such as the one described in the suit fall outside the scope of application of this category

of rules. Therefore, the interpretative criterion used in the contested judgment is neither arbitrary nor capricious, and not even a question of choice, since it is laid down by provisions that are an integral part of our current legal system, and these guidelines constitute the only valid key to interpretation in this matter.

(. . .)

Eighth: The prosecutor questions whether the 'extolment' or 'justification' of terrorist offences may be classified as opinion. And he bases his argument on the fact that art. 607.2 of the Penal Code, under the heading of 'Crimes of genocide', sanctions conduct consisting of the 'dissemination using any means of ideas or doctrines that deny or justify the offences' listed in the previous paragraph. Therefore, according to him, if the criterion maintained in the judgment appealed against is applied, such apologetic conduct would be impossible to prosecute beyond our borders, even though, in his view, this is not what is agreed in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (*RCL* 1969\248; *NDL* 8726), which mentions incitement to commit genocide in article III.c).

However, the prosecutor's opinion finds no backing either in theory or in International Law or in national law. First, because the offence of incitement is committed by expressing a point of view, making public an opinion. And second, because according to the Convention on the Prevention and Punishment of the Crime of Genocide the apology of genocide does not actually constitute genocide, as is inferred from article II, which only includes under this heading acts such as killings, serious bodily or mental harm, the infliction of destructive conditions, measures designed to prevent births and forcibly transferring children. And also because what this text universally proscribes is (solely) 'direct and public incitement to commit genocide'. According to the first meaning given in the *Diccionario de la Real Academia Española* (Dictionary of the Spanish Royal Academy), the Spanish word used here, 'instigar', is equivalent to 'incitar' (to incite), which is precisely the verb used in art. 18 of the Penal Code to define provocation, something that is empirically and legally different from an apology.

Therefore, apology of genocide is not included in the Convention and is not internationally punishable, even though it is punishable in Spain, pursuant to art. 607.2 of the Penal Code. This points to the total symmetry between the treatment given by our legislator and by the international legislator to apology of genocide, and the treatment apology of terrorism has received in this courtroom, in this case with respect to its prosecution. And this could not be otherwise, owing to an elementary criterion of legal rationality, on the basis of the coherent and unequivocal legal ground".

IV. SUBJECTS OF INTERNATIONAL LAW

1. *Immunity from enforcement of a foreign state*

– *ATC* 112/2002, 1 July, Application for a declaration of fundamental rights n. 4759/2001

On 27 September 1995 the judge of Social Affairs Court n. 35 in Madrid ruled that Mr Francisco S.O., an employee of the US Embassy in Madrid, had been unfairly dismissed. This judgment was confirmed by a decision of the Social Affairs Division of the Superior Court of Justice of Madrid on 19 May 1997. In view of the employer's failure to comply with the previous ruling, the employee filed a request for its enforcement and a writ issued by the judge of Social Affairs Court n. 35 in Madrid dated 24 July 1998 established the sum of 1,385,936 pesetas principal, 103,945 pesetas legal costs and 138,539 pesetas interest. A subsequent writ issued on 25 September 1998 modified the principal, which was established at 1,465,936 pesetas. Given the failure of the party against which the enforcement action was to be taken to designate any goods liable to attachment, it was agreed by a writ of execution of 28 July 2000 to attach the monies to which the US Government or its Embassy could be entitled as refunded VAT. The party against which the enforcement action was taken lodged an appeal for reversal on the grounds of the non-existence on Spanish territory of goods liable to be attached in order to satisfy the amounts owed, on the understanding that all goods held enjoy the privilege of immunity from enforcement as they relate to activities "iure imperio". The appeal was dismissed by a writ dated 23 November 2000 and a subsequent appeal against refusal of leave to appeal was also dismissed by the social affairs division of the Madrid Superior Court of Justice on 16 May 2001. The resulting application for a declaration of fundamental rights n. 3442/200 claimed that the decision to attach monies relating to refunded VAT infringes the right to effective judicial protection (art. 24.1 CE), specifically the right of non-attachment of the goods of foreign states used for activities "iure imperio". Finally, in a writ of 13 November 2000, the judge ordered that the amount of principal be made available to the enforcer; the other party lodged an appeal for reversal against this decision, which was dismissed by a writ of 13 July 2001 stating once again that the US Embassy not only is entitled to the refund of VAT on activities "iure imperio", but also, pursuant to Royal Decree 669/1986, of 21 March (RCL 1986\ 1096 and 1408), as a result of commercial operations deriving from cooperation and trade agreements, and that although in both cases these operations were "exempt" from VAT, only in the first could they be considered "immune". On 10 September 2001 an appeal for a declaration of fundamental rights was lodged against the decision of Social Affairs Court n. 35 of Madrid, of 13 July (decisions 238/1995,) dismissing the appeal for judicial review lodged against the writ issued by that same judge on 13 November 2000 in proceedings for the enforcement of the judgment on dismissal (n. 38/1998), on the grounds that it violates article 24.1.

"Legal grounds:

First: Before examining the appellant's claim of infringement of rights, it is necessary to clarify several points: first, that the present constitutional proceedings originates from a judgment dated 27 September 1995, issued by the judge of Social Affairs Court n. 35 in Madrid, sentencing the government of the United States of America to pay compensation for unfair dismissal to Mr Francisco S. O., who rendered his services at that government's Embassy in Madrid; second, following the request for enforcement of the aforementioned judgment filed by the unfairly dismissed worker owing to failure to be paid the sums owed, the party

against which the enforcement action was taken and now the appellant failed to designate any goods liable to attachment, claiming that all the goods it possesses on Spanish territory are immune from attachment as they are used for sovereign activities (*iure imperio*) of that State; and third and last, after the judge ordered the attachment of certain goods, the sums of refunded VAT to which the party was entitled, and after the latter was ordered to specify the origin of its deductible VAT in order to be able to determine possible immunity from attachment, it failed to comply with the judge's request by shirking the duty to prove its claim that all the VAT refunded came from immune operations.

Given this state of affairs, in a writ dated 13 July 2001, the judge ratified his decision on attachment and that the party against which the enforcement action was taken should make available the principal, given that, on the one hand the VAT refunded not only originated from sovereign activities but also from commercial activities deriving from cooperation and trade agreements which, although exempt for tax purposes, could not be classified as immune from enforcement; and, on the other hand, the party's claim that all its operations be considered 'sovereign' amounted to evading Spanish jurisdiction in the fulfilment of its duties, which involves an obvious breach of law, a breach of the principle of good faith, and a violation of the right to effective judicial protection from the enforcement of judgments relating to the dismissed worker, and the claimed extension of immunity is unacceptable as it has no grounds in International Law or in the case-law established by the Constitutional Court.

Disagreeing with the aforementioned decision, the party lodged the present application for a declaration of fundamental rights on the understanding that the decision infringes the fundamental right to effective judicial protection (art. 24.1 *CE* [*RCL* 1978\2836 and *Ap.NDL* 2875]) 'insofar that it does not state whether the enforcement measures adopted by a court apply to goods protected by a legal consideration of immunity', claiming, once again, that all its goods are immune from enforcement, as it had previously maintained throughout the court process (systematically appealing against each of the decisions issued in the enforcement process) and to this Court, with which it lodged an application for a declaration of fundamental rights n. 3442/2001 with identical claims and identical grounds. For this reason, in the opinion of the Prosecutor, this appeal is extemporaneous, since the last decision on the contested attachment order was delivered through the writ of 16 May 2001. However, this objection should not be taken into account as through the decision currently contested (writ of 13 July 2001) the court also ruled on the lack of immunity from enforcement of the monies attached when passing judgment on the appeal for reversal; and it is precisely on this judicial consideration that the appeal hinges and to which the appellant imputes the breach of a fundamental right.

Second: The claims presented in accordance with the procedure laid down in art. 50.3 *LOTC* (*RCL* 1979\2383 and *Ap.NDL* 13575) merely confirm the appropriateness of dismissing the application for a declaration of fundamental rights as they manifestly lack any grounds that justify a decision on their substance by this

Court (art. 50.1.c *LOTC*), since the invoked breach of a fundamental right did not occur. Indeed, the plaintiff turned to this Court given the impossibility of appealing by process of law against the Social Affairs Court decision to attach its goods, seeking an interpretation of ordinary legality in accordance with its claims, as is stated clearly in the petition of the appeal, whereby it urges that this court declare the immunity from enforcement of any monies due to the United States Embassy or Government in respect of any refunding of VAT by the Spanish tax office.

And in this connection it is necessary to point out that, as this Court has stated, "art. 21.2 *LOPJ* (*RCL* 1985\1578, 2635 and *Ap.NDL* 8375) and the rules of Public International Law to which this precept refers do not impose a rule of absolute immunity from enforcement on foreign States; rather, they allow the relativity of the said immunity to be established. This conclusion is further backed by the very requirement of effectiveness of the rights laid down in art. 24 *CE* and by the 'reason' for immunity, which is not to grant States indiscriminate protection but rather to safeguard their equality and independence. Therefore, any delimitation of the scope of this immunity should be based on the premise that, in general, when a particular activity or when the allocation of particular goods does not involve the sovereignty of the foreign State, both International Law and, accordingly, national law do not authorize the failure to enforce a judicial decision; consequently, a decision of non-enforcement would amount to infringing art. 24.1 *CE* (see particularly *SSTC* 107/1992, of 1 July [*RTC* 1992\107], *F.* 4; 292/1994, of 27 October [*RTC* 1994\292], *F.* 3; 18/1997, of 10 February [*RTC* 1997\18], *F.* 6; and 176/2001, of 17 September [*RTC* 2001\176], *F.* 3).

When applying the aforementioned doctrine it is clear that the present appeal involves a simple disagreement of the appellant with the judicial decision adopted as it is contrary to the appellant's claim (immunity from enforcement of all its goods), and raises a question before this Court (determination of goods liable to attachment in the enforcement procedure) that only the courts of law are empowered to decide on in the exercise of their duty 'ex' art. 117.3 *CE*, and which can only be reviewed by this Constitutional Court in cases of lack of grounds, manifest arbitrariness, unreasonableness or blatant error (*SSTC* 111/2000, of 5 May [*RTC* 2000\111], *F.* 8; and 161/2000, of 12 June [*RTC* 2000\161], *F.* 4).

However, none of these defects can be imputed to the contested decision (as the Prosecutor maintains) insofar as the court's interpretation of current law cannot be described as ungrounded, unreasonable, arbitrary or erroneous. The judge made the decision to attach sums corresponding to refunded VAT after considering, in a reasoned manner, that such monies originated both from actions *iure imperio* and from private activities (trade operations or cooperation) which, unlike the first kind, do not enjoy the privilege of immunity from enforcement as they are not bound to the sovereignty of a foreign State. This conclusion was not invalidated by the appellant, not even when it received an injunction from the court to prove the specific provenance of the attached monies in order to determine their possible immunity, and it thus maintained a clearly passive attitude with the aim of protecting all its goods from the enforcement order (which had been issued by

the court to ensure it fulfilled its legal duties in respect of an unfairly dismissed worker) and, basically, aimed to secure an extension of its privilege of immunity from enforcement that is neither allowed by International Law nor complies with the constitutional doctrine that this Court has established in this respect. Equally inadmissible is its attempt to justify its inactivity regarding the burden of proof by the fact it is a sovereign state and, accordingly, transfer the burden to the other party, requiring that the dismissed worker prove to the judge the use of the Embassy's goods and assets.

