Spanish Judicial Decisions in Public International Law, 1998

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. Foreign Matters of State

a) State responsibility in domestic matters

– *STS* of 17 February 1998 (Court for Suits under Administrative Law) *RJ* 1998/1636

Damages liability of the public administration: Scope: Agreement between the Kingdom of Spain and the Kingdom of Morocco on compensation for assets salvaged by Morocco for which the Moroccan Government was obliged to make a lump-sum payment to the Spanish Government in the amount agreed. The Spanish Government thus assumed the responsibility of distributing that amount to the beneficiaries of the Agreement, i.e., the Spanish citizens who owned the assets that were transferred to the Kingdom of Morocco. An examination of the Agreement led to a claim filed by the injured parties based on the insufficient sum of the compensation received.

"Legal Grounds:

Spanish Yearbook of International Law, Volume VI, 1998

(...)

Second: Art. 2 of the Agreement states the following:

Art. 2. The following elements were considered in determining the lump-sum amount to be paid as global compensation under this Agreement:

(...)

Eighth: The time has come to examine the third and last of the hypotheses, the affirmation of which would lead to recognition of the obligation to compensate: the question is whether by virtue of the signing of the Agreement, those that were expropriated and who today are filing this appeal, in light of their own interests or others of a general nature, were not permitted to exercise efficient action to recuperate the part of the value of their assets that was not obtained through negotiations between the two States. If this affirmation were true, that would mean that Spain subrogated its obligations to the Kingdom of Morocco with respect to those expropriated who were not covered by the agreed global compensation.

A careful look at the Agreement signed with Morocco leads us to a negative conclusion on this point as well.

The Agreement signed by Spain and the Kingdom of Morocco does not imply, despite the conflicting opinion of the complainants' legal representatives, objective or subjective novation of the State's outstanding obligations to those expropriated given that there was no modification of the object or of its principal conditions nor was there a substitution of the creditor or the debtor (Art. 1203 of the Civil Code).

The appealers are attempting to link the prohibitive novation effect of any appeal to the Kingdom of Morocco to the use of the expression 'final settlement' (*finiquito* in the original Spanish text) in the Agreement in reference to the agreed amount and to Art. 5 of the text signed by the two States.

As can be observed in legal ground 2, the expression 'final settlement', which expresses the will to establish a specified amount to close out the accounts – a specific obligation or set of obligations, undoubtedly refers to the agreed 'compensation' but this does not suffice to exclude individual claims because: a) the compensation is conceived as a 'global' amount to be distributed by the Government to the 'beneficiaries' of the Agreement and not as the sum of all of the individual claims the purpose of which is to remedy the economic damages suffered individually by the expropriated or injured parties; b) the final settlement refers specifically to the compensation stipulated in the Agreement, i.e. provided for in the Agreement without making any allusion to the fact that this settlement has anything to do with compensation that could be granted through other appeal processes initiated by the injured parties; c) the commitment undertaken by the Government is binding (Art. 5 of legal ground two has also been transcribed) 'as long as the other Government meets the obligations for which it is responsible, in accordance with the Agreement, to not file or pursue, in the courts of the

other Government or other judicial institutions, possible claims made by its citizens with regard to the assets, rights or interests described in Arts. 1 and 2 of this Agreement'. No excluding reference is made, however, to claims that an individual may file; d) quite to the contrary, a freedom-giving reference is made by virtue of the mention of the people who have a direct responsibility to 'the debts that Spanish farmers have with the Moroccan State and its institutions provided for under this Agreement with one expressly stated exception.

The interpretation of these clauses leads to the conclusion that the only validation that can be accepted by the signing of the Agreement is found within the scope of relations between the two parties bound by International Law that sign the Agreement without any reference to the rights of those who are directly affected (who are cited within the Agreement as beneficiaries) nor any mention of the fact that Spain subrogates its remaining obligations to the Kingdom of Morocco.

(...)

The petitioners asked, in an argument the logic of which verged on the absurd, if there was any legal petition they could turn to in order to claim their rights if indeed the Agreement did not support them. The issue should, however, be looked at from another perspective: it is a fact that nothing more could be done in the field of diplomatic protection, including claims between States or before other judicial bodies to which only the former have access, with the signing of the Agreement (and, as the petitioners admitted, there was nothing abnormal surrounding the diplomatic protection afforded by Spain to its nationals). Having admitted this, however, the problem is not whether there are legal channels through which to successfully file individual claims for the compensation that the injured parties feel is their due, but rather whether these channels existed prior to the signing of the Agreement and whether they are closed off or limited in some way as a result of its coming into force. The details of the negotiation process alluded to above and based on the *interna corporis* of the development of the instrument according to the documentary information that was provided for our examination, are not basis for proof and, for that reason, this court is of the opinion that there are no damages for which compensation must be made or, to state it another way, the economic damages suffered by the petitioners were not caused by the Government's action of reaching an Agreement with the Kingdom of Morocco but were caused by the expropriation carried out by this state through the Dahir of 2 March 1973.

Ninth: For the above reasons, the claims filed in this case should be dismissed.

(...)".

2. Validity and applicability of Treaties in Spanish Domestic Law

– *STS* of 10 March 1998 (Court for Suits under Administrative Law) (*RJ* 1998/2708)

The decision delivered by Section Eight of the Administrative Law Court of Madrid's High Court of Justice in Administrative Law Appeal number 2690/1990, filed by the solicitor Mr. Enrique Sorribes Torra in name and representation of Mr. Eduardo V.H. against the resolution taken by the Ministry of Justice on 18 January 1990 which dismissed the appeal to a higher court filed against the resolution taken by the Deputy Secretary of that Ministry on 5 September 1989 declaring a stay of proceedings in the case filed by the petitioner who requested that he be issued a Royal Document of Reinstatement of the title of Marquis of Boria; confirming that those resolutions were in conformance with the law and making no specific statement regarding the payment of court fees.

"Legal Grounds:

(...)

Fifth:

(...) The petitioner based his case, first of all, on the Treaty of Peace and Friendship signed in Vienna on 30 April 1725 which did not provide for any limitation regarding the degrees of succession of titles of nobility and argues that, by virtue of Arts. 93 to 96 of the Constitution, rights recognised in an international treaty cannot be invalidated by decree.

Regarding the validity and applicability of international treaties in our domestic law, one must turn to the provision embodied in Art. 96.1 of the 1978 Spanish Constitution that recognises that once international treaties are officially signed and published in Spain, they form part of the domestic legal system; constitutional regulation that acknowledges the aphorism *pacta sunt recipienda.*

Treaties signed prior to the entry into force of the Constitution are not subordinate to it. The relationship between the Constitution and these treaties is ruled by the criteria of jurisdiction to the degree to which the constituent lacks the authority to free itself from Treaties in force at the time that the Constitution entered into force. It should be considered that within the scope of jurisprudence prior to the Constitution and the reform of the Preliminary Title of the Civil Code, recognition was not given to treaties with respect to Spanish law. In order to be considered a direct source to be incorporated into our legal system, the regulation in question must meet the standards set out in the Base Law of 17 March 1973 (*RCL* 1973\498 and *NDL* 18762) allowing for the modification of the Preliminary Title of the Civil Code and specifically regarding the text sanctioned with the authority of the law by Decree on 31 May 1974 (*RCL* 1974\1385 and *NDL* 18760). This has been established through sentences like the one delivered on 14 November 1974 (*RJ* 1974\4361) that denies international treaties the character of direct source of law prior to

our Preliminary Title. Art. 1.5 of that Title clears up any possible doubt to the extent that the legal regulations contained in the international treaties shall not be directly applicable in Spain until which time they form part of the internal rules through their publication in the Official State Gazette.

Sixth: In accordance with our domestic law, three conditions must be met for the direct application of treaties: a) international entrance into force, b) official publication and c) the self-executing nature of its provisions. Its publication in Spanish law plays a dual role: on the one hand the legal norms contained in the international treaties become part of the domestic law in accordance with Art. 96.1 of the Constitution and on the other hand, in compliance with Art. 1.5 of the Preliminary Title of the Civil Code, it becomes directly applicable through the state institutions once it enters into force or is provisionally applicable as agreed by the contracting states.

Its direct application is conditioned by the self-executing nature of its provisions, i.e., that their relation be sufficiently precise so as to allow this direct application without the need for further legal and regulatory development in tune with the will of the contracting states. It was recognised in very recent case law that, although the old dominating doctrine in vogue with classical internationalists supports the criteria that international treaties and agreements are not in and of themselves a source of our domestic law but rather a binding regulation between the signing states and that to provide them with enforcement authority the appropriate internal legal act is required, the practice with regard to international relations and the full recognition of supranational organisations has led to the recognition of the treaties and their application within the signing states as domestic law once formalities have been met allowing for this without the need for any other provision confirming that which is already part of domestic law.