As a result, the contested judgement deserves no reproach from the constitutional point of view insofar as not only was there no breach of the fundamental right as claimed, but, on the contrary, it showed deference for this right, by protecting the worker's right to effective judicial protection by not constraining without cause his possibility of achieving the effective enforcement of the decision that declared his dismissal unfair and recognized his right to receive compensation as established by law (see particularly *SSTC* 107/1992, of 1 July, *F.* 4; 292/1994, of 27 October, *F.* 3; 18/1997, of 10 February, *F.* 6; and 176/2001, of 17 September, *F.* 3).

Therefore, the Court

Rules

That the present application for a declaration of fundamental rights filed by the government of the United States of America be dismissed and the proceedings be shelved.

Madrid, on July the first, two thousand and two".

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. *Human Rights and Fundamental Freedoms*

a) The right to appeal a judgment before a higher court in criminal proceedings

– *STS* 25 July 2002, Criminal Division. Appeal for judicial review n. 69/2001

In this decision the Supreme Court partially allows the appeal lodged by Mr Brian Anthony H. and declares null and void a decision issued by the same court on 6 July 1988 dismissing the appeal lodged by Mr Brian Anthony H. This decision of 25 July 2002 orders the proceedings be resumed at the stage of the lodging of the appeal in cassation, in order that the appellant be offered the possibility of lodging such an appeal. The TS considers that in this way the appellant may effectively enjoy his right to appeal a judgment. However, in the opinion of the TS, it is not appropriate to grant authorization for the formalization of the actual appeal for review as there is no new evidence or new facts to prove the innocence of the persons condemned.

Reporting judge: Mr. Carlos Granados Pérez

"Legal grounds:

First: We are currently at the stage of bringing the appeal for judicial review, prior to formalization, for which the express authorization of this division of the Supreme Court is required.

The appeal for judicial review is a special appeal in that, if successful, it amounts to infringement of the principle of respect for the *res judicata* and for the overriding need for certainty in the field of law. Therefore this legal remedy can only be feasible when attempting to remedy situations proven to be unjust and in which there is evidence of the accused's innocence with respect to the facts that constituted the grounds of the condemnatory judgment and provided that it complies with one of the circumstances laid down in article 954 of the Criminal Procedure Law (*LECrim.* 1882, 16).

The appellant wishes for authorization to lodge an appeal for judicial review as he contends that his situation is similar to the 4th case described in article 954, which allows judicial review 'when, subsequent to the judgment, new facts or new evidence become known which prove the innocence of the convicted person'.

In this case the new fact is the opinion issued by the Human Rights Committee of 2 April 1997. It is claimed that this opinion states that the Kingdom of Spain violated various civil rights guaranteed by the Covenant, specifically: violation of the right to freedom in connection with the refusal to grant bail and consequent pre-trial custody; subjection to degrading treatment during custody; undue delays; and violation of the right to appeal the judgment before a higher court.

It is also claimed that, on the basis of the foregoing, Michel and Brian H. 'are entitled to an effective remedy that involves compensation' and 'to an effective and enforceable remedy if a violation is found to have been committed'.

It is pointed out that Brian H. brought an action for State liability for the miscarriage of justice and at the same time lodged an appeal for annulment with the Provincial Court of Valencia, which dismissed the appeal as five years had elapsed since the service of the judgment and it was not a suitable remedy for declaring the judicial error. An application for a declaration of fundamental rights was subsequently filed with the Constitutional Court against the aforementioned decision of the Provincial Court of Valencia. The Constitutional Court, in a decision dated 13 November 2000 (*RTC* 2000\260), dismissed the appeal on the grounds that the appellant had not exhausted all judicial means and pointed out that in order to examine and, if appropriate, redress the possible violations of the appellant's fundamental rights, annulment was not the only means, as he had the option of filing an appeal for review as laid down in the Criminal Procedure Law (arts. 954 and ff.), as the opinion of the Committee may be considered a new fact for the purpose of article 954.4 of the Criminal Procedure Law, or of bringing an action on the grounds of miscarriage of justice as set forth in articles 292 and 293 of the Criminal Procedure Law.

In the background to his appeal, the appellant states that the H. brothers gave notification of their intention to appeal (sic) the decision of the Provincial Court

of Valencia by appointing a lawyer. The Supreme Court rejected the appointment of the aforesaid lawyer as he was not registered in Madrid; the H. brothers therefore presented the grounds of the appeal to the Supreme Court themselves. This court appointed a duty lawyer to defend the interests of the H. brothers. This lawyer informed the court that he considered there were no grounds for the appeal, and the court accordingly appointed a second duty lawyer, who also stated the appeal was ungrounded. The Supreme Court gave them 15 days to find a private lawyer. It is claimed that the H. brothers wrote to the lawyers' association asking to be assigned a lawyer and *procurador* but never received a reply.

It is still claimed that article 876 of the Criminal Procedure Law (with the wording in force at the time, as the first three paragraphs were subsequently repealed by Law 1/1996, of 10 January [*RCL* 1996\89], on Free Legal Aid) established in paragraph two that 'if the appointed lawyer should not consider the appeal appropriate, a second lawyer shall be appointed, and if this second lawyer also fails to find any grounds for appeal, he shall state his refusal and the case information shall pass to the Prosecutor, in order that he establish the grounds for the appeal for the benefit of the person who has filed it or, if considered appropriate, return it accompanied by a letter summarizing the reasons. If the prosecutor takes the first course of action, the appeal shall be conducted in the ordinary manner; if the second course is taken, the court shall notify the appellant in order that, if he deems appropriate, he may appoint a lawyer and lodge the appeal within 15 days, otherwise he shall be deemed to have dropped the appeal.'

It is claimed that these facts are those which gave rise to the issuing of the opinion declaring the following: 'The Committee notes that . . . the appeal was not effectively heard by a court of appeal because they did not have a lawyer to present the grounds for appeal. Therefore, they were denied the right to a review of the conviction and of the punishment, violating paragraph 5 of article 14 of the Covenant'.

The letter of request, specifically the fourth legal ground which examines the reasons for the appeal, adds that the convicts Michael and Brian H. were denied the right to be heard by another court in a criminal case in the proceedings against them. Therefore, once the violation of the aforementioned Covenant has been established, they are entitled to an effective remedy other than an administrative appeal for the miscarriage of justice.

Second: In a decision dated 14 December 2001 (*JUR* 2002\1744), this court examined the effects of the reports of the UN Human Rights Committee on national law and on judicial decisions passed on *res judicata*. This decision states, among other things, the following: '. . . it is evident that art. 2.3.a) of the Covenant does not allow for a private remedy which can affect final judgments. The text is clear: the States Parties to the Covenant must provide for a remedy against decisions which may violate the rights recognized therein. But by no means are they obliged to provide for a remedy based on a decision of the Human Rights Committee. If the States Parties had wished to attribute the opinion of the Committee an effect such as that which the appellant claims, they would have regulated such effects

and their means of enforcement, that is, something other than a remedy'. Therefore, we cannot say that art. 2.3.a) of the Covenant supports the right of this court to declare the contested judgement null and void by means of art. 238 *LOPJ*. This conclusion is further supported by the very wording of the report, paragraph 13 of which establishes that 'the State Party has the obligation to take the necessary measures to ensure that similar violations do not occur in future' and paragraph 14 refers to the Committee's wish to 'receive from the State Party within 90 days information on the measures adopted to apply the report' – in this case this is stated in paragraph 17 – and it is thus clear that the obligation is valid for the state and for the future, and that the application of the findings of the report should be carried out within a broad range of possibilities which the State Party should decide. It is obvious that if the Committee thought that the Spanish Courts should set aside the judgment as a result of their findings, it would neither have merely expressed a desire nor left open the manner of compliancc. In short, if the government is not obliged to modify the legislation, it is obvious that the Spanish courts, whose final judgments cannot be reversed through a remedy of the Committee, cannot be obliged to set aside the judgment'. The decision goes on to state that 'nor is it appropriate to resort to an appeal for judicial review, considering the Committee's findings to be a 'new fact' in the sense of art. 954.4 *LECrim.*, as this is not, as we have seen, a fact that is binding for the government or for the courts of the State Party'.

Third: . . . The related doctrine upholds the right of a person convicted of a crime to have his conviction and sentence reviewed by a higher tribunal, as stated in paragraph 5 of article 14 of the International Covenant on Civil and Political Rights, and in order to enforce the right to a judicial review required by the Committee's findings, on which the present appeal is based, and given the special characteristics of this case, it is considered appropriate that this should lead to a partial allowance of the objections stated in the present appeal for review and that the right to a remedy become effective by declaring null and void the decision delivered by this court on 6 July 1988 dismissing the appeal in cassation prepared by Brian Anthony H., and the proceedings be resumed at the stage of lodging the appeal in cassation, thereby granting the opportunity for it to be formalized by the person who expressed his wish to lodge an appeal in cassation, and exercising his right to appeal to a higher court.

With this scope the claims of the *Procurador* Mr C.P., acting on behalf of Mr Brian Anthony H., should thus partially be allowed; on the contrary, it is not appropriate to grant authorization to lodge the actual appeal for judicial review, since there is no new evidence or facts that prove the innocence of the appellant with respect to the facts for which he was tried by the Provincial Court of Valencia".

b) Women's right to equality in the eyes of the law

– *STC* 41/2002, 25 February. Application for a declaration of fundamental rights n. 1203/1997

The appellant had worked for the company Fels Werker, SA, since 2 September 1992, with the professional category of 2nd-level administrative clerk. The relationship between employer and employee began with an indefinite contract; soon after the appellant returned to work after taking maternity leave for the birth of a child, the company proceeded to terminate her employment contract on 6 March 1995, apparently for objective organizational reasons. After the appellant sued the company for unfair dismissal, the company decided to readmit her before the trial came up, though not to her former post but rather to a newly created position. On 7 June 1966 the company attempted to hand her a letter stating that, for objective reasons (her post was to disappear), her employment contract would be terminated. That same letter offered the worker severance pay and compensation for failure to observe the period of notice. The worker refused to take the letter, which was consequently sent to her by registered post with acknowledgement of receipt. At the time of this second dismissal the worker was eight weeks' pregnant, though the company was not aware of this circumstance. The appellant filed a suit asking for the dismissal to be declared null and void, claiming that the company had used the pretext of objective dismissal to disguise a discriminatory dismissal on the grounds of gender, the true reason for which was the fact that she was again pregnant, which she had mentioned to several colleagues and to the financial director. The decision of Social Affairs Court n. 3 of Almería on 25 July 1996 partly allowed her claim and declared the dismissal unfair. An appeal was made to a higher court, and the social affairs division of the Granada Superior Court of Justice issued a judgment on 11 February 1997 dismissing the appeal. The court did not consider the dismissal to be discriminatory and concluded that "if the company was unaware of the pregnancy of the appellant, it is unlikely, if not impossible, that it based its decision to terminate its relationship with the appellant in such circumstances". The appellant filed an application for a declaration of fundamental rights against these decisions, claiming that the principle of non-discrimination for reasons of gender set forth in art. 14 CE (RCL 1978\2836 and Ap.NDL 2875) had been violated.

Reporting judge: Mr Eugeni Gay Montalvo

"Legal grounds

First: The appellant claims that the contested decisions that declared her dismissal unfair violate the principle of equality and non-discrimination on the grounds of sex, as set forth in art. 14 *CE* (*RCL* 1978\2836 and *Ap.NDL* 2875) and the principle of reversal of the burden of proof to which the alleged discrimination gave rise.

In short, it is claimed that the contested judicial decisions, although expressly recognizing the existence of signs of discrimination on the grounds of sex, consider the objective dismissal which the appellant suffered after enjoying maternity leave (and being readmitted only after considerable pressure from the trade unions) insufficient grounds as these signs are offset by the company's lack of knowledge of her pregnancy when it dismissed her for the second time, instead of ascertaining whether the company based its decision to terminate the contract on a real and

non-discriminatory reason, which was the court's duty under national and community law.

(. . .)

Third: Second, it should also be recalled that this court has repeatedly stated that discrimination on grounds of sex includes all types of pejorative treatment that are based not only on the pure and simple fact of the sex of the victim but on the concurrence of reasons or circumstances that are directly and unequivocally related to the sex of the person. Such is the case of pregnancy, an element or differentiating factor which, for obvious reasons, exclusively affects woman (*STC* 173/1994, of 7 June [*RTC* 1994\173], *F.* 2). Decisions of dismissal based on pregnancy, as they exclusively affect women, therefore constitute discrimination on grounds of sex forbidden by art. 14 *CE*.

An examination of the regulations for which art. 10.2 *CE* serves as an interpretative source bears this out. Indeed, art. 5.d) of Convention n. 158 of the ILO (*RCL* 1985\1548 and *Ap.NDL* 3016) states that pregnancy shall not justify the termination of a contract. Furthermore, according to art. 4.1 of Recommendation n. 95, also of the ILO, the period during which it is illegal for the employer to dismiss a woman begins on the day she notifies the employer of her pregnancy by supplying a medical certificate. And the Declaration of 1975 on equal opportunities and treatment for female employees stresses that pregnant women shall be protected against dismissal on the grounds of their condition throughout the pregnancy (art. 8.1).

Although it falls outside this interpretative framework, the analysis of Community Law provides a similar solution. From arts. 1.1, 2, paragraphs 1 and 3, and 5.1 of Directive 76/207/EEC (*LCEur.* 1976\44) one infers that the dismissal of a female worker on the grounds of her pregnancy constitutes direct sexual discrimination (ECJ judgment of 8 November 1990 [ECJ 1991, 74], *Hertz case*), as does refusal to hire a pregnant woman (judgment of the same date relating to the *Dekker case* [ECJ 1991, 73], point 21 of which states that discrimination on the grounds of pregnancy or maternity constitutes direct discrimination and excludes the possibility of justifying the reasonability and proportionality of such as measure), and the termination of the contract cannot even be justified by the fact that a legal prohibition, imposed by the pregnancy, temporarily prevents the pregnant worker from working nights (ECJ judgment of 5 May 1994 [ECJ 1994, 69], *Habermann-Beltermann case*). Later, art. 10.1 of Directive 92/85/EEC (*LCEur.* 1992\3598) prohibited the dismissal of pregnant workers who had notified the employer of their state during the period from the beginning of the pregnancy to the end of maternity leave (the protection is extended to the whole of this period: ECJ judgment of 30 June 1998 [ECJ 1998, 159], *Brown case*). As pointed out in an ECJ judgment of 14 July 1994 (ECJ 1994, 133), *Webb case*, this precept does not provide for any exception to the prohibition on dismissing a pregnant woman during that period, except for exceptional circumstances that are not related to the state of the woman in question.

(. . .)

Fourth: . . . in the case in hand it should be said that the appellant's claims are not convincing as regards the existence of signs of discrimination proving the existence of a general discriminatory environment or, at least, facts that give rise to strong suspicions of discrimination on the grounds of pregnancy.

(. . .)

As the contested judgments stress, if it is claimed that the cause for dismissal was pregnancy, it is necessary to ascertain the existence of such a pregnancy and whether the company against which the suit is brought was aware of this; therefore, since it was found that the company was not aware of the pregnancy, it is difficult to attribute such a violation to the company's decision to terminate the contract and to consider that the company based its decision on such a circumstance.

Furthermore, as regards the alleged breach of the sharing of the burden of proof, it is worth recalling that in order for the alleged reversal to occur, it is not sufficient for the worker to be pregnant and to prove this objective fact but rather, on the basis of this fact, it is necessary to claim concrete circumstances on which to base the existence of a presumable discriminatory treatment. Insofar as it is not sufficient to state a mere claim, but rather to prove evidence, there are no indications of an incorrect appraisal of the burden of proof by the court on the basis of the fact that the company failed to prove the existence of a sufficient real and serious cause for termination proving that the dismissal was not discriminatory. From the found facts it is not possible to deduce the existence of the fact to be proved: the existence of a sign or principle on which to base the presumption of violation of the right of non-discrimination on the grounds of pregnancy as the appellant claims. Therefore, since insufficient evidence of violation of the Constitution has been provided, the court is under no obligation to reverse the burden of proof making it compulsory for the company to prove its lack of intent to violate a fundamental right.

(. . .)".

c) Right to personal freedom and security

– *STC* 169/2001, 16 July. Application for a declaration of fundamental rights n. 3824/1999

This application for a declaration of fundamental rights was filed against the decisions of the Central Magistrates Court n. 5 of the National Court of 19–04–1999 and 31–05–1999 and against a decision of 30–07–1999 of the criminal division (third section) of the National Court confirming the refusal to modify the precautionary measure imposed consisting of release and prohibition on leaving Spain and confiscation of passport. Violation of the fundamental right of freedom and security; offences of terrorism and genocide; "Scilingo Manzorro" case; insufficient power of the law to adopt such a measure restricting the fundamental right and lack of proportionality; granting of protection.

Mr Adolfo Francisco S. M filed application for a declaration of fundamental rights n. 3824/1999 against the decisions of 19 April and 31 May 1999 of the Central

Magistrates Court n. 5 of the National Court and against a decision of 30 July 1999 of the third section of the criminal division of the National Court. The appeal was filed against these first decisions (decisions of 19 April and 31 May 1999 respectively), which denied a request for modification of a precautionary measure (prohibition on leaving Spanish territory and confiscation of passport) and against the second decision (30 July 1999) upholding them. This case dates back to a preventive detention order adopted during the pre-trial hearing of case 19/1997 of the National Court (decision of 10 October 1997) on the grounds of conduct constituting terrorist offences and genocide allegedly committed by Mr Adolfo Francisco S. M during the military regimes of Argentina and Chile. On 9 January 1998, the wife of Mr Adolfo Francisco S. requested his release without bail owing to lack of financial resources. A decision of the same date agreed to his release but with the obligation apud-acta of appearing before the court on a weekly basis, surrendering his passport and being expressly forbidden to leave Spanish territory. The appellant later requested the modification of the precautionary measure preventing him from leaving Spanish territory (letter of 25 March 1999) and Magistrates Court n. 5 of the National Court turned down his request (decision of 19 April 1999) on the basis of the following arguments: (1) The prohibition on leaving Spanish territory is the only way of ensuring that the accused remains at the disposal of Spanish justice, (2) The charge is not broad. It is specific and concrete and refers to the alleged participation in "very serious" crimes (alleged genocide, terrorism, disappearances of persons and torture); (3) the degree of (alleged) responsibility shall be established in the oral proceedings and this cannot be used as grounds for placing the accused outside the scope of Spanish jurisdiction, (4) the fulfilment of criminal orders does not free a person from responsibility and (5) while the possibility of his fleeing is unlikely, his return, if authorized to leave Spanish territory, would be impossible.

Reporting judge: Mr. Julio Diego González Campos

"Legal grounds:

First: The present application for a declaration of fundamental rights was filed against the decisions of 19 April and 31 May 1999 of the Central Magistrates Court n. 5 of the National Court refusing the request for modification of the precautionary measure established in proceedings 17/1997, consisting of release from custody with prohibition on leaving Spanish territory and confiscation of passport, and against a decision of 30 July 1999 of the third section of the Criminal Division of the National Court, which confirmed these decisions. It is claimed that they violated the right of access to the ordinary judge predetermined by law (art. 24.2 *CE* [*RCL* 1978\2836 and *Ap.NDL* 2875]) in relation to the principle of legality, the right to the effective protection of the courts and not to go undefended and the principle of non-retroactivity of unfavourable provisions restricting individual rights (arts. 24.1 and 25.1 *CE*), on the understanding that the Spanish courts lack the jurisdiction to try the offences with which the appellant is charged; and the violation of the right to freedom (art. 17.1 *CE*) in relation to the right to effective protection of the courts and not to go undefended (art. 24.1 *CE*), considering that

the judicial decisions relating to the aforesaid precautionary measure are ungrounded and, therefore, disproportionate.

Another aspect of this appeal is the possible violation of the right to freedom (art. 17.1 *CE*) owing the lack of legal provision for the precautionary measure imposed, a question posed by this court, using the powers conferred for this purpose by art. 84 *LOTC* (*RCL* 1979\2383 and *Ap.NDL* 13575), to the parties to the case in order that they declare what they deem appropriate. But the present appeal does not include the claims added by the appellant in a letter of 18 October 2000 regarding the possible breach of the right to the effective protection of the courts, the right not to go undefended and the right to a trial without undue delay, based on the committal for trial order of 2 November 1999 and the decision of 2 November 1999 modifying the latter. For, as this court declared, it is the letter of application for a declaration of fundamental rights and not the claims that constitutes the object of the declaration that is requested (see particularly *SSTC* 30/1989, of 7 February [*RTC* 1989\30], *F.* 1; 2/1990, of 15 January [*RTC* 1990\2], *F.* 1; 132/1991, of 17 June [*RTC* 1991\132], *F.* 2; 185/1996, of 25 November [*RTC* 1996\185], *F.* 1; 55/2001, of 26 February [*RTC* 2001\55], *F.* 3).

All the parties oppose this except for the Prosecutor, who wishes for the appeal to be allowed, as he considers that the appellant's right to freedom has been violated owing to the lack of provision for and proportionality of the precautionary measure.

Second: As set forth in detail in the case records, the appellant claims a breach of his right to the judge predetermined by law (art. 24.2 *CE*) on the understanding that Spanish courts are not competent to try the offences with which he is charged – terrorism, genocide and torture committed during the period in which Argentina was governed by the military junta. All the parties point out the existence of grounds for disallowing this claim, namely his failure, during the earlier stage, to invoke the allegedly violated right [art. 50.1 a) in relation to art. 44.1 c) *LOTC*], for neither in the request for modification of the precautionary measure nor in the appeals filed against the decisions adopted thereon was a breach of the fundamental right claimed. What is more, the Prosecutor adds that the failure to formally invoke the right is further borne out by the attitude of the appellant who, by voluntarily appearing before the examining judge to give a statement on the facts of case 17/1997, proved his recognition of the Spanish courts' jurisdiction to judge such facts.

Now, we must rule in favour of those who are opposed to allowing these grounds for appeal. From the reading of the records of the case – in particular the letters requesting modification of the precautionary measure, authorization to leave Spanish territory and the appeals against the decisions on this measure – it can be inferred that, indeed, the appellant failed to state a breach of his right of access to the ordinary judge predetermined by law to the court. Therefore, this claim must be dismissed, in accordance with our doctrine on failure to invoke the allegedly violated right at an earlier stage of the proceedings (see particularly *SSTC* 1/1981, of 26 January [*RTC* 1981\1], *F.* 4; 3/1981, of 2 February [*RTC* 1981\3], *F.* 1; 201/2000,

of 24 July [*RTC* 2000\201], *F.* 3, with a full summary of constitutional case-law), which makes it unnecessary for this court to rule on the possible concurrence of other obstacles alleged by the parties and prevents the question from being examined in depth.