Seventh: The above mentioned circumstances do not appear to be accredited in the case at hand and, as a result, were not applied with respect to the 1725 Treaty of Vienna invoked by the petitioner in his appeal for its incorporation into domestic law.

(...)

The above leads us to the conclusion that a coherent interpretation of Art. 96.1 of the Constitution insists on, together with the obligation to incorporate treaties into our legal system under the rule *pacta sunt recipienda*, the obligation to respect the prescriptions contained in the treaties within our system of sources, recognising that those subsequent to the Constitution automatically become part of our domestic law once they are published in the Official State Gazette. Our legal system therefore does not recognise the dual mechanism by which International Law is transformed or receives special treatment in order to be considered as domestic law.

As a result of the above, the application of the 1725 Treaty of Vienna proposed by the petitioner must be rejected because that treaty was limited to determining the mutual recognition of titles bestowed by monarchies in

conflict but did not imply subjecting these titles to different regulations nor did it exonerate the titles from the application of general regulations regarding expiration, reinstatement, succession and other issues implying balance, reciprocal recognition and submission to the same precepts. The case made by the petitioner, whose intention it is to elude the regulation which applies in these matters and restore a title based on the 1725 Treaty, is therefore unacceptable vis a vis those who request the reinstatement of titles granted by the current monarchy or even centuries hence.

(...)".

– *STC* of 29 June 1998 (*BOE*, 30 July 1998)
Rapporteur: Judge Carles Viver i Pi-Sunyer

Here the Constitutional Court delivers a judgement on appeal for legal protection number 2018/1997 filed against Ruling number 23/1997 of the Plenary of the National Criminal Court (Audiencia Nacional) delivered on 21 April 1997. This ruling allowed the extradition of Mr. Hugo Bernardo Borgobello Luzuriaga in compliance with the sentence imposed for the crime of illicit possession of arms.

The Constitutional Court judgement allows the appeal ruling that the petitioner's right to a fair trial was violated.

"Legal Grounds:

(...)

Second: ... The truth is that the two judicial resolutions being challenged in this court both recognise that Mr. Borgobello was not present at any of the hearings that took place during the course of the legal process in Italy. However, the Second Additional Protocol to the European Convention on Extradition done in Strasbourg on 17 March 1978 (*BOE* of 11 June 1985), specifically Title III, Art. 3 was deemed applicable to the case. The text is as follows:

'Article 3: The Convention will be broadened with the following provisions: Default judgements':

When one contracting party files a request to the other contracting party for extradition of a person in order to enforce a sentence or security measure imposed in compliance with a resolution handed down against that person in his absence, the requested party may refuse that extradition if, in its opinion, the hearing that gave rise to the sentence did not respect the minimum right to defence attributable to any criminal suspect. However, extradition will be granted if the requesting party provides the assurance that it deems sufficient to guarantee the person whose extradition is requested the right to a new hearing to safeguard his right to defence. This decision will authorise the requesting party either to enforce the sentence in question if the convict does not oppose or to initiate proceedings against the person whose extradition has been requested.

When the requested party informs the person whose extradition has been

requested of the resolution handed down in his absence, the requesting party will not consider this communication as binding with respect to penal procedures in that state'.

Both Section Two as well as the Plenary of the National Criminal Court both realize that Italy expressed certain reservations regarding the above-transcribed Title III at the signing of this Protocol. They did highlight, however, that Italy withdrew this reservation through the mechanism provided for in Art. 9.3 of the same Protocol with a communication to the Secretary General of the Council of Europe and the withdrawal made a certain impact when it was received on 23 August 1990. In the judicial resolutions being challenged, although the publication of the withdrawal of reservations was not included, it was communicated through other channels, specifically through direct communication from the Italian authorities to the Court on a number of different occasions. As a result, the precept is applicable to the case. The hearing held in the Republic of Italy against the petitioner concluded with a final sentence and Italy has failed to provide guarantees that it is willing to hold a new hearing but rather contends that minimum rights to defence were upheld throughout the concluded hearing. The Spanish judicial bodies, once they arrived at a definition of these minimum rights, concluded that they were in fact respected in this case by the Italian courts and therefore considered appropriate the surrender of Mr. Borgobello.

(...)

4. (...) This guarantee, included in the *nulla traditio sine lege*, answers to a number of different objectives. On the one hand, the intention is that the extradition, for the most part, remain subject to legal regulations and not exclusively to the will of the states that are not able to arbitrarily extradite just anyone who may be in their territorial jurisdiction in accordance with Art. 9 of the Universal Declaration on Human Rights, Art. 5.1.f) of the European Convention for the Protection of Human Rights and Art. 13 of the International Covenant on Civil and Political Rights. On the other hand, the intention of the *nulla traditio sine lege* principal is to subordinate action taken by the judicial bodies that contributes to the favourable or unfavourable decision of surrender to regulations adopted by the legitimate representatives. And finally, it allows for a greater degree of legal security for the beneficiaries with a view to the foreseeable consequences of court actions with respect to a measure such as extradition with negative effects for the surrendered person and, in a broader sense, for his right to freedom.

5. In the view of the petitioner, the guarantees alluded to here were not respected in his case because extradition was based on the withdrawal of reservation to what was still a precept of a treaty, was not published in an official state gazette and that therefore does not constitute a legal right. The judicial resolutions being challenged do recognise this failure to publish but give no importance whatsoever to this aspect.

From the perspective of the Spanish legal system it goes without saying

that the publication of regulations and official communiqués is a constitutional mandate. Art. 9.3 states that the Constitution guarantees the publication of regulations. In accordance to Art. 91 the King, once sanctioning and enacting laws, will call for their immediate publication. And Art. 96.1 states that legally signed international treaties, once officially published in Spain, will form part of its domestic law. Within the scope of ordinary legality, Civil Code Art. 1.5 states that the legal regulations contained in international treaties will not be directly applied in Spain until which time they form part of the legal system subsequent to their complete publication in the *BOE*. And Art. 2.1 of the same Civil Code states that the laws will enter into force twenty days after their complete publication in the above-mentioned Gazette if the law itself does not provide for alternative provisions.

Although the principal of the publication of regulations is not considered as a fundamental right (*ATC* 657/1986) there is no doubt that according to Art. 9.3 of the Spanish Constitution it is a requirement. In a general sense, this guarantee is the unavoidable consequence of Spain's proclamation as a State of Law and is closely linked to the principal of legal security developed in that same Art. 9.3 (*SSTC* 179/1989 and 151/1994). From the citizens' perspective, this takes on particular significance because they are only able to assure their legal standing as well as their effective subjection and that of the public authorities to the legal system if the beneficiaries of these regulations are given a proper opportunity to become familiar with them by means of a general instrument that officially recognises their existence and content. Therefore, any regulation that was impossible or very difficult to gain access to would clearly go against the principle of publication (*STC* 179/1989).

6. The next step is to determine whether the withdrawal of the reservation tabled with reference to the treaty has to be published in order to be applicable in our legal system – publication that, as was stated above, the judgements being challenged do not consider a requirement. Therefore, both the constitutionality of the treaty which has not been questioned at all as well as the effects of the withdrawal of the reservation in the international legal system, are beyond the scope of our analysis.

If the reservation is considered a unilateral statement made by a State at the time of signing, ratifying, accepting or approving a multilateral treaty or becoming a party thereto, and if the object of the reservation is to exclude or modify the legal effects of certain provisions contained therein in its application in that state in accordance with Arts. 2.1.d) and 21.1 of the 1969 Vienna Convention on the Law of Treaties (the accession instrument of which was published in the *BOE* on 13 June 1980), the consequence would be that the reservation, to the degree that it modifies or excludes a provision, forms part of that treaty and, applying the same logic, the withdrawal of the reservation would also form part of the treaty. In this case the reservation calls for the exclusion of a precept, fully applicable to extradition relations between Italy and Spain given that the possibility of formulating the

reservation is provided for in Art. 9.3 of the Second Additional Protocol to the European Convention on Extradition and therefore does not require subsequent acceptance by the rest of the signing states. The withdrawal of the reservation may take place at any time and there is no need for the state that initially accepted it to express its agreement with the withdrawal in accordance with Art. 22.1 of the Vienna Convention. Art. 9.3 of the above-mentioned Second Protocol states that the withdrawal will be made my means of a statement sent to the Secretary General of the Council of Europe and will come into force on the date of its reception. In this case the reservation meant that the Republic of Italy refused to accept the obligation provided for in Title III of the Second Protocol; namely it did not recognise the Protocol's legal force in extradition relations between Italy and Spain. Therefore, the withdrawal of that reservation did, in principle, imply the entry into force of that Title for both states.