Third: Altbough the second alleged violation centres on the breach of the right to freedom (art. 17.1 *CE*) in relation to the right to the effective protection of the courts and the right not to go undefended (art. 24.1 *CE*), which the appellant bases on the insufficiency of grounds and lack of proportionality of the measure imposed, it shall nonetheless be examined after the question of lack of legal provision for the measure in question, which was stressed by this court to the parties, since the absence of legal provisions for a measure constraining a fundamental right constitutes in its own right a breach of the fundamental right affected (*SSTC* 52/1995, of 23 February [*RTC* 1995\52], F.F. 4 and 5; 49/1999, of 5 April [*RTC* 1999\49], *F.* 5) and is an essential prerequisite of the constitutional legitimacy of the interference of an official authority in fundamental rights (*SSTC* 37/1989, of 15 February [*RTC* 1989\37], *F.* 7; 52/1995, of 23 February, *F.* 4; 207/1996, of 16 February [*RTC* 1996\207], *F.* 4; 49/1999, of 5 April, *F.* 4).

Now, first of all it must be established whether we are dealing with a case of a measure affecting the right to freedom and security protected in art 17.1 *CE* or whether, as one of the parties maintains, the measure affects the freedom of movement recognized in art. 19 *CE* only for Spanish citizens, so that the precautionary measure, having been adopted with respect to the national of auother country, cannot constitute a violation of this fundamental right.

Fourth: The arguments that support the opinion that the claim be dismissed are based on two premises that this court cannot share: the absolute exclusion of the nationals of other states from the scope of protection of art. 19 *CE* and the autonomy of the prohibition on leaving Spanish territory and confiscation of passport as a measure constraining the rights of the appellant.

a) First of all, the fact that art. 19 *CE* does not expressly mention foreign nationals does not mean that they automatically and in all cases lack the right to move freely throughout Spanish territory and, specifically, that they lack the right to depart from Spanish territory when they have entered it legally. In *STC* 94/1993, of 22 March (*RTC* 1993\94), *F.* 2, we maintained that 'the lack of a constitutional declaration proclaiming the free movement of persons who do not possess Spanish nationality is not sufficient grounds for considering the problem to be solved . . .'. The literal wording of art. 19 *CE* is insufficient, because that precept is not the only one that should be considered; in addition it is necessary to take into account other precepts that determine the legal status of foreign nationals in Spain, including in particular art. 13 *CE*. Paragraph 1 states that foreign nationals in Spain shall enjoy the public freedoms guaranteed by Title I of the Constitution, albeit in the terms established by treaties and the law . . . And paragraph 2 of this same art. 13 states that only Spaniards shall be entitled to the rights recognized in art. 23 *CE* . . . Therefore, it is obvious that aliens are entitled to the fundamental rights of residence and free movement enshrined in art. 19 of the Constitution' (similar

opinions expressed in *SSTC* 116/1993, of 29 March [*RTC* 1993\116], *F.* 2; 86/1996, of 21 March [*RTC* 1996\86], *F.* 2; 24/2000 of 31 January [*RTC* 2000\24], *F.* 4). So, aliens are entitled to the fundamental rights enshrined in art. 19 provided that they are recognized in treaties or in the law and under the terms of such recognition.

From this point of view, in order for us to conclude that arts. 12 and 13 of the International Covenant on Civil and Political Rights (*RCL* 1977\893 and *Ap.NDL* 3630) recognize the right of free movement of persons who have legally entered the territory of the state, as this Court has declared (*SSTC* 94/1993, of 22 March, *F.* 4; 116/1993, of 29 March, *F.* 2; 24/2000, of 31 January, *F.* 4) the appeal would require us, going beyond the dismissive conclusion reached by some of the parties, to analyze whether the right to free movement is generally recognized in any national law or in any international treaty signed and ratified by Spain. And in this connection, it should be pointed out that art. 20 of Organic Law 7/1985, of 1 July (*RCL* 1985\1591 and *Ap.NDL* 5093), on the rights and freedoms of aliens in Spain, in force when the contested decisions were adopted, provided that 'departures from Spanish territory may be carried out voluntarily, except in cases of prohibition laid down in the present Law'. So, having established the foregoing, the constitutionality of the prohibition on leaving Spanish territory of the appellant, who arrived in Spain legally to give a statement voluntarily in proceedings 17/1997, as a measure constraining his right to free movement, it is also necessary to examine whether it constitutes a constraint provided for in the law and whether it is proportionate and necessary, since we cannot forget that any measure constraining fundamental rights must be grounded in law and be necessary for the achievement of legitimate ends in a democratic society, and its application must be reasoned and reasonable (see particularly *STC* 207/1996, of 16 February, *F.* 4).

b) In the case analyzed, the prohibition on leaving Spanish territory and the consequent confiscation of the passport does not constitute an autonomous measure but one of the guarantees that make up the precautionary measure imposed in lieu of pre-trial custody, that is, pre-trial release.... Therefore, the constitutional legitimacy of the contested decisions must be examined from the angle of the right to freedom enshrined in art. 17.1 *CE*, since, irrespective of the content of the agreed guarantee, that is, of the right constrained by the condition that ensures the presence of the defendant at the trial, what defines the scope of constitutional protection is the fact that it is a condition imposed as a guarantee that constitutes the precautionary measure which furthermore was adopted in lieu of pre-trial custody. The fact that the precautionary measure – pre-trial release – by nature restricts freedom and that it replaces pre-trial custody, that is, the possibility that the latter be restored if the measure is not fulfilled, are the characteristics that bear out the influence on the right to freedom of the appellant in this case and define the framework of analysis of the contested decisions.

(...)

Fifth: ... An examination of the breach of the right to freedom, given the possible lack of legal provision the measure restraining this right, requires two

clarifications regarding the object of the examination. First, in the light of the heterogeneousness and multiplicity of the rules quoted by the parties as possible legal provision for the measure, it should be pointed out that in examining this hreach this Court must confine itself to analyzing the rules on which the judicial authority bases its intervention, since we cannot forget that we are dealing with a request for a declaration of fundamental rights, the object of which is a specific action by a public power, materialized in certain judicial decisions on the aforementioned precautionary measure, and that the ınain purpose is its annulment; therefore, the analysis of the breach of the right cannot be carried out by abstracting the content of the aforesaid decisions, as this would require this Court to perform the task, for which it lacks competence, of analyzing all Spanish law as a whole. This is, nonetheless, without prejudice to anything this Court may consider relevant to point out in relation to the provisions quoted by the parties, in order to provide a response to those who have, and have stated this before this Court, a legitimate interest in opposing the present appeal.

The second necessary clarification concerns the definition of the precautionary measure ınposed. As we have pointed out when identifying the fundamental right affected, we are not dealing with a measure that has been imposed as an autonomous precautionary measure but one of the conditions that ınake up pre-trial release. Therefore, the precautionary ıneasure is a pre-trial custody without bail comprising specific precautions, namely the obligation *apud acta* to appear before the Court on a weekly basis and whenever summoned, confiscation of passport and the express prohibition on leaving Spanish territory without authorization. Basically, pre-trial release on the condition of being available to the Court . . .

Sixth: . . . In short, the claimed provisions should be examined from the point of view of the three requirements laid down by our Constitution on legal provision for measures constraining fundamental rights: the existence of a legal provision empowerıng the judicial authority to impose the measure in the specific case; the legal status this provision should have; and the ability of the Law to guarantee legal certainty.

Seventh: Having made the aforementioned clarification, the analysis of the existence of a specific legal provision for the measure should be based, as pointed out previously, on the content of the rules regulating pre-trial release in the Criminal Procedure Law, that is arts. 528 and following and the corresponding provisions on pre-trial release in lieu of pre-trial custody (art. 504 *LECrim.*), which are those to which the contested judicial decisions refer.

There is no need to cite them, as it is clear from reading them that the Criminal Procedure Law empowers courts to grant pre-trial release as an autonomous ıneasure (arts. 528 and following), and as a measure in lieu of pre-trial custody (art. 504, paragraph 2). It also shows us that, on the one hand, this Law authorizes the judge to impose, at his own discretion and depending on the concurrent circumstances, two types of guarantees, payment of bail (art. 529) and provisional deprivation of the use of the subject's driving licence and confiscation of the related document (art. 529 bis). On the other hand, the court must also impose on the

defendant the obligation to appear before the court *apud acta* whether he has been released with or without bail. In short, these constitute the general rules with status of Law that the judicial constraint of the fundamental right to freedom consisting in pre-trial release under the obligation of remaining at the disposal of the courts requires. But it is obvious that they do not contain a specific legal provision regarding the prohibition on aliens of abandoning Spanish territory and confiscation of passport, which is what the appellant is questioning in the present case.

Eighth: Furthermore, in response to the claims of the parties to this constitutional proceedings, it should be pointed out that neither of the provisions mentioned in their respective letters fulfils the triple legal requirement specified for a measure constraining fundamental rights . . . None of the precepts of the Law on Public Security and the Law on the Rights and Freedoms of Aliens in Spain contains an autonomous legal authorization enabling the courts to grant this measure during the course of a criminal proceedings; rather, it is based on the Criminal Procedure Law.

c) Having established that such an express and specific authorization is not found in the rules regulating pre-trial release in the Criminal Procedure Law, it merely remains to analyze whether the rules on this and the regulation of pre-trial custody constitute sufficient legal provision, on the understanding that these rules, which specifically authorize the adoption of the precautionary measure that most constrains the right to freedom, also entitle the courts to grant precautionary measures that are less restrictive of the right to freedom. Now, the answer to this question cannot be affirmative either.

Indeed, the line of reasoning *ad maiore ad minus* would only lead us to conclude that the precepts concerning pre-trial custody assume the existence of a generic precept providing for interference in the fundamental right, just as we have found the rules on pre-trail release to contain; but, as the Prosecutor states in his claims, this does not allow us to maintain that these provisions as a whole provide the sufficient legal basis that the constitutional requirement of legal certainty and protection of freedom require, as we have pointed out [*SSTC* 36/1991, of 14 February, (*F.* 5), and 151/1997, of 29 September, (*F.* 4)].

Ninth: This court has declared that the constitutional principle of proportionality of measures constraining fundamental rights requires that, in addition to being provided for by law, such a measure must be suitable, necessary and proportional to a constitutionally legitimate end [see particularly *STC* 207/1996, of 16 February, (*F.* 4)]. We should also recall that under normal circumstances a precautionary measure is not imposed on a person awaiting trial, as is deduced from the effective validity in our laws of the fundamental rights to freedom (art. 17.1 *CE*) and the presumption of innocence [art. 24.2 *CE*; see particularly *SSTC* 128/1995, of 26 July, (*F.* 3); 14/2000, of 17 January, (*F.* 3)]. Its special nature and the necessary protection of the right to presumption of innocence as a rule of trial procedure requires that precautionary measures be adopted when there is reasonable evidence of criminality [*STC* 128/1995, of 26 July, (*F.* 3)] and to the extent they are required in order to achieve a constitutionally legitimate aim which, in par-

ticular, as regards pre-trial release, lies in ensuring that the accused is physically available to appear before court, by guaranteeing he will be a party to the suit and, if necessary, depending on the result, guaranteeing his presence at the trial [see particularly *SSTC* 85/1989, of 10 May, (*F.* 2); 56/1997, of 17 March, (*F.* 9); and 14/2000, of 17 January, (*F.* 7)].

The constitutional requirements of the proportionality of measures constraining fundamental rights [see particularly *STC* 207/1996, 16 February, (*F.* 4)] are basically the criteria of suitability, necessity and proportionality. That is, that it should be possible to attain the desired objective through the measure adopted, suitability; that there should not be a less onerous or injurious measure for achieving the proposed objective, necessity; and that sacrificing the right should bring more benefits than disadvantages to general interest in keeping with the seriousness of the interference and the personal circumstances of the person on whom it is imposed, strict proportionality .

Tenth: Specifically, regarding the analysis of the proportionality of the measure, we must point out, first, that the contested decisions, with reference to the statements given by the appellant before the judge, indicate the existence of signs of criminality, and it must therefore be understood that the adoption of the measure was grounded and the appellant cannot be considered to be in the right regarding this point. In this connection, the claim of not being guilty or justification of his conduct is irrelevant to the requirement of the existence of criminality as a legal ground for the precautionary measure and a requirement of its constitutional legitimacy.

Second, the legitimate constitutional aim of the precautionary measure is stated in the contested decisions. Thus, on the one hand, the decision of 19 April 1999 states that 'the prohibition on leaving Spanish territory is the sole means of guaranteeing that the accused remains at the disposal of the Spanish judicial authorities and, if prosecuted, that he can be brought to trial'; on the other, the decision of 31 May 1999 maintains that the 'reasons set forth in the challenged decision are of sufficient weight and substance to indicate that the precautionary measure adopted is the minimum measure that can be taken and the subject's freedom of movement is compatible with his submittal to Spanish justice, which could not otherwise be guaranteed'; and, finally, the decision of 30 July states that 'given the seriousness of the offences described, although an accompanying committal for trial order is needed in future, if appropriate, it should be agreed for the time being, in order to have certain guarantees that the process reaches completion, that the prohibition on abandoning Spain be maintained'.

Now, the fact that the contested judicial decisions state a legitimate end does not signify that the measure adopted is necessary, appropriate and proportional to achieving it. The requirements of proportionality of judicial decisions constraining fundamental rights establish the need that the decisions show evidence of elements allowing this court to assess whether the required evaluation of proportionality has been made. In this case, the decisions state the impossibility of guaranteeing that the appellant be brought up for trial in any other manner, on the basis of the

risk of flight, or the risk of failure to return to Spain should his departure be authorized. However, no reasons are given.

As this court has stated on various occasions in similar circumstances, whereas averting the risk of flight is one of the legitimate aims of pre-trial custody, the courts are required to weigh up the personal circumstances of the subject, particularly if this information is known by the court and used to support the claims of the appellant [see particularly *SSTC* 128/1995, of 26 July, (*F.* 4); 33/1999, of 8 March, (*F.* 7); 14/2000, of 17 January, (*F.* 4)]. In this case, the appellant claimed in all his statements that there was no risk of flight and that he had demonstrated an attitude of collaboration with the judicial authorities by appearing voluntarily before the judge to give statements. However, neither of the contested decisions provides an individual answer to this claim or indicates on what circumstances the court bases its belief that there was a risk of evasion of justice. It is not incumbent on this court to assess this question, for our powers in this respect are limited to conducting an external examination of the contested judicial decisions.

Furthermore, as the Prosecutor claims, the lack of proportionality of the measure also stems from the absence of a time limit thereon. In this connection we should bear in mind the seriousness of the measure taken to ensure the appellant's attendance during the proceedings, for the appellant is an Argentine citizen who resides, works and has his family outside Spain. Therefore, in this case, the measure taken to ensure that the accused attends the proceedings constitutes a particularly burdensome situation for he who suffers it and is not comparable to the damage that could be caused by other types of pre-trial release guaranteed by bail or prohibition on the use of a driving licence or to the damage that this same measure could cause to a person, whether Spanish or foreign, whose life is based in Spain. This makes it all the more necessary for the courts to assess the proportionality of the measure in the light of the time the appellant has been banned from leaving Spanish territory and the foreseeable slowness of a proceedings like the present one, given its obvious complexity and size. For the indefinite nature of the prohibition on leaving the country could in itself constitute sufficient grounds for considering the constraint of the right to be disproportionate and, accordingly, for granting that a violation of the appellant's right to freedom has taken place (*mutatis mutandis STC* 175/1997, of 27 October, *F.* 4).

Eleventh: In connection with the foregoing, we must declare that the appellant's right to freedom has been violated owing both to the insufficiency of the law providing for the agreed measure constraining the fundamental right from the requirements of legal certainty of law, and to the lack of proportionality of the imposed measure, and we must therefore set aside the contested decisions. Nonetheless, as this Constitutional Court has declared [*SSTC* 88/1988, of 9 May, (*F.* 2); 56/1997, of 17 March, (*F.* 12); 98/1998, of 4 May, (*F.* 4); 142/1998, of 29 June, (*F.* 4); 234/1998, of 1 December, (*F.* 3); 33/1999, of 8 March, (*F.* 8); 14/2000, of 17 January, (*F.* 8)], it is the court of law which must decide whether or not to adopt the precautionary measures permitted by the law in accordance with the constitutional requirements of protection of the right to freedom and in accordance

with what this Court has declared in ground 10 regarding the proportionality of the measure and specifically the establishment of a time limit thereon in keeping with the needs of the proceedings and its seriousness.

Decision

Bearing in mind the foregoing, the Constitutional Court, acting on the authority invested in it by the Constitution (*RCL* 1978\2836 and *Ap.NDL* 2875) of the Spanish nation,

Has decided

To partially allow the present application for a declaration of constitutional rights and, accordingly:

1. To dismiss the claim regarding the right to the legally predetermined Judge (art. 24.2 *CE*).
2. To declare that the appellant's right to freedom has been breached (art. 17.1 *CE*)".

d) Right of artistic creation

– *STSJ* Catalonia, 11 July 2001. Contentious-Administrative Division. Jurisdiction for suits under administrative law n. 7/2001

The second division of the Chamber for Contentious Administrative Proceedings of the Superior Court of Justice of Catalonia delivered a judgment on 11 July 2001 allowing the appeal lodged by Paco Dorado SL against the judgment issued on 13 December 1999 by the Court of Contentious Administrative Proceedings n. 12 in Barcelona, which dismissed the appeal lodged against the decision of the Generalitat (regional government) of Barcelona on the grounds that the fundamental right to creation and artistic production had not been violated.

The Catalan TSJ maintains that refusal to authorize the holding of the opera and bullfight on horseback spectacle "Carmen, ópera andaluza de cometas y tambores" violates the aforementioned fundamental right.

Reporting judge: Ms. Celsa Pico Lorenzo

"Legal grounds:

(. . .)

Second: The appellant considers that the decision of the *Generalitat* constitutes censorship and destruction of a fundamental element of an artistic creation of Mr T., whose representation rights are held by the appellant, and art. 20.2 *CE* has thus been violated.

These days it is not frequent for violation of freedom of artistic expression to be invoked, and our post-constitutional legal system, apart from earlier cases involving pornographic literature and magazines (*STS* second chamber or Criminal Division 13 February 1981 [*RJ* 1981\549]), practically lacks any rulings on this subject. Even in the case-law of the European Court of Human Rights (almost all of which refers to sexual morality) we find very few judgments that examine article 10 of the European Convention for the Protection of Human Rights (*RCL*

1979\2421; *Ap.NDL* 3627) on freedom of expression, which includes freedom of artistic expression – specifically freedom to receive and communicate information and ideas – which involves engaging in the public exchange of cultural, political and social information and ideas of all kinds (point 27 of the Eur. Court HR judgment 24 May 1988 [Eur. Court HR 1988\8], case 159/1988, Müller and Others; point 49 Eur. Court HR judgment Karatas 8 July 1999 [Eur. Court HR 1999\98]).

The decisions of the Strasbourg court are almost always based on an examination of whether the measures chosen by the national authorities 'laid down by the law', 'for a legitimate purpose intended to protect sexual morals', the concept of which it recognizes as having changed in recent years (Müller case), are 'necessary in a democratic society', pursuant to article 10 of the European Convention for the Protection of Human Rights. Despite the Court's tendency to consider violations of the aforementioned article 10 to be non-existent (Eur. Court HR judgment 7 December 1976 [Eur. Court HR 1976\6], case 26/1976, 'the little red schoolbook'; Eur. Court HR judgment 24 May 1988, case 159/1988, Müller and Others; Eur. Court HR judgment 20 September 1994 [Eur. Court HR 1994\29], case 474/1994, Otto-Preminger Institute; Eur. Court HR judgment 25 November 1996 [Eur. Court HR 1996\62], case 699/1996, Wingrove) the proliferation of dissenting opinions in the decisions points to the inappropriateness of the measures adopted and the relativity of the concept of obscenity, recalling that similar accusations were once levelled at authors such as Baudelaire or Flaubert (Müller case).

Third: . . . Within the European framework it should thus be concluded, for it is now totally accepted in the field of freedom of artistic creation, that more flexible limits have been developed and established than those laid down in art. 20 of the Spanish Constitution and art. 10 of the European Convention, as mentioned by *STC* 31/1994, of 31 January (*RTC* 1994\31) on the now indisputable possibilities of managing a private television company.

(. . .)

Fifth: Having then dismissed the argument maintained in the judgment presently being examined regarding the lack of legitimisation of the claimant, it is necessary to examine the matter in depth in order to determine whether the aforementioned fundamental right was violated.

We must pass judgment on the failure to authorize the staging in Barcelona's *Plaza Monumental* of the play *Carmen, opera andaluza de cornetas y tambores* by the playwright Salvador, with an audience of some eight thousand and without seating in the square's arena, with the notice that 'during the interval a bullfight will take place with a single bull and bullfighters on horseback'.

Sixth: We see that the decision not to authorize the spectacle is based on Law 3/1988, of 4 March on the protection of animals. Article 4.2.a) of the aforementioned regional law excludes bullfights in places which had bullrings built for the purposes of such spectacles at the time the law entered into force from the prohibition on using animals in spectacles, fights and other activities that may cause them suffering. In keeping with the aforementioned law, paragraph four of art. 210 of the general bylaw on the urban environment, passed by the plenary of Barcelona

city council on 26 March 1999, excludes from the prohibition of public events involving animals duly authorized bullfights held in suitable premises.

At this point there can be no question that the bullfight on horseback to be held during the interval of *Carmen, ópera andaluza de cometas y tambores* was due to take place in accordance with the rules of bullfighting at a site built for that purpose. The plots of similar works by the French authors Bizet and Merimée, with the presence of the bullfighter E., are well known.

Taking our argument further, there can be no doubt that *Carmen, ópera andaluza de cometas y tambores* is a unique artistic creation consisting of a show which is interrupted – by an interval in other spectacles – to perform a bullfight in accordance with current legislation (*RD* 145/1996, of 2 February regarding the aforementioned Law 3/1988, of 4 March). The failure to authorize a spectacle when both parts, the play-musical and the bullfight, conform to current regulations on spectacles therefore constitutes a violation of the aforementioned fundamental right.

(. . .)".

e) Right of meeting

– *STSJ* Catalonia, 18 May 2001, Contentious-Administrative Division. Jurisdiction for suits under administrative law n. 1008/2001

The Second Division of the Chamber for Contentious Administrative Proceedings of the Superior Court of Justice of Catalonia dismisses the appeal lodged by the Asociación Cultural Sun Parade against the decision of 10 May 2001 of the government office in Barcelona which passed on the documentation presented together with the request for permission to exercise the right to demonstrate to Barcelona Council and the city planning authority Port 2000, considering that the latter were the bodies empowered to make such a decision. In this connection, it is considered that the request does not refer to the exercise of such a right but rather to the staging of a leisure and cultural activity.