Art. 32.2 of Decree 801/1972 of 24 March on the regulation of State Government activity regarding international treaties states that the withdrawal of reservations formulated by other states regarding multilateral treaties to which Spain is party must be published in the *BOE*. However, of even greater importance from a constitutional point of view is Art. 96.1 of the Spanish Constitution which states that duly ratified international treaties will become part of the legal system once they have been officially published in Spain.

A clause of a treaty (and, as was mentioned above, the withdrawal of the reservation is in fact a clause) will therefore not be recognised by the Spanish legal system if it has not first been officially published. The Spanish courts cannot apply a precept that is not integrated into our law, especially if this law affects a fundamental right of individuals such as personal freedom. This case is, in fact, within the scope of treaties affecting fundamental individual rights which gives it greater importance because the ratification of the Second Additional Protocol to the European Convention on Extradition was ratified by the General Courts in accordance with Spanish Constitution Art. 94.1. It should also be considered that within the scope of passive extradition, the right to freedom is not only compromised with respect to a penal sentence (even more serious in this particular case to the serving of a prison sentence in the requesting state) but also by disallowing permanence on Spanish soil of a foreign national by forcibly transferring him to the border and surrendering him the authorities of the requesting state. Furthermore, failure on the part of the Spanish authorities to meet their obligations regarding the publication of events related to the treaty cannot have a damaging effect on the interests of an individual whose extradition has been requested.

7. The arguments put forward by Section Two as well as by the Plenary of the National Criminal Court in their recognition of the withdrawal of the officially published reservation do not change the conclusion that has just been reached. The fact is that the publication in the *BOE* of the Second

Additional Protocol does not counterbalance the lack of publication in an Official State Gazette of the withdrawal of the reservation in question because, as has already been argued above, that withdrawal affects an essential aspect of the treaty, namely that the parties to the treaty find themselves bound by one of its precepts. It should also be mentioned that the publication in the *BOE* on 11 June 1985 of the Ratification Instrument for the Second Protocol specifically includes the reservation formulated by Italy with respect to Title III, which led all to believe that this Title did not apply to Italian-Spanish relations and that is exactly the state of events until which time the withdrawal of that reservation is officially published in Spain.

It is not necessary to get into the issue of whether obligations were met or not with regard to notification sent to Spain of the withdrawal of the reservation by the Secretary General of the Council of Europe (mandatory in compliance with Art. 12.g) of the Second Protocol) because that rule has nothing to do with a modification of Art. 96.1 of the Spanish constitution. Using the same reasoning, the fact that the withdrawal was communicated directly to the National Criminal Court by the Italian authorities does not make up for the failure to publish required under the Constitution because those standing trial are not required to be cognisant of written law applicable through judicial precedents but rather should be provided with the opportunity to familiarise themselves with it through its publication in official gazettes.

In summary, the National Criminal Court deemed appropriate the extradition in application of a precept that, since the withdrawal of the reservation directly linked to it was not officially published, did not form part of the Spanish legal system and therefore violated the fundamental guarantee of extradition which states that extradition may only be granted in fulfilment of a treaty or law and based on the principle of reciprocity.

The fact that the appeal for legal protection was accepted made it unnecessary to deal with the rest of the violations of fundamental rights alluded to by the petitioner.

(...)".

IV. SUBJECTS OF INTERNATIONAL LAW

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human Rights

a) The right to one's private residence and respect for privacy and family life

– *STSJ* Community of Valencia, Court for Suits under Administrative Law, 18 November 1998 (*RJCA* 1998/4198)

The Government Commission of the Town Hall of Alcalá de Chisvert handed

down a judgement on 26 February 1995 by virtue of which it issued a licence for a bar-restaurant on the thoroughfare known as Paseo Ribamar de Alcocebre.

The TSJ allowed the administrative law appeal filed by the 'Community of Property Owners of the La Marina Apartments' and declared null and void the bar-restaurant licence that had been issued naming the Town Hall responsible for the payment of court costs due to its reckless disregard for the rights of others.

"Legal Grounds:

First: In this suit the complainant (community of property owners of the 'La Marina' apartments) filed an appeal against the 'Agreement of the Government Commission of the Town Hall of Alcalá de Chisvert of 26 February 1996 by virtue of which it issued a licence for a bar-restaurant on the thoroughfare known as Paseo Ribamar de Alcocebre'.

Second: The following facts must be analysed in order to resolve this case:

On 10 June 1994 Messrs. Francisco H.C. and Enrique M.M. file an application for a restaurant licence supported by favourable reports drafted by the municipal architect and municipal technical expert. It was announced in the Official Provincial Gazette on 7 July 1994 and was forwarded to the Provincial Commission on Business Activities that issued a positive report on 21 November 1994.

The licence was granted on 21 February 1995 and the operating permit was issued on 24 August 1995.

It was also proven that the restaurant was open during the summer season of 1994 and 1995 and the file shows a great number of complaints registered by the neighbours for the noise coming from this establishment.

Between 16 July 1994 and 15 August 1995 the municipal police of Alcalá de Chisvert took 15 sound measurements and the results indicated sound emissions of between 40 and 71 decibels.

There is no evidence of any action taken by the Town Hall in response to the measurements taken by the municipal police.

(...)

Fourth: (...)

It is a violation of Art. 18.2 of the Spanish Constitution in the sense that all citizens have the right to peace and quiet at their home residence and the passive attitude of the Town Hall was an impediment to the enjoyment of one's residence and is thus considered an illegitimate invasion in the sense given by this court in its interpretation of the European Court of Human Rights: '...there is an issue that should be made clear; no industry or place of business may legally surpass the established limits for noise and odour. In the event that the business is operating without a licence and is therefore considered clandestine, it should be closed. In the event that it does have a licence, it is failing to comply with the conditions established therein and the applicable regulations. In this latter case, the establishment should be summoned to adjust its noise, odours, vibrations, etc. in compliance with its licence and if it chooses not to comply or for some reason cannot, it should

also be closed; in the first case, given its wilful disregard for the law and in the second because the licence was issued incorrectly and should therefore be revoked. This is the reasoning that should be applied to the 8 December 1994 judgement (López Ostra case) delivered by the European Court of Human Rights that ruled that these situations violate Art. 8 of the 4 November 1950 Rome Convention (*RCL* 1979\2421 and *ApNDL* 3627) (Protection of Human Rights and Fundamental Freedoms) with the understanding that such situations involving odours, noise, smoke, etc. are a violation of the complainant's rights to enjoy his place of residence and to privacy and family life guaranteed by Art. 8 and he thus is entitled to compensation. Along these same lines, judgement 235/1997 of 7 March (Section Three of the Court for Suits under Administrative Law of the High Court of Justice of the Community of Valencia) found the Town Hall of Valencia guilty of violating Art. 18.2 of the Spanish Constitution by allowing a situation of night-time noise to persist in a residential neighbourhood and compensation was made.'

At the very moment that the competent authorities (Autonomous Valencian Government, the Town Hall) detect that an industry or business establishment is failing to comply with applicable regulations regarding the transmission of noise, odours, vibrations, etc., they have the obligation to put a stop to it (Art. 12 Law 30/1992 'jurisdiction may not be renounced and will be exercised by that administrative organ that has jurisdiction) by taking the proper measures and if they fail to do so they will be considered as co-responsible for the violation of the law. That is why in the case law under scrutiny the Administration is found guilty, not for its production of noise, odours, vibrations, etc. but rather due to its passive attitude it became co-responsible for this violation of the law and the constitutional rights of those affected'.

In the case at hand we are faced with a Town Hall that is inoperative when it comes to application of the law. Under these circumstances the case file made this Court very suspicious especially considering page 19 where it is indicated that the Environmental Council, in compliance with current legislation, imposed an upper limit of 35 decibels and the Town Hall of Alcalá de Chisvert, despite the fifteen measurements taken by the municipal police clearly showing sound levels which were well over these limits, failed to look into the situation or take any steps whatsoever. Under these conditions, opinions given by the municipal technical experts are not admitted and the disputed licence was declared null and void.

Fourth: Based on Art. 2, paragraph 1 of Autonomous Community Law 3/1989 of 2 May on Permissible Activities which states '... all of which, without prejudice to the intervention that the laws and regulations concede in this field to other institutions and whose authorisation is a prerequisite to the granting of the municipal licence' and linking this precept to Art. 5 of Law 2/1991 of 18 February (*RCL* 1991\937 and *LCV* 1991\65) on entertainment events, public establishments and recreational activities (*DOGV* number 1492 of 26

February) determining the jurisdiction of the Autonomous Government of Valencia (public events) to define the safety conditions and appraisal that should figure on the licence, Art. 7.4, without prejudice to authorisations and actions by other institutions (Provincial Commission on Permissible Activities) Art. 5.6, we are bound to arrive at the conclusion that a preliminary report should have been made and if this was not the case that would automatically indicate the invalidity of the licence request from the very outset. This is one of the many conclusions reached by the High Court of Justice of the Community of Valencia in its recent judgement number 980/1997 of 6 October 1997. As a result the appeal was allowed and the licence issued was declared null and void".

b) Right to the presumption of innocence and free movement

– *STSJ* Autonomous Community of Valencia, 27 July 1998, Court for Suits under Administrative Law (*RJCA* 1998/2880)

Mr. Mohamed S.B. filed an Administrative Law Appeal against a judgement delivered by the Delegation of the Valencian Government on 18 July 1997 denying him his certificate of registration due to his being involved in a case involving deportation.

The TSJ admitted the appeal thus nullifying the decision challenged and affirming the petitioner's right to obtain a certificate of registration.

"Legal Grounds:

First: The petitioner, of Tunisian nationality, was unable to procure documents from his country and therefore filed a request at provincial police headquarters for a certificate of registration provided for in Arts. 22 *LO* 7/1985 (*RCL* 1985\1591 and *ApNDL* 5093) and 63 of its regulations (*RD* 155/1996, of 2 February [*RCL* 1996\630 and 1185]). His request was denied due to the fact that his deportation case, in accordance with Art. 26 of that law, was being heard. On 16 December 1996 he was arrested as the author of an alleged crime of falsification of documents leading to the initiation of penal procedures which, in turn, led the Delegation of the Valencian Government in its 12 May 1997 resolution to pronounce his deportation from Spanish territory. The 18 July 1997 resolution taken by the Government Delegate of this Autonomous Community denying the certificate of registration to both him and his son, a minor by the name of Mohamed E.B. born on 22 June 1996, is the object of this jurisdictional study.

In his appeal the complainant, although he does not expressly invoke a violation of any fundamental right, cites Arts. 9.3, 13, 14, 17, 18, 19, 24 and 29 of the Spanish Constitution (*RCL* 1978\2836 and *ApNDL* 2875). The public prosecutor, with a greater degree of legal rigour in response to the complaint, claimed violation of the right of freedom of movement protected by Spanish Constitution Art. 19 because the complainant is accused of being involved in a

deportation procedure according to Art. 26, d) *LO* 7/1985 in the absence of a judicial sentence against him and that is the basis for the refusal to issue him the requested documentation without which his right to freedom of movement is not guaranteed.

Second: This Court, although it understands the argument woven by the Public Prosecutor, is of the opinion that not only the right to free movement was violated in the case of Mr. Mohamed S.B. but also in a direct and fundamental way his right to the presumption of innocence (Spanish Constitution Art. 24) and, as a result, his right to freedom of residence (Spanish Constitution Art. 19). This thesis will be supported by reasons which will be explained below but first, and with a view to properly focussing this controversy, attention must be drawn to the legislation which sets the stage for the action taken by the Administration in this case.

(...)

And considering these two lawsuits the Administration, denying the documentation requested by the complainant, simply states that he is involved in a deportation case in accordance with Art. 26 but, in fact, his deportation has already been ordered for an alleged crime of falsification of documents giving rise to a penal procedure which eliminates the possibility of the rest of the concurring motives for expulsion provided for in this precept and only allows for dealing with the hypothesis of his being issued the certificate in the cases of letters d) or f).

Third: When the administrative judgement under scrutiny here was delivered there was only record of one encounter with the police which was following his arrest on 16 December 1996 for an alleged crime of falsification of documents for which preliminary investigative proceedings were initiated by Trial Court number 19 in Valencia, case number 5776/1996. There is no record whatsoever of an accusation brief filed by the Public Prosecutor which the Administration presumed had been filed but its existence is purely academic with respect to this case.

With regard to police reports the Constitutional Court has, in fact, affirmed on repeated occasions (vgr. *STC* 14 October 1997 [RTC 1997\173]) that 'a police report can only be considered as admissible evidence if it is reiterated and ratified during the course of the oral proceedings, normally through testimony made by the police officers who signed the report (*SSTC* 100/1985 [*RTC* 1985\100], [*RTC* 1985/101\], 145/1995 [*RTC* 1995\145], 173/1985 [*RTC* 1985\173], 49/1986 [*RTC* 1986\49], 145/1987 [*RTC* 1987\145], 5/1989 [*RTC* 1989\5], 182/1989 [*RTC* 1989\182], 24/1991 [*RTC* 1991\24], 138/1992 [*RTC* 1992\138], 303/1993 [*RTC* 1993\303], 51/1995 [*RTC* 1995\51], and 157/1995 [*RTC* 1995\157]).'

With regard to the presumption of innocence it has declared (*STC* 11 March 1997 [*RTC* 1997\45]) that: 'The presumption of innocence is only abandoned when a lawfully established, independent and impartial court declares a person guilty after a hearing with all of its corresponding

guarantees (art. 6.1 and 2 of the 1950 European Convention [*RCL* 1979\2421 and *ApNDL* 3627]) and during the course of which sufficient evidence for the prosecution was presented.' The presumption of innocence is, therefore, an essential principle in judicial proceedings and also plays a role in the execution of administrative sanctioning authority (*SSTC* 73/1985 [*RTC* 1985\73] and 1/1987 [*RTC* 1987\1]), in addition to the already cited *STC* 120/1994 (*RTC* 1994\120). Among the many attributes comprising the polyfaceted concept of the presumption of innocence we find the procedural one which consists of displacing the *onus probandi* with other added legal effects. In that respect, as has already been mentioned, (according to the reasoning derived from *STC* 120/1994) within penal law *estricto sensu* the presumption of innocence is accompanied by four requirements enumerated in our *STC* 76/1990 [*RTC* 1990\76] and listed in 138/1992 [*RTC* 1992\138]. Of these only two, the first and the last are useful here in this case applying the necessary adaptations *mutatis mutandis* given the shift in the sanctioning authority. The burden of proof for each infraction lies with the Public Administration involved and a *probatio diabolica* of the unlawful acts cannot be required of the accused. Furthermore, the overall assessment of the evidence presented is within the exclusive jurisdiction of the one judging who freely applies criteria with the sole responsibility of making reason of the result of that operation (*STC* 76/1990). In short, the existence of a sufficient body of evidence the individual pieces of which must be obtained without infringing upon the fundamental rights of the accused and the free assessment of the evidence by the judge are the basic elements which safeguard this constitutionally protected presumption of innocence and are both explicit and implicit in the voluminous doctrine emitted by this Tribunal (89/1992 [*RTC* 1992\89]).

As a result, either the cause for expulsion provided for in letter d) (declared guilty of an intentional crime) or that which is provided for in letter f) (participation in illegal activities) is applied, but in both cases the Administration is acting as if a judicial sentence had already been delivered against Mr. Mohamed S. when the fact is that the only thing he had against him were some police reports or, at most, an accusation filed by the Public Prosecutor but no guilty verdict had been delivered by the penal jurisdictional bodies. It therefore must be concluded that the petitioner's right to presumption of innocence has been violated by virtue of using this motive to refuse the concession of the certificate of registration which was requested by the petitioner himself.

And as a result of this, in so far as this document is needed to legally reside in Spain, it is evident that the accused's right to freely take up residence and free movement within national territory (Spanish Constitution Art. 19.1) have been violated. These rights are attributable to foreign subjects as long as a basic requirement is fulfilled: established permanence in the country. This is stipulated in the International Covenant on Civil and Political Rights (*RCL* 1977\893 and *ApNDL* 3630) according to which the right to move freely and

to set up residence is only granted to those individuals who have established themselves within the territory of the state in question. Art. 19 of the Spanish Constitution refers literally to 'Spanish subjects' but this is a legally configured right meaning that its contents and application are determined by the laws developing it and it is perfectly acceptable 'that laws and treaties affect the application of these rights in function with the nationality of the individual with different treatment for Spaniards and foreigners with respect to entering and leaving the country and residing therein' (*STC* 94/1993 [*RTC* 1993\94]). It is accepted that 'Art. 14 of the Spanish Constitution which proclaims the principle of equality refers exclusively to Spanish subjects; it is they who, in accordance with the constitutional text, are equal under the law and there is not prescription whatsoever that extends that same equality to foreigners' (*STC* 107/1984 [*RTC* 1984\107]). This same differentiation in treatment is justified by the European Court of Human Rights (18 February 1991). The Constitutional Court goes on to add that 'only those foreigners who, by provision of law or treaty or by virtue of an authorisation granted by a competent authority have the right to reside in Spain, may benefit from the protection afforded by Art. 19 of the Spanish Constitution even though this protection may not be on the exact same terms as for Spanish subjects but rather on those determined by the laws and treaties referred to in Art. 13.1 of the Spanish Constitution.'