Reporting judge: Mr. José Manuel Bandrés Sánchez-Cruzat

"Legal grounds:

First: The *Asociación Cultural* Sun Parade, by lodging the present appeal through the special procedure for protection of the fundamental right of meeting regulated in article 122 of Law 29/1998 of 13 July (*RCL* 1998\1741) regulating jurisdiction for suits under administrative law, contests the decision of 10 May 2001 of the Government Subdelegate in Barcelona, issued by delegation of the Government Delegate in Catalonia, ordering that the documentation submitted with the request for permission to exercise the fundamental right of demonstration on 2 June 2001 in the streets of Barcelona be passed to Barcelona Council and to the public planning body Port 2000, considering them to be the authorities empowered to deal with the request.

The claimant's legal counsel asks that the decision be set aside as it violates article 21 of the Constitution (*RCL* 1978\2836 and *Ap.NDL* 2875); the Prosecutor

and Counsel for the State are opposed to this request, and demand that the appeal be dismissed.

(. . .)

Fourth: The right to meet in public places is guaranteed by article 21 of the Constitution as a fundamental right and does not need to be authorized by the administrative authorities.

This fundamental right, political in nature, which is a subjective right exercised collectively and affects the rights and interests of other citizens and the exclusive use of public assets, is not, however, absolute or unlimited, as can be seen in the doctrine of the Constitutional Court.

In order to exercise the fundamental right of demonstration, it is simply necessary to notify in advance the government authority to allow it to assess the lawfulness of exercising this fundamental right and to prevent public disorder, as the Constitutional Court stated in judgment 36/1982, of 16 June (*RTC* 1982\36), since article 21 of the Constitution does not empower the government authority to ban its exercise if there are no reason why it should disturb the public order.

The exercise of the right to demonstrate imposes negative obligations on the public authorities, not to interfere in its exercise, but also positive obligations, to protect in a suitable manner the right to demonstrate in order to satisfy effectively and efficiently the exercise of this right, as can be inferred from the case-law of the European Court of Human Rights (Judgment of 21 June 1988 [Eur. Court HR 1988\17]), a doctrine that applies to our laws by virtue of article 10.2 of the Constitution.

Organic Law 9/1983 of 15 July regulating the right of meeting and amended by Organic Law 9/1999, of 21 April, in accordance with these constitutional postulates, which should be interpreted according to the international treaties signed by Spain on human rights, states that no meeting shall require prior authorization and that the authority shall be notified in advance of meetings held in places of public transit and demonstrations in order to ensure their proper development and, if necessary, ban them if they are deemed to disturb public order and endanger people or property. Any citizen is entitled to this right, which is individual in nature, although it is exercised collectively and, accordingly, by any group or association.

Fifth: From the examination of the administrative proceedings and the documentary evidence provided in the hearing, it can be inferred that the object and purpose of the meeting planned by the *Asociación Cultural* Sun Parade – a cultural demonstration consisting of a parade of floats along *Avenida Paralelo* to *Port Vell* and ending on the city's beaches, intended to promote the values of peace, tolerance and coexistence – does not constitute an expression of the fundamental right of demonstration but rather the holding of a leisure-related festive and public activity.

The holding of the intended meeting does not constitute the exercise of a political right pertaining to the formation of public will and opinion, as the Prosecutor and State Counsel rightly maintain; rather it is a leisure activity and the expres-

sion of the right to culture and the right to leisure laid down in articles XV and XXI of the European Charter for the Safeguarding of Human Rights in the City, adopted at Saint Denis on 18 May 2000, and ratified by the plenary of Barcelona Council on 21 July 2000.

Given the prevalence of artistic, cultural and festive elements over political claims in the planned procession, the meeting should be regarded as a public spectacle, defined as a recreational activity related to public leisure to be held in public thoroughfares, in accordance with article 10 of the Law of the Parliament of Catalonia 10/1990, of 15 June, on Public Spectacles and Establishments and Recreational Activities.

It should be pointed out that the possible interference of the government authority by granting permission for such a cultural demonstration would be contrary to law as it would encroach upon the powers vested in the local authorities, pursuant to article 10 of the aforementioned Law of the Parliament of Catalonia 10/1990, of 15 June, and article 63.2 b) and n) of the Law of the Parliament of Catalonia 8/1987, of 15 April (*RCL* 1987\1275 and *LCAT* 1987\1220), on the local laws of Catalonia and would amount to an exorbitant exercise of the powers of policing public order conferred by article 10 of the Organic Law on the Right of Meeting.

It is therefore not appropriate to consider the contested government decision to be unfounded on the grounds that it assesses inappropriately the involvement of commercial interests in the gathering, or to deduce any type of legal effects stemming from failure to issue the administrative action within a period of 48 hours, as stated in article 10 of the Organic Law regulating the Right of Meeting, as the request of the *Asociación Cultural* Sun Parade does not pertain to the coustitutional exercise of the right of demonstration, and no defenceless or violation of the right to legal protection guaranteed in article 24 of the Constitution took place.

It is therefore incumbent on this court to dismiss the appeal, since the contested decision is lawful.

Sixth: The party will not be ordered to pay the costs, as there is no sign of recklessness or unscrupulousness, in accordance with article 139 of the Law regulating Jurisdiction for Suits under Administrative Law.

(. . .)".

f) Right of asylum

– *STC* 53/2002, 27 February. Claim of unconstitutionality n. 2994/1994

Claim of unconstitutionality brought by the Ombudsman, Ms Margarita R. B., against section 8 of the sole article of Law 9/1994, of 19 May, modifying the Law Regulating the Right to Asylum and Refugee Status, namely the wording given to the third indent of paragraph 7 of art. 5: refusal. This section states the following: "While the application or request for re-examination is being processed, the applicant shall remain at the border post, for which suitable premises shall be provided". The appeal claims that the new wording that this paragraph of the sole article of Law 9/1994 gives to article 5 of Law 5/1984 (26 March) regulating the right to asylum and refugee status is unconstitutional. The wording of paragraph 3 of article 5.7 of Law 5/1984

violates (1) article 17.2 of the Spanish Constitution (CE) regarding the duration of preventive detention and also article 53.1 of the Constitution (as it breaches the essential content of the right to freedom) and (3) article 81.1 in relation to article 17.1 of the Constitution (as the challenged precept is not an organic law). In the opinion of the Ombudsman, the most controversial issue is to examine whether the provisions of Law 9/1994 constitute "a new form of deprivation of liberty" in the sense of article 17.1 of the Spanish Constitution: If that measure is considered a form of deprivation of liberty it would be subject to the guarantees laid down in article 53.1 of the Constitution and, specifically, to the application of article 17. In addition, any law regulating forms of deprivation of liberty should adopt the form of an Organic Law (article 81.1 CE).

Reporting judge: Mr. Fernando Garrido Falla

"Legal grounds:

(. . .)

Fifth: We have just recalled that aliens requesting asylum enjoy the right to freedom (art. 17.1 *CE*) vis-à-vis Spain's public authorities. Now, that fundamental right is not absolute and unlimited (*SSTC* 178/1985, of 19 December [*RTC* 1985\178], *F.* 3; 341/1993, of 18 November [*RTC* 1993\341], *F.* 6); the same art. 17.1 *CE* states that nobody may be deprived of his freedom 'except in accordance with the provisions of this article and in the cases and in the manner provided by the law'. We are not dealing strictly speaking with a legally established task as it is not the legislator's job to regulate the right to freedom in general. We are simply dealing with the constitutional provision for laws which – within the limits deriving from the Constitution itself – may establish certain restrictions on the enjoyment or exercise of the right to freedom. It is now incumbent on the Constitutional Court to determine whether one of these restrictions – that of art. 5.7.3 *LRDA* – has exceeded the limits that the Constitution establishes for the Law. Art. 17.1 *CE* refers to two kinds of limits: first, those mentioned expressly in the different paragraphs of art. 17 *CE*; second, other limits shared with the other fundamental rights: the requirement of certainty and proportionality of the limitation. Let us begin with the express limits mentioned in art. 17 *CE*.

Sixth: First, it is clear that it is not possible to counter with art. 5.7.3 *LRDA* the maximum period of seventy-two hours that art. 17.2 *CE* establishes for detention; or, consequently, the requirement that the arrested person be handed over to the judicial authorities within the same maximum period of seventy-two hours. This Court has maintained since *STC* 341/1993, *F.* 6, that the 'arrested person' referred to in art. 17.2 *CE* is, in principle, somebody on whom a precautionary measure of preventive detention of a criminal nature has been imposed; and therefore, the maximum period of seventy-two hours is not applicable when the deprivation of freedom serves a radically different purpose such as the protection of someone who claims to be persecuted, at the same time with the assurance that the entry and stay of aliens in Spain takes place with full respect for the Law. Now, since that same *STC* 341/1993 we have also said that it is inferred from art.

17.2 that any deprivation of freedom other than detention must be limited in time. This criterion was reiterated in *SSTC* 174/1999 (*RTC* 1999\174), *F.* 4 and 179/2000, of 26 June (*RTC* 2000\179), *F.* 2, both of which refer to the expulsion of aliens from the airport transit area. It should be pointed out that that time limit on any deprivation of freedom – other than detention for the prosecution of criminal offences – is not necessarily uniform; rather it must be adapted – naturally without arbitrary concessions to the governing authorities – to the purposes that the deprivation of freedom serves in each case. There is no doubt about the time limits that art. 5.7.3 *LRDA* imposes on the permanence or wait of asylum seekers in 'suitable premises': up to four days and up to two more days if re-examination of a rejected application is requested. Nor are there any doubts about the maximum nature of these time limits and about the consequence (assuming that it is not expressly rejected) that follows from their completion: the right to enter Spain provisionally, beyond the 'suitable premises' of the border post and with no other limit than the possible restrictions on the establishment of residence laid down in art. 4.3 *LRDA*. From the foregoing it can be concluded that the supposed deprivation of freedom established in art. 5.7.3 *LRDA* has clearly defined time limits. We will examine the proportionality of these maximum time limits later on (ground 8).

Seventh: We have seen earlier, quoting our *STC* 341/1993, *F.* 5, that any constraint on freedom must be certain and foreseeable, as otherwise the Law would lose its function as a guarantee of the very fundamental right to which it relates and would subject the exercise of the right to the will of whoever enforces the Law. Now, there is no uncertainty regarding the scope of the supposed restrictions on freedom established in art. 5.7.3 *LRDA*.

Eighth: Restrictions on freedom must also be proportional. That is: suitable, necessary and pondered (among recent judgments, *SSTC* 265/2000, of 13 November [*RTC* 2000\265], *F.* 8; 103/2001, of 23 April [*RTC* 2001\103], *F.* 10). As for the first – the suitability of the restriction to the aim pursued – it is undeniable that confining asylum seekers to 'suitable premises' effectively prevents, by protecting the persecuted person, evasion of the laws regulating the entry, residence and movement of aliens in Spain. Second, as regards the requirement of necessity, it is not clear what other less restrictive measure could achieve the same degree of efficiency in applying the ordinary system for the entry of aliens as having applicants remain or wait in 'suitable premises' at the border; it should be borne in mind in any event that provisional authorization of entry (while the asylum application is processed) is clearly difficult to apply if the application for asylum is denied definitively: owing both to the need to locate the applicant and to the need for physical transfer to the border post.

Furthermore, nor can it be considered in an abstract manner and *a priori* that the maximum periods for remaining in the 'suitable premises' at the border post exceed that which is strictly necessary. The maximum period of four days is clearly related to the minimum time required to process and answer an application for asylum. The same can be said of the maximum period of two days for

re-examination. In this connection it should be borne in mind that art. 5.7.1 establishes that the representative in Spain of the United Nations High Commissioner for Refugees must be informed of the request for asylum within a maximum period of four days, and that the representative may interview the applicant if he or she wishes. The application must be initially accepted or rejected (rejection must be grounded pursuant to art. 54.1 *LPC*) within the same four-day period and the asylum seeker must be notified according to the procedure set out in art. 59 *LPC*. If the alien asks for their application to be reconsidered (they have twenty-four hours to do so) the maximum period for issuing a decision and notifying the applicant is just two days, during which time a meeting must be held with the representative of the United Nations High Commissioner for Refugees, or, at least, the meeting must be prior to the making of the final decision by the Ministry of the Interior (art. 5.7.2 *LRDA*). In view of the laws regulating the processing of applications for asylum, it cannot be considered that the maximum periods during which the freedom of the asylum seeker is restricted are greater than is strictly necessary.

Ninth: Finally, nor can it be said that the regulation of art. 5.7.3 *LRDA* is contrary to the requirement of being pondered, which is also part of the principle of proportionality. Following the methodology referred to in *STC* 103/2001, of 23 April, *F.* 10, the requirement of being pondered involves: first, the identification of a good or interest of constitutional significance which is served by the limitation of another constitutional good; and second, the identification of conditions in which one constitutional interest prevails over another. As for the first, the restriction on freedom laid down in art. 5.7.3 *LRDA* is designed to ensure compliance with the legislation on the entry of aliens into Spain – the significance of which for the other European Union countries was stated in legal ground 3 – without endangering the life or integrity of the person who allegedly suffers persecution, in accordance with International Law on human rights. Compliance with the law – particularly legislation on aliens – is a constitutional good enshrined in arts. 10.1 and 13.1 *CE*: art. 10.1 *CE* refers expressly to 'respect for the Law' as the basis for political order and social peace. Art. 13.1 *CE* expressly states that aliens shall enjoy the public freedoms under the terms laid down by the Law. Therefore, there can be no doubt that respect for legislation on the entry, permanence and residence in Spain of aliens is of relevance to the Constitution.

Tenth: Having identified the existence of a constitutional good to which the restriction laid down in art. 5.7.3 *LRDA* applies, we must also state that respect for the Law (and accordingly the law on aliens) only permits limited, controlled and certain restrictions on a constitutional good (personal freedom) which enjoys a pre-eminent constitutional position as both a fundamental right (art. 17 *CE*) and a higher value of its legal system (art. 1.1 *CE*). This 'rule of conditioned prevalence' among concurrent constitutional goods is also clearly backed by art. 5.1.f) of the European Convention on Human Rights (ECHR), which expressly provides for the prevention of illegal entry into a country's territory as a possible legal cause for restricting personal freedom.

Having established the foregoing, and in view of our reasoning in this judg-

ment, we must conclude that the constraint on the freedom provided for in art. 5.7.3 is pondered.

We must now address a second formal reproach. In the opinion of the Ombudsman, art. 5.7.3 *LRDA* should take the form of organic law, and the contested precept is therefore unconstitutional. As for the definition of organic laws (art. 81.1 *CE*), since *STC* 5/1981, of 13 February (*RTC* 1981\5), this Court has adhered to a strict criterion of interpretation, as regards both the term 'development' and the 'matter' that is an object of reservation. This strict criterion is intended to prevent the legal system becoming stagnated and to preserve the rule of unqualified parliamentary majorities (among others, *SSTC* 173/1998, of 23 July [*RTC* 1998\173], *F.* 7; 129/1999, of 1 July [*RTC* 1999\129], *F.* 2).

(. . .)

Fourteenth: Let us begin by pointing out that the precept currently being challenged modifies the procedure for asylum applications laid down in a non-organic law, Law 5/1984, of 26 March. It is true that this law stems from the express need for regulation stated in art. 13.4 *CE*. But it is equally true that there is no constitutional rule stating that such a law be drawn up and passed as an organic law, nor indeed can this be deduced from art. 13.4 *CE*, which states that the ordinary law shall establish the terms under which citizens from other countries and stateless persons may enjoy the right of asylum in Spain. Having established this, we must now examine whether the new paragraph 7.3 of art. 5 of Law 5/1984 provides for a specific requirement of being passed as an organic law. We must point out in this connection that art. 5.7.3 *LRDA* does not contain any 'direct restrictions' on the fundamental right enshrined in art. 17.1 *CE*, but rather specific restrictions on the manner, time and place in which certain foreign nations seeking asylum in Spain enjoy the freedom laid down in the Constitution. It is important to stress that art. 18 *LRDA* recognizes the right of persons who have been granted asylum to fully enjoy their freedom with no further restrictions than the possible 'precautionary measures' set forth in art. 18.2 *LRDA*, and the same conclusion can be drawn – pursuant to arts. 4.2 and 5.1 *LRDA* – in relation to foreign nationals whose application for asylum is being processed (either expressly confirmed as valid or due to absence of objections). It should then be affirmed that art. 5.7.3 *LRDA* neither develops nor regulates directly and generally foreign nationals' right to freedom, not even the right to freedom of a specific group of foreigners (those who apply for asylum at the border). Art. 5.7.3 *LRDA* imposes – in the framework of a set of regulations basically intended to protect the foreign national, the Law on Asylum – certain time and spatial limits on foreigners in a provisional situation of waiting that is perfectly identified in the Law. This is a restriction on the freedom of movement – with respect to their intention to enter Spain freely – for a maximum of four days (and at most a further two days if, the application having been rejected, expulsion is delayed by a request for reconsideration of the application) which under no circumstances prevents the appellant returning freely to his place of origin or, if necessary, to a third state with different entry requirements. Therefore we must conclude that we are dealing with a provisional and

limited modification of the manner in which certain subjects in very specific circumstances that cannot be generalized enjoy their right to freedom. Art. 5.7.3. *LRDA* does not constitute a frontal development of the right to freedom, nor do the restrictions it establishes amount to an essential limitation of that freedom, which are circumstances that, in accordance with art. 81.1 *CE*, must be dealt with exclusively by organic laws. We must therefore conclude that art. 5.7.3 *LRDA* does not need to be passed according to the procedural requirements of organic laws.

Decision

Bearing in mind the foregoing, the Constitutional Court, acting on the authority invested in it by the Constitution of the Spanish Nation,

Has decided

To dismiss the present claim of unconstitutionality.

Madrid, twenty-seventh of February two thousand and two".

VI. STATE ORGANS

VII. TERRITORY

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

XII. INTERNATIONAL ORGANISATIONS

XIII. EUROPEAN COMMUNITIES

1. *Right of non-discrimination*

a) Right to widows/widowers pensions in equal conditions

– *STS* Madrid, 14 May 2001, Social Division. Appeal for reversal n. 5911/2000

The 4th division of the Chamber for Social Affairs of the Madrid Superior Court of Justice dismisses the appeal lodged against a judgment of 27 September 2000 delivered by the Social Affairs Court of Madrid. The issue disputed is the right of the appellant, based on the Treaty of Amsterdam among other legal instruments, to

be paid a widower's pension following the death of his homosexual partner with whom he cohabited. The Court considers that the unequal treatment given to matrimonial unions and cohabiting homosexual couples in law does not constitute discrimination.

Reporting judge: Ms. Concepción Rosario Ureste García

"Legal grounds:

Sole ground: The counsel of the petitioner states only one ground based on art. 190 (this should read 191) c) *TRLPL*, pointing out the violation, owing to an erroneous interpretation, of arts. 14 and 10 *CE*, 174 *LGSS* and the Treaty of Amsterdam, and also quoting judgments of the *TSJ* that do not constitute case-law for the purposes stated in arts. 191 and 194 of the proceedings. The issue under debate has been analyzed and judgments delivered by the Court on previous occasions (Judgment of 26–1–1999, among others), in which the following is stated: the repeatedly quoted art. 174.1 *TRLGSS* establishes as a requirement for the granting of a widower's pension that the applicant be the 'spouse' who has survived the deceased, and therefore (taking up the content of the former art. 160) only recognizes as beneficiaries persons having the status of widow or widower whose spouse has died, and therefore marriage is a *conditio iuris* for entitlement to the benefit in question; this is stated in a judgment of 25–2–1999 delivered by this Chamber for Social Affairs (3rd Division) which dismissed the claim regarding the right to receive a widower's pension and compensation for the death in an accident en route to/from the place of work of his homosexual partner with whom he cohabited, arguing in the legal grounds that the invoked situation similar to marriage lacks legal force for the purposes described in the proceedings and for the purposes of the present appeal, nor can this conclusion be altered by the fact the law forbids marriage between two homosexuals, while art. 32.1 enshrines the supreme rule of the legal system, which limits the right to marry on the basis of full legal equality to men and woman as a standard institution, that is, it defines a civil status, that of being married, and other legal consequences commonly accepted by society, without prejudice to the principle of equality in the eyes of the law that is proclaimed by art. 14 of the Constitution, since it is that same supreme rule which establishes the personal elements that constitute marriage, and the legal impossibility of marrying does not constitute discrimination of any kind because art. 160 (currently 174) only recognizes the right of the surviving spouse to receive a widow's or widower's pension, and the law should be applied in accordance with the principle of legality guaranteed by art. 9.3. *CE*.

The appellant filed an application for a declaration of fundamental rights against the aforementioned decision of the Madrid Superior Court of Justice. The related Constitutional Court decision of 11–7–1994, quoting various decisions of that Court stating that the requirement of marriage in order to qualify for a widow's or widower's pension according to the Social Security system does not conflict with art. 14 *CE*, or with the measures of the public authorities that grant a different and more favourable treatment to family units based on marriage than on other

conventional units, gives an essential reason, namely 'like unions between cohabiting couples, unions between persons of the same biological sex are not legally regulated institutions, nor is there a constitutional right to their establishment; unlike marriages between men and women, which are a constitutional right (art. 32.1) that generates *ope legis* many rights and duties (*STC* 184/1990), and we must thus recognize 'the full constitutionality of the heterosexual principle as a requisite for a marriage union, as laid down in our Civil Code'; and one of the advantages attributed to such a union is the possibility of access to pensions for widowhood.

(. . .)

Furthermore, as for the alleged clash with art. 10 of the Spanish Constitution, a *STC* of 15–11–1990 (184/1990) pointed out that 'free development of the personality is neither prevented nor restricted by the fact that the surviving member of a cohabiting couple is not entitled by law to a widow's or widower's pension . . ., it is obvious that art. 10.1 of the Constitution cannot serve as a basis, considered alone and in isolation, for the right of the surviving member of a cohabiting couple to receive a pension when the other member dies'.

(. . .)

Art. 160 of the *LGSS* and Additional Provision 10.2, of Law 30/1981, of 7 July, are not opposed to arts. 10, 14 and 39 of the Spanish Constitution, and the reasoning that underpins it is 'substantially similar' to international rules and decisions; we may cite in this respect convention n. 102 of the ILO (*RCL* 1988\2049 and *RCL* 1989\771) on Social Security minimal standards, referred to in art. 12.2 of the European Social Charter (*RCL* 1980\1436, 1821 and *Ap.NDL* 3008) and n. 128. In the same way the European Court of Justice, when giving a preliminary ruling on the interpretation of art. 119 of the Treaty establishing the European Economic Community (*LCEur.* 1986\8) and Directive 75/117/EEC (*LCEur.* 1975\39) in a judgment dated 17–2–1998 (*TJCE* 1998\28) – a decision cited in the legal grounds of the present appeal – regarding the case of company rules providing for cheaper transport for the worker's spouse or person of the opposite sex with whom the worker cohabits concludes that this rule does not constitute a discrimination prohibited by those precepts, or a discrimination on the grounds of sex, in that it is fully applicable to workers of either sex (we should not forget that current community law does not apply to discrimination based on sexual orientation (point. 47)) and also leaves the task of adopting measures that may affect such a situation to the legislator, pointing out that although the European Parliament has declared that it condemns any discrimination based on an individual's sexual preferences, rnles establishing an equal footing have not yet been adopted, although the Treaty of Amsterdam, signed on 2–10–1997, modifying the Treaty establishing the European Union (*LCEur.* 1986\8), the treaties establishing the European Communities and related acts, has taken a first step by adding to the Treaty an article 6A which, when in force, 'will allow' the Council to adopt, in certain circumstances (unanimous voting on the proposal of the Commission and following consultation with the European Parliament) the measures required to abolish dif-

ferent forms of discrimination, including discrimination on the grounds of sexual orientation.