The Administration therefore, considering that the petitioner was illegally residing in Spain by virtue of a resolution that violates his right to presumption of innocence, simultaneously violated his right to free movement. For these reasons this Court allows this appeal.

c) Right to free movement for European citizens

– *STSJ* Autonomous Community of Valencia, 28 May 1998, Court for Suits under Administrative Law (*RJCA* 1998/2162)

Ms. Susana I.G. filed an administrative law appeal against a judgement delivered by the Government Delegate in Valencia on 7 July 1995 denying her request for a community residency card for a family member.

The TSJ allowed the appeal thus nullifying the challenged judgement because it is contrary to law and thus recognised the right of the complainant to obtain a community residence permit for a family member as an individualised legal situation.

"Legal Grounds:

Second: First of all it should be highlighted that the complainant, as a lawful, non-separated spouse of a European Community Member-State citizen (in this case Spanish), is covered by the regulations on entrance, permanence and employment in Spain with the same rights as a Member-State citizen.

As has been pointed out by the Supreme Court in numerous judgements,

the Treaty on European Union signed in Maastricht on 7 February 1992 and in force since 1 November 1993 (*RCL* 1994\81, 1659 and *RCL*\1997\917) once definitively ratified by the judgement delivered by Germany's Constitutional Court on 12 October 1993, provides for the recognition of the concept of Union Citizenship, the subjective extension of which is defined in Art. 8 of the EEC Treaty of 25 March 1957 (*LCEur* 1986\8). Section a) of this legislation grants European citizens the right to move and reside freely within the territory of the other Member States. The essential content of free movement is inferred by its regulation that includes a prohibition on the part of the host state to demand requirements, set up barriers or use other obstacles that go beyond what is necessary to guarantee order and public security as well as to control the identity and nationality of those that cross national borders.

It should also be pointed out that the treaties referred to, treaties of accession, European development regulations and directives comprise the common regulatory base that govern rights of entry and residence.

In our domestic law the Spanish Constitution in Art. 13.1 states that foreign subjects in Spain will be granted those public freedoms provided for in Title I in the terms established under treaties and law; expressed in similar terms in Art. 4 of Organic Law 7/1985 (*RCL* 1985\1591 and *ApNDL* 5093) regulating the rights and freedoms corresponding to foreign subjects in Spain.

Among those freedoms guaranteed under Title I, Art. 19 makes specific mention of the right to freely reside in Spain as part of European Community territory (analysed below), freedom of movement and, as a consequence of the latter, permanence in Spain which acquires unusual nuances when it involves citizens of European Community Member States given application of the common regulatory base referred to above always within the framework of Arts. 48 and 52 of the Treaty establishing the European Economic Community that recognise the principles of free movement and freedom for EC nationals to set up residence in any other Member State.

(...)

Third:

(...)

In compliance with that regulation, the decision under appeal refused to issue the complainant a residence permit for a family member based on the 1995 police report submitted to the State Legal Service stating that the petitioner was sentenced by the Provincial Court of Madrid for a crime against public health to two years, four months and one day probation and a fine of 1,000,000 Pesetas or 16 days incarceration in the event of non-payment.

Fourth: At this point a fundamental analysis of the issue is needed, and this is what the complainant is alleging; is that sentence sufficient to warrant the motive of public order in refusing to grant the residence permit.

Art. 15 cited above states in section 3.1, d) that when decisions are based on motives of public order of public safety they should be based exclusively on

the individual behaviour of the person to whom they directly apply.

The concepts of public order and public security are legal concepts which undoubtedly leave room for interpretation. With regard to their precise definition no help is provided by the Regulatory Public Order and Public Security Laws or by the Organic Law applying to foreign nationals and provisions for its application to which Art. 15 itself turns despite the fact that Arts. 23 to 26 of the Organic Law on Citizens Security are in conflict with it.

In any case, we find ourselves before a restrictive 'European concept an example of which is the case law from the European Court, accepted by our Constitutional Court, regarding acts or activities that 'are contrary to the normal exercise of Fundamental Rights or Public Freedoms' (Constitutional Court Judgement 59/1990 [*RTC* 1990\59], and others) or that 'hinder the free development of social and collective individual rights and freedoms or that hinder or impair the normal evolution of the institutions.'

In this sense it is clear that activities related to drug trafficking go against public order and security and even infringe upon the fundamental right to life and the equally important right to physical and psychological well being.

Despite these facts, it should be pointed out that Art. 15 of Royal Decree 766/1992 under analysis, justifies the adoption of measures restricting the right of free movement and residence not so much with regard to acts against public order or public security but rather with regard to the existence of reasons of public order or security that justify the restriction.

If we turn to Council Directive 64/221/CEE of 25 February (*LCEur* 1964\4) on the Coordination of Special Measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, Art. 3 states that these reasons 'should be based exclusively on the personal behaviour of the individual to whom they are applied.' It goes on to state that 'the mere existence of a penal sentence is not a motive in and of itself for the adoption of these measures'.

The 28 June 1990 Council Directive dealing with the Right of Residence reiterates that the Member States may only make exceptions to its provision for the reasons stipulated and in compliance with Directive 64/221/CEE.

It should be pointed out that the following premise is established in its preamble: 'the right to residence may only be exercised if it is conferred also on all members of the family.'

Fifth: Continuing with the analysis or more precise definition of the concept of 'reasons' of public order or public security, the Luxembourg Court in its 27 October 1977 Judgement (Regina-Pierre Bouchereau) concluded that the existence of a penal sentence is of great importance in determining whether it could be indicative of personal behaviour that constitutes a current threat to public order.

The same reasoning was employed by the National Criminal Court in its 21 December 1995 Sentence concluding that the Administration, in order to

justify the restrictive measure adopted, was obliged to relate the sentence with persistent conduct against public order.

In this case the Administration against which the complaint was filed, which should have determined whether the petitioner met the requirements to be granted the residency card and then, depending upon the circumstances, refused for reasons of public order or security, simply referred to the existence of a penal sentence for a crime against public health with no mention whatsoever of the complainant's personal behaviour that could serve as the basis for refusing the card requested. Under these circumstances the lack of supporting evidence or facts based on reality is undeniable and the appealed judgement must therefore be revoked and the declaration that should have been made by the Administration on whether to grant the community family residence card should be substituted by an examination of whether the requirements for this card were met or not.

d) Right of asylum

– *STS* of 10 March 1998, Court for Suits under Administrative Law (*RJ* 1998/3244).

In the city of Madrid on 10 March 1998.

Supreme Court Appeal 7411/1996l heard in Section Six of Courtroom number three of the Supreme Court, filed by Court Solicitor Ms. Raquel Nieto Bolaño representing Ms. Terezinha F. against the Judgement delivered by Section eight of the Court for Suits under Administrative Law of the National Court on 24 July 1996 that rejected the administrative law appeal filed against the resolution handed down by the Ministry of Justice and the Interior on 25 November 1994 refusing to consider concession of the right to asylum filed for by the petitioner. The Treasury Council was party to the suit.

By virtue of a new brief presented before this Court on 2 March 1998, the petitioning party affirmed that the "humanitarian reasons" are based on the difficult personal situation faced by the petitioner in her country of origin.

"Legal Grounds:

First: Within the scope of International Law, the 28 July 1951 Convention (*RCL* 1978\2290, 2464 and *ApNDL* 11685) on the Statute of Refugees and the 31 January 1967 Protocol relating to the Status of Refugees (*RCL* 1978\2290, 2464 and *ApNDL* 11685) to which Spain is party as of 14 August 1977, (the 1951 Convention entering into force on 12 November 1978 and the 1967 Protocol on 14 August 1978, published in the *BOE* number 252 on 21 October 1978), indicate the need that all persons have, with no distinctions whatsoever, of fundamental rights and freedoms as expressed in the preamble to the Geneva Convention of 28 July 1951 and the New York Protocol Text of 31 January 1967 ratified by virtue of Resolution 2198 (XXI United Nations Assembly), texts that form part of our internal legal system in compliance

with Art. 96.1 of the Constitution (*RCL* 1978\2836 and *ApNDL* 2875) and Art. 1.5 of the Preliminary Title of the Civil Code (*RCL* 1974\1385 and *NDL* 18760) and which are further developed within the scope of our internal legal system with Law 5/1984 (*RCL* 1984\843 and *ApNDL* 5087) regulating the right to asylum later modified by Law 9/1994, of 19 May (*RCL* 1994\1420 and 1556) the texts of which were completed by Royal Decree 511/1985, of 20 February (*RCL* 1985\909 and *ApNDL* 5089) which initially controlled the Regulation concerning the application of the Law on the Right to Asylum and Refugee Status and by Royal Decree 203/1995 of 10 February (*RCL* 1995\741) ratifying the Regulation for the application of Law 5/1984, modified by Law 9/1994 of 19 May (*RCL* 1994\1420 and 1556).

Second: In order to resolve the issue at hand we should begin with the following suppositions:

a) Applying the above-mentioned legislation we find that this is not a case of a political refugee because that status is granted to those with founded fears of being persecuted for reason of religion, nationality, opinions or by virtue of belonging to a certain social group, who are outside the country of their nationality and who cannot, or because of their fears do not want to seek protection within their country. We have here a series of legally undetermined concepts that presents the Administration with a certain level of difficulty in evaluating these concepts and the need to make a positive determination of whether the circumstances warrant the granting or refusal of asylum.

These circumstances which on occasion are very difficult to prove show that in the case of a political refugee there is the need to prove the reasonable probability of suffering persecution for the reasons listed that need to be proven based upon an assessment that will indicate whether these circumstances warrant fear and persecution for reasons of race or religion. This is not the issue in the case analysed here.

b) Furthermore, in the case of asylum and refugee status, Law 5/1984 later modified by Law 9/1994, develops Art. 13.4 of the Constitution making its granting contingent upon ideological or political motives in accordance with criteria of solidarity and tolerance; objectives pursued by democratic states.

In compliance with Art. 14 of the Universal Declaration on Human Rights (*ApNDL* 3626), Arts. 2 and 3 of that Declaration specify the concurring circumstances necessary for the granting of asylum. Art. 3 is especially explicit in establishing the causes which justify the request and refusal, the circumstances under which persons who have been granted refugee status and who suffer persecution or who are subject to court proceedings may request asylum, recognising this right for any foreign subject who meets the requirements set out in International Documents ratified by Spain, special consideration being given to the Convention relating to the status of Refugees done in Geneva on 28 July 1951 and to the Protocol relating to the status of Refugees done in New York on 31 January 1967. Asylum is not granted to those included in any of the suppositions described in Arts. 1.F and 33.2 of

the Geneva Convention.

c) As in the case of refugees, the gracious nature of the protection granted in the exercise of the State's sovereign authority requires, in the case of asylum, maximum discretion in the concession or refusal, open to appeal through an administrative legal process as recognised by previous judgements delivered by this Court on 10 December 1991 (*RJ* 1991\9206) and 30 March 1993 (*RJ* 1993\1975). It is therefore incumbent upon this Court to examine whether the decision adopted was taken in a rational and objective manner in accordance with the final objective sought by the regulation while also bearing in mind that the discretional decision may be governed by extra judicial criteria related to best interests, convenience or national security. In all cases, however, it must be the result of an administrative decision justified by objective data and should only be nullified when there is a clear and convincing incongruence or a conflict between the solution chosen and the factual reality to which it is applied, clearing diverging from the teleological grounds of the applicable regulation.

Third: The application of the criteria described above to the issue under scrutiny indicates that, in accordance with the reiterated case law doctrine delivered by this Court in cases of this nature, clear evidence supporting the facts on which the concession of asylum is based, given the specific circumstances that may be involved, is not a requirement. If the petitioner's appeal is to meet with success, it should not be forgotten that the principal issue is the determination of the degree to which evidence is required if we consider that in certain countries socio-political circumstances may imply the subversion of democratic and human values giving rise to persecution for reason of race, religion or belonging to a particular social or political group, contrary to the system operating in democratic nations. Situations of confusion or doubt are encountered making it difficult to obtain evidence to prove the condition or situation of persecution. It should be considered that these circumstances are conditioning factors affecting the conduct of the citizens of those states, forcing them into exile or deporting them from their own country given their situation of persecution, harassment, accusation or indictment due to a difference of opinion, ideas or beliefs. The situation does not seem to be accredited in this case because both the request for asylum as well at that for refugee status is based on the subjective element of fear of facing persecution and this is very difficult to prove considering the essentially subjective nature of the evidence.

Fourth: Furthermore, the European Union has established (*Official Journal of the European Communities*, 4 March 1996, number L63/2, Brussels) the joint position as defined by the Council and based on Art. K3 of the European Union Treaty (*RCL* 1994\81 and *LCEur* 1992\2465) relative to the harmonised application of the definition of the term 'refugee' in compliance with Art. 1.° of the 28 July 1951 Geneva Convention relating to the status of Refugees that adheres to the following basic criteria: a) the

existence of founded fear of being persecuted for reason of race, religion, nationality, political opinion or membership in a particular social group. b) These motives should be sufficiently serious given their nature or reiteration comprising a serious affront to human rights and should come about as a result of one of the above-mentioned circumstances: race, religion, nationality, membership in a certain social group or political opinion. c) In order to be considered persecution, the attacks or damages should be sufficiently serious, surpassing measures deemed necessary for the maintenance of public order, prohibiting or discouraging a religious practice even in one's private residence.

In the case examined, the United Nations report was not attached (UNHCR) which would constitute a decision adopted by that International Refugee Organisation when it was active, nor were the applicable criteria accredited by the petitioner.

Fifth: The Supreme Court Appeal was initiated in accordance with Art. 100.2, c) of the *LJCA* (*RCL* 1956\1890 and *NDL* 18435) given the manifest lack of grounds with regard to the alleged 'humanitarian' reasons on which the appeal was based. The preceding reasoning brings us to the conclusion, as was the case in our judgements delivered on 29 June 1992 (*RJ* 1992\4729), 8 November 1993 (*RJ* 1993\8607), 23 June 1994 (*RJ* 1994\4972) and 10 May 1996 (*RJ* 1996\4349), that accreditation was not provided and it was not even based on sufficient proof, as required by Art. 8 of the above-mentioned Law 5/1984, that the requesting party is indeed suffering persecution to such a degree that she fears for her life or the free exercise of her fundamental freedoms. Nor is this a case of the humanitarian reasons listed in Art. 3.3 of the Law regulating the Right to Asylum and the granting of Refugee Status and Art. 17.2 of Law 9/1994 of 19 May, modifying Law 5/1984 of 26 March which are cited by the petitioner. For all of these reasons this Supreme Court Appeal is not admitted and in compliance with Art. 100.3 of the *LJCA*, court costs will be borne by the petitioner.

(...)".

e) The right of prison inmates to be treated with dignity

– STS of 26 November 1998, Court for Suits under Administrative Law (*RJ* 1998/9312).

The Judgement delivered by Section Three of the Court for Suits under Administrative Law of the National Court on 11 October 1991 partially allowed the administrative law appeal filed by Mr. Manuel Casal Fraga, legal representative of Ms. Manuela L.C. against the alleged dismissal by the Ministry of Justice of the request filed by the petitioner in writing on 4 December 1986 and nullified the resolution contested by virtue of non-conformity to law, declaring the right of the complainant to receive compensation for damages in the amount of two million

pesetas without assigning court costs.

In the appealed judgement, arising from alleged damages liability for abnormal behaviour on the part of the penitentiary services, the following circumstantial elements are recognised in the third legal ground:

1.°) An administrative action taken by the penitentiary services.

2.°) A result with damages consisting in the suicide death by hanging of an inmate incarcerated in the penitentiary centre located in La Coruña.

3.) A cause and effect relationship between that one and this one due to non-compliance with the fundamental duty of watching out for the physical well-being of the inmates, a responsibility of the penitentiary institutions in compliance with Arts. 1.3 and 4 and 8.1 of the General Penitentiary Law (RCL 1979\2382 and ApNDL 11177) and 1.5.3 and 23 of its regulation (RCL 1996\521 and 1522). Damages were directly attributable to the malfunctioning of that penitentiary centre's medical service.

In filing the remedy of appeal, the Treasury Council requested the nullification of the challenged sentence alleging that the incarceration of the inmate was not necessary because as a psychiatric patient there was no foreseeable problem. Furthermore, in the view of the Treasury Council, the observations made by the Court of First Instance in the appealed sentence lead one to just the opposite conclusion in recognising that no administrative irregularity took place.

Having completed all legal prescriptions, the judgement was delivered on 19 November 1998.

"Legal Grounds:

First: The object of the remedy of appeal is limited to determining whether the challenged sentence, delivered on 11 October 1991 by Section Three of the Court for Suits under Administrative Law of the National Court partially allowing the administrative law appeal filed by Mr. Manuel C. F., legal representative of Ms. Manuela L.C., against the alleged dismissal by the Ministry of Justice of the request filed by the petitioner in writing on 4 December 1986, nullifying that resolution and declaring the right of the complainant to receive compensation for damages in the amount of two million pesetas as the result of the hanging of her son in the Penitentiary Centre in La Coruña, is in compliance with the law.