(. . .)

Ruling

We must dismiss and do dismiss the appeal lodged by Angel Javier S. C., against the decision delivered by the Social Affairs Court n. 16 of Madrid on 27 September 2000, by virtue of a suit brought by the appellant against the National Institute of Social Security and General Treasury of the Social Security regarding his claim for a widower's pension, and, therefore, we must confirm and do confirm the decision in question".

– *STSJ* Catalonia 13 March 2001, Social Division. Appeal for reversal n. 8221/2000

The Social Affairs Division of the Superior Court of Justice of Catalonia delivered a judgment on 13 March 2001 dismissing the appeal for reversal lodged by the Association of Basketball Clubs Saski Baskonia SAD, against a judgment of 14 June 2000 delivered by the Social Affairs Court n. 12 of Barcelona in a suit brought by Senol S. M. against the association for violating the right of non-discrimination on the grounds of nationality.

Reporting judge: Mr. Féliz Azón Vilas

"Legal grounds:

(. . .)

Third: As regards the reason for the law applied, in which, as has been stated, an erroneous interpretation is claimed of article 37 of the additional protocol to the Partnership Treaty signed by the European Community and Turkey on 23 November 1970, we should point out that the question consists of determining whether the appellant was discriminated against by the Association of Basketball Clubs on the grounds of his Turkish nationality when he was granted a foreign player's permit as opposed to a Spanish player's permit – which is the type of permit that should have been issued according to the suit the judgment of which, sufficiently grounded, is currently being contested.

The appeal argues that access to competition sport should not be understood to be a condition of employment in the sense that access to a particular post (a national or EU place in a team) it is not a condition of employment and claims that sport has its peculiarities.

In this respect we should recall the arguments used in the *Bosman* judgment delivered by the European Court of Justice, which maintains that the Treaty provisions on the free movement of persons are intended to facilitate the exercise of any kind of professional activity within the EU by nationals of the member states and are opposed to measures (even those of associations and organizations not subject to public law; see the *Walrave* judgment) that could place such nationals in an unfavourable position if they wished to engage in an economic activity in the territory of another State (94).

Point 2) of the aforementioned judgment furthermore establishes that article 48 of the EEC Treaty (*LCEur.* 1986\8) is opposed to the application of regulations adopted by sporting associations according to which, in the competition matches organized by them, football clubs may only pick a limited number of professional players who are nationals of other member states, stating in point 117) that paragraph 2 of article 48 expressly establishes that the free movement of workers would entail the abolishment of all discrimination on the grounds of nationality between workers of member states as regards employment, payment and working conditions, and in point 120) that the fact that there are clauses that do not affect the employment of such players but rather the possibility of their clubs picking them for an official match is (contrary to the law) since insofar that participation in such matches is the essential aim of the activity of a professional player, it is obvious that a rule that limits it also restricts the possibilities of employing the player in question.

Having established that EU sports players cannot be limited by type of contract when rendering their services, we must now attempt to determine whether this reasoning is also applicable to a non-EU citizen of Turkish nationality, assuming that he meets all the requirements imposed by the member state on foreign nationals for reasons of public order or otherwise.

Fourth: To solve the problem appropriately, we must examine the international conventions which the European Union has entered into with Turkey and in this connection it is particularly relevant to cite the additional protocol signed on 23 November 1970 in Brussels annexed to the Agreement establishing the Association between the European Economic Community and Turkey, article 37 of which states that 'As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community'. Likewise, Decision 1/80 of the EC-Turkey Association Council of 19 September 1980 states that 'the Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and Community workers'.

In view of the aforementioned regulation, we can only conclude that the appellant, a Turkish citizen, having met all the requirements for working legally in Spain, cannot be subjected to any limitations based on his nationality that cause his situation to differ from that of EU nationals when rendering their services as sports players in Spanish territory, as this would have to be regarded as discrimination on the grounds of nationality, which is precisely what the EU rules are intended to prevent and which, let us not forget, have a direct effect in Spain as a member of the Union.

Since this is the argument maintained by the contested judgment we must confirm it on all grounds and therefore dismiss the appeal lodged by the representative of the *ACB*. In addition, pursuant to article 233 of the Law on Employment

Procedure, the appellant should pay the legal fees of the parties, which the Court establishes at 50,000 pesetas for each.

(. . .)".

2. *State liability for damage resulting from breach of its obligations under Community law*

– *SAN* 7 May 2002, Contentious-Administrative Division. Appeal n. 365/2001

The Ministry of Justice dismissed, due to failure to reply within the time limit, the claim for compensation from the Spanish State for breach of community law, for failure to transpose into national law Parliament and Council Directive 94/47/EC, of 26–10–1994, on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-share basis. The AN partially allows the appeal and declares the State liable for damage resulting from failure to comply with Community Law and considers that the appellant is entitled to compensation from the State.

Reporting judge: Mr. Eduardo Menéndez Rexach

"Legal grounds:

First: The present appeal is lodged against the decision to dismiss, through failure to reply, the claim initially filed by the appellant with the Council of Ministers on 18 February 1998 for compensation for damage incurred to individuals resulting from the Spanish state's breach of its obligations under Community law – namely its failure to transpose into national law Parliament and Council Directive 94/47/EC of 26 October 1994 (*LCEur.* 1994\3610), on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; the Council of Ministers passed the claim to the Ministry of Justice, against whose failure to reply expressly the current appeal is directed.

(. . .)

Fifth: The issues to be examined in the present appeal are the extent of the State's liability, the existence of a time limit in relation to certain contracts, the ineffectiveness of another group of contracts in providing compensation on the basis of their signing owing to their failure to meet the requirements of art. 1227 of the Civil Code and the amount of compensation of a final set of contracts since not only the conduct of the government but also that of the contractors contributed to causing the damage. There is in fact no question about the existence of non-contractual liability, since the counsel for the state, following the report issued on 27 July 1999 by the Directorate of the State Legal Department, which features in the record, acknowledges the requirements established by the case-law of the European Court of Justice for determining the liability of the state for damage caused to certain claimants as a result of breach of Community law consisting of a delay in transposing Parliament and Council Directive 94/47/EC; art. 12 of this

rule establishes that States have 30 months from the publication in the Official Journal of the European Communities on 29 October 1994 to adopt the necessary measures to comply with the stipulations therein. By the time this period expired on 29 April 1997 Spain had not complied with any of its obligations. This led the Commission to bring an action with the Court of Justice (case C-311/98) against the Kingdom of Spain for failure to fulfil its obligations, which was removed from the register on 25 May 1999, no doubt on the initiative of the Commission, as the regulatory changes laid down by the Directive had by then been made in national law through the aforementioned Law 42/1998, of 15 December; however, it should be pointed out that in order to bring an action like the present one it is not necessary for the ECJ to declare that the State has failed to fulfil its obligations (Judgment of 8 October 1996 [ECJ 1996, 178], *Dillenkofer and Others*, joined cases C-178/94, C-179/94 and C-188/94 to C-190/94). Nonetheless, although it is not required in order to justify the existence of State liability in this case, since it is recognized in the reply to the claim, it is appropriate to state the principles on which this liability is based as they are useful in settling some of the remaining issues. The general principle of liability of the national authorities for infringement of Community law has been established by the ECJ since the judgment of 19 November 1991 (ECJ 1991, 296), *Francovich and Others*, joined cases C-6/90 and C-9/90; as the ECJ recently declared in a judgment of 4 July 2000 (ECJ 2000, 150), *Haim II*, case C-424/97, '... liability for loss and damage caused to individuals as a result of breaches of Community law attributable to a national public authority constitutes a principle, inherent in the system of the Treaty, which gives rise to obligations on the part of the Member States (see Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* v. *Germany* [1996] ECR I-4845, paragraph 20; and Case C-127/95 *Norbrook Laboratories* v. *MAFF* [1998] ECR I-1531, paragraph 106)'. Having established this general princple, the aforementioned judgment quotes the requirements for liability: '... It is clear from the case-law of the Court that three conditions must be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible: the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured parties. Those conditions are to be applied according to each type of situation (*Norbrook Laboratories*, paragraph 107)'. It goes on to state that these conditions '... must be satisfied both where the loss or damage for which reparation is sought is the result of a failure to act on the part of the Member State, for example in the event of a failure to implement a Community directive, and where it is the result of the adoption of a legislative or administrative act in breach of Community law, whether

it was adopted by the Member State itself or by a public-law body which is legally independent from the State'. If we compare the facts of the case at hand with the aforementioned conditions for liability, we find, first, that the State failed to implement a Community directive requiring it to adapt its national law to Directive 94/47/EC within the established 30-month period; second, that this directive conferred rights on individuals, like the appellants in this case, which were perfectly identifiable by the provisions of the Directive and could not be enjoyed, such as the right to withdraw *ad nutum* and the possibility of cancellation without defrayal within the established time period (art. 5 of the Directive) and the prohibition of payment of advance payments before the end of the period during which the aforementioned right may be exercised, it being precisely these amounts which were claimed from the government and which the claimants establish as the damages incurred; the causal link is constituted precisely by the fact that the impossibility of exercising such rights is a direct consequence of the State's breach of Community law, since pursuant to national law in force at the time it was lawful for advance payments to be made at the time of signing the contract and there was no possibility of cancellation, which was introduced subsequently in Law 42/1998 as right of withdrawal (art. 10). There is no need to expand on this point as the Administration acknowledges all the conditions we have summed up in relation to the circumstances of this case and the causal link between the State's breach of its obligations and the damage incurred by the claimants, although it disagrees that compensation should be paid to most of them, owing not to the lack of such requirements but to the lapsing of the action since contracts cannot be invoked against the State as there is no reliable record of the date they are entered into, and we must therefore analyze the claims of the defendant, starting with the lapsing of the action in relation with some of the claimants.

Sixth: The procedure through which the claim for state liability must be made in cases such as the present one, and in accordance with EU case-law, having established tbe state's obligation to provide compensation, must be in such as way as is established by the respective national law on state liability, that is, under the same conditions that '. . . must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation' (for example, the aforementioned ECJ judgments *Francovich*, *Norbrook Laboratories* and *Haim II*).

In Spanish law these rules are laid down, first and foremost, in art. 106.2 *CE*, which recognizes the right of individuals to obtain reparation for any damages to their goods and rights caused by the operation of public services; this is developed in Law 30/1992, of 26 Noveınber, Title X of which deals with the rules regulating the liability of the public authorities and therefore, according to the aforementioned case-law of the ECJ, this legal framework and lesser regulations that complete it, such as Royal Decree 429/1993, of 26 March (*RCL* 1993\1394, 1765), on the procedure of the public authorities in matters of state liability are applicable to the present case.

(. . .)".