(...)

Third: In focussing this issue on the death of inmates in penitentiary centres, we should fall back on the pertinent case law that can be summarised as follows:

a) This Court has delivered case law on a number of occasions on the deaths of prison inmates and emphasis is always placed on the need to determine whether a third person was involved as an active agent because case law constantly requires the presence of some element of abnormality in the penitentiary service sufficient to establish a link between the administrative omission and the death, thus determining the unlawful nature of the damage

produced despite the intervention of third parties in the events leading up to that damage.

This jurisprudential criteria is the outcome of a number of judgements including the Sentences of 15 July 1988 (*RJ* 1988\5896), 22 July 1988 (*RJ* 1988\6095), 13 March 1989 (*RJ* 1989\1986), 4 January 1991 (*RJ* 1991\500), 13 June 1995 (*RJ* 1995\4675), 18 November 1996 (*RJ* 1996\8063), 25 January 1997 (*RJ* 1987\266), 26 April 1997 (*RJ* 1997\4307) and 5 November 1997 (*RJ* 1997\8298).

b) In cases of death of inmates in penitentiary centres, the direct, immediate and exclusive characterisation in jurisprudence of the causal link between the administrative activity and the damage or injury produced is not a stumbling block to the recognition of damages liability. This Court has highlighted (as in the 25 January 1997 sentence [*RJ* 1997\266]), that the essential causal relationship between the Administration and the damage produced can appear in an indirect or concurrent manner while still admitting the possibility of a moderation of responsibility in the event that other causes intervene which would necessarily result in the distribution of responsibility when determining compensation payments.

c) And finally this Court and Section excludes any damages liability on the part of the Administration in the event that no irregularity is detected in the delivery of the service given that supervision was adequate (as was the case in the 5 May 1998 sentence [*RJ* 1998\4625], in Supreme Court Appeal number 7098/1993) or given the inexistence or omission of public penitentiary services (as was the case in the 19 June 1998 sentence [*RJ* 1998\5272], in Supreme Court Appeal number 1985/1994).

Fourth:

(...)

The challenged sentence considers that the abnormal behaviour of the deceased inmate, who had set fire to his house where he resided with his mother and who made a statement to the civil guard who arrested him to the effect that the fire broke out because the 'house was falling in on him' and who also wrote with his own blood on the bill of indictment the words 'this is abusive', should have sufficiently alerted the penitentiary administration prompting them to implement the necessary cautionary and safety measures that would have prevented the death of the inmate had they been adopted.

Fifth: On numerous occasions this Court has called attention to case law (the most important being the 5 November 1997 sentence [*RJ* 1997\8298]) and the manifest responsibility to keep inmates in conditions of dignity and safety as mandated by the Spanish Constitution in Arts. 10.1 and 15 and by the Universal Declaration of Human Rights of 10 December 1948 (*ApNDL* 3626), Art. 3 and by virtue of the provisions contained in the European Convention on Human Rights and Fundamental Freedoms done in Rome on 4 November 1950 and ratified in Spain on 26 September 1979 (*RCL*

1979\2421 and *ApNDL* 3627). Also worthy of mention here are the Declarations contained in the International Covenant on Civil and Political Rights of 19 December 1966 ratified in Spain on 13 April 1977 (*RCL* 1977\893 and *ApNDL* 3630).

Arts. 10.2 and 96.1 of the Spanish Constitution refer to these declarations, treaties and agreements guaranteeing the fundamental right to life and physical and moral integrity constituting an important element to be applied to the issue being debated here. Attention should also be given to the fact that Organic Law 1/1979 of 26 September (*RCL* 1979\2382 and *ApNDL* 11177), General Penitentiary Law in its Arts. 1, 3, 4 and 8.1 and the directly applicable regulation (Royal Decree 1201/1981, of 8 May [*RCL* 1981\1427, 1814 and *ApNDL* 11181], modified by Royal Decree 783/1984, of 28 March [*RCL* 1984\1091 and *ApNDL* 2591]), contain the basic guidelines with regard to this material giving the penitentiary authorities the responsibility for the control and security measures needed to protect inmates. These measures are not alien to the functioning of the penitentiary centre but rather form part and parcel of its very organisation and discipline as was pointed out by this Court in a number of case law sentences (among others see sentences of 4 January 1991 [*RJ* 1991\500] and 13 June 1995 [*RJ* 1995\4675]).

Sixth: The description of the facts as inferred from study of the administrative file and the judicial proceedings reveal that the deceased inmate had received psychiatric care from 1980 to 1986 and had been admitted on several occasions to the psychiatric centre in Conjo. Furthermore, in the 8 November 1982 Resolution emitted by the Galician Government with respect to assessment and orientation regarding disability, the subject was assessed with a 42 percent handicap with a note indicating that he suffered from paranoid psychosis requiring psychiatric medical treatment which he was subject to on an ongoing basis. The existence of new prescriptions dated 8 August 1986 were also discovered as was the fact that three days after the last medical visit he set fire to the house in which he lived with his mother.

All of these circumstantial elements point to the necessary adoption, on the part of the public penitentiary services, of the proper measures given that psychiatric problems that needed medical attention had been detected prior to the events described in the bill of indictment which, on a provisional basis, ordered his incarceration on 1 September 1986, ratifying a former order for provisional imprisonment issued on 20 August 1986. This required medical care was not provided by the Administration; the observation and treatment team at penitentiary centre where he was incarcerated had no specific medical credentials in the area of psychiatry according to the report from the administration of the Centre in La Coruña dated 25 February 1991. Furthermore, from the date of his detention he was not seen by any psychiatrist nor was he sent to any psychiatric centre because the medical team found this to be unnecessary according to the report filed by the medical

service of the Centre in La Coruña on 14 February 1991.
(...)".

f) The right not to be tortured

– *STS* of 2 March 1998 (Criminal Court) (*RJ* 1998/1759)

The present case is a Supreme Court Appeal for infraction of the law filed by the representatives of the popular prosecution the Pro Human Rights Association of Andalusia and the private prosecutor Fernando V.A. against the judgement delivered by Section One of the Provincial Court of Seville that absolved the accused Gerardo M.P., Rafael F.C., Antonio D.M., Isidro C.D. and Jorge C.C. for crimes of mistreatment and others.

"Legal Grounds:

First: Torture, mistreatment and specifically degrading treatment, regardless of whether it takes place in a domestic setting or during the course of public service, politics, terrorism or, more specifically, in a penitentiary setting, undoubtedly constitutes an extremely important subject because the fundamental rights described in Art. 24 of the Constitution (*RCL* 1978\2836 and *ApNDL* 2875), considered over and above any other legal provision, are the very pillars of due process protected by the *Magna Carta*. It is also self evident that these constitutional mandates must be upheld in their broadest sense both during and after the penal process which obviously means that the execution of a prison sentence must also be considered within the scope of the constitution and under its protection when it comes to the rights of prison inmates.

What at the outset was a revindication and social outcry in defence of human dignity that was considered appropriate by legal doctrine and the courts, eventually became a considerable legislative step forward which, through original Art. 204 bis (*RCL* 1973\2255 and *NDL* 5670), underwent a development process with Organic Law 3/1989 (*RCL* 1989\1352) first and then the currently applicable Art. 174 of the 1995 Code (*RCL* 1995\3170 and *RCL* 1996\777). Recognition must also be given to the role played on the international level by Universal Declaration on Human Rights (*ApNDL* 3626) in the Convention of Rome (*RCL* 1979\2421 and *ApNDL* 3627) and the International Covenant on Civil and Political Rights of New York (*RCL* 1977\893 and *ApNDL* 3630).

(...)

Tenth: As was stated in the judgements of 6 June 1997 (*RJ* 1997\4594) and 22 September 1995 (*RJ* 1995\6743) a background study has already been done on torture and mistreatment. Torture has been defined by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 ratified by Spain on 21 October 1987 (*RCL* 1987\2405) as any act by which pain or serious suffering is intentionally

inflicted upon a person with the purpose of obtaining information or a confession from him or from a third party or with a view to punishing the person for an act committed or of which he is a suspect or to intimidating or coercing that person or others. This definition is in tune with the idea tabled at the V United Nations Congress on Crime Prevention and the Treatment of Delinquents held on 1 September 1975. Ideas are also taken from the old Art. 204 bis of the Penal Code which must be analysed in light of Art. 5 of the Universal Declaration on Human Rights, 7 of the International Covenant of New York, 3 of the Convention of Rome and 6 of the General Penitentiary Law (*RCL* 1979\2382 and *ApNDL* 11177). It must be analysed mindful of the fact that paragraph 21 of the above-cited Art. 204 bis was established by virtue of Organic Law 3/1989 of 21 June after the Spanish Constitution and the Courts pointed to the need to more perfectly characterise a criminal figure totally incompatible with the democratic spirit.

Derived from Art. 15 of the Spanish Constitution, this value takes on the form of a complete and total rejection of that which represents or supports contempt for human dignity in all cases and regardless of the circumstances. This was the essence of the judgement delivered on 25 April 1978 by the European Court of Human Rights, the first that marked the difference between torture or inhumane treatment with what was formerly known as degrading treatment. This judgement made it clear that degrading treatment is not necessarily an element inseparable from torture.

The term 'mistreatment' defines a general and wide-ranging attitude. It is somewhat stronger than perversity and wickedness in that it includes different and varied behaviours of greater or lesser degree, of more or less importance. Within the scope of mistreatment, however, degrading treatment and torture are clearly different. Degrading treatment implies a sort of habitual conduct (Judgments delivered by the European Court of Human Rights on 25 February 1982 and 18 January 1978); one repeated more in relation to situations of less gravity although still damaging to one's dignity because they always include a sense of contempt and humiliation. Torture, on the other hand, is a more intense sort of behaviour that, under Spanish legislation, commonly means the committing of another nature of crime although interrogation accompanied by intimidation or physical violence is also punishable as a less serious exception.

Eleventh: Having applied the above-mentioned doctrine to the facts of this case there can be no doubt whatsoever regarding the lack of crime with reference to Art. 204 bis, paragraph 3; nor were crimes committed as defined in Art. 582.2 and 585 of the 1973 Code.

(...)

Thirteenth: Interpretation of Art. 187.5 which corresponds to Art. 533 of the current Code brings us to the conclusion that, in accordance with the 5 July 1985 judgement, the use of unnecessary force with prison inmates can be characterised as harshness and severity disproportionate with the regulations

of the penitentiary regime. In order to detect the existence of a crime, however, it must be determined whether the severity, harshness or force is proportionate to the behaviour of the inmates. The force will be considered unnecessary when the civil servant becomes conscious of the fact that the measures used are excessive, unnecessary, disproportionate and unjust given that the activity or conduct of the inmates does not warrant use of these methods. It should not be forgotten that in this case we are referring to methods that affected 13 out of 1,500 prison inmates.

We are dealing here with an incomplete penal regulation that obliges us to turn to other complementary regulations such as the General Penitentiary Law of 26 September 1979 and the Penitentiary Regulation of 8 May 1981 (today's version 9 February 1996). This special type of crime which, like the former, can only be committed by a civil servant working in one of the penitentiaries indicated by law requires, more so than in other cases, a thorough study of each specific case. It must therefore be determined whether the inmates or convicts actually suffered this unnecessary force that was denounced.

The motive must necessarily be rejected. If 'the use of unnecessary force' refers to the use of methods the severity of which is not necessary under law in relation to the proportionality of the above-mentioned legal assets to be protected or with respect to the penitentiary regulations, the crime in question was never committed because the tragic events described justified the restrictions that did not include the absence of the most elementary assistance. The authority that the Law and its Regulations bestow on civil servants and the obligations of the inmates considered jointly for the best possible coexistence of everyone involved point to the need to take decisions which must be examined in light of whether they involve the use of added aggravating measures to the ones considered necessary (see the judgement of 2 February 1996 [*RJ* 1996\788]).

(...)".

VI. ORGANS OF THE STATE

VII. TERRITORY

1. Acquisition of nationality in the case of a person horn in territory uuder Spanish jurisdiction

– *STS* of 28 October 1998 (Civil Court) (*RJ* 1998\8257)

The Court of First Instance number 58 of Madrid heard the special case concerning Law 62/1978 of 26 December filed by Mr. Badadi Mohamed M.H. against the Spanish State and the Public Prosecutor's Office regarding

jurisdictional protection of individual rights. The complainant filed suit requesting a judgement in the following terms: 1. A statement attesting to the violation of the complainant's fundamental right to equality under the law by the Spanish State by virtue of the resolution delivered by the Directorate General for Registration and Notarised Documents which failed to recognise the complainant's Spanish nationality by virtue of origin as well as the certification of his birth in the Spanish Registry. 2. Declaration of his Spanish nationality by virtue of origin and, as such, its inscription in the Civil Registry in order to put an end to damages suffered and re-establish the complainant's full rights. 3. Assign all court costs to the accused. The Judge delivered Judgement on 3 March 1995 dismissing the suit.

A remedy of appeal was filed against this judgement which was accepted and heard by the Provincial Court of Madrid, Section Thirteen which delivered its judgement on 16 January 1996 dismissing the remedy of appeal.

A Supreme Court appeal was then filed.

"Legal Grounds:

First: (...) The civil nature of the issue at hand should be highlighted because cases of nationality linked to personal statute, in terms of both tradition and regulatory norms (Civil Code), have generally been under civil jurisdiction and no other. However, the perfectly acceptable administrative intervention in the organisation and documentation of personal civil registries and the authority bestowed on the Administration regarding nationality which is not automatic but acquired through a naturalisation process or granted based on continued residence, circumstances that justify exceptions to the rule specifically set out in Art. 22 of the Civil Code, paragraph 5, in accordance with the wording from Law 18/1990, of 17 December (*RCL* 1990\2598), where it states that 'the granting or refusal of nationality by virtue of residence can be contested by way of an administrative law appeal.' Given that this is a case of nationality by virtue of origin, there is no doubt that any sort of legal issue should be decided by civil jurisdictional order.

Second: In accordance with the facts presented, this appeal court is in disagreement with the criteria established by the challenged judgement in its acceptance of the exception 'lack of jurisdictional authority.' This opinion is based on Art. 22 of the Civil Code and on the final remission that the precept makes to the 'administrative law appeal.' Simply considering the '*petitum*' of the suit is enough to show that what the complainant is requesting, among other things, is recognition of his Spanish nationality by virtue of origin, a legal issue which is not covered in the cited regulation. (...).

Third: The issue being debated here is rooted in the confusion created by the internal legislation promulgated by the former colony known as the Spanish Sahara in the period of history prior to 'decolonisation' (carried out amidst a great number of difficulties which resulted in the abandoning of the territory that was subsequently occupied militarily by another State). Of course this is independent of any objective assessment that would do justice to the Sahara territory with relation to the metropolitan territory in accordance

with International Law. That historical period was known, from the point of view of doctrine, as the era of 'provincialisation' resulting from the manifest and reiterated legislative will to integrate that territory into the Spanish State despite its differences with other Spanish 'provinces.' It was therefore considered as an extension of metropolitan territory, i.e. Spanish territory, without exceptions and with all the political ties comprising that conception that, undoubtedly, were projected to the Saharan population and contributed to their understanding of their status as Spanish nationals. Illustrious administrative experts pointed out that 'provincialisation' raised the status of those territories to the rank of national territory. Among other applicable regulations, the 19 April 1961 Law (*RCL* 1961\577) should be highlighted because it 'established the base upon which the legal system of the Sahara Province would be based regarding its municipal and provincial regimes.' Some of this law's most important aspects are found in Art. 4 which literally states that 'the Sahara Province will have the right to representation in Parliament and other public institutions on a par with other Spanish provinces.' This rule was implemented and Saharan representatives participated in Parliament and sat on the National Council. It is clear that the intention of this regulation was to openly demonstrate equal status for 'Mainland Spaniards' and 'Native Spaniards' referred to in the 29 November 1966 Order (*RCL* 1966\2140) which provides instructions for the right to vote in the referendum organised by Decree 2930/1966 (*RCL* 1966\2106). ('Art. One. Spaniards, both mainland as well as native, residents in the Sahara provinces..., that have the right to vote in the referendum established by Decree 2930/1966, of 23 November...'). Considering the authoritarian characteristics of the political regime that reigned in Spain prior to the current constitutional system, it could be concluded that, from the perspective of participation in politics, a key element in the establishment of '*status civitatis*', assimilation was complete. This fact is further exemplified when the profound differences regarding social and private legal order stemming from ancestral customs and roots often times religious in nature were considered 'simple regional customs' pertaining to the provincial regime according to the interpretation of the legislator himself (exposition of motives in the above-mentioned law) who compared the diversity of 'institutions and administrative economic regimes' to the diversity 'that exists in Spain nowadays' (referring to different economic regimes and the special configuration of what are known as the 'Cabildos' or island governments). In a clear demonstration of this position, Spain initially refused to provide the UN Secretary General with information regarding the 'non-self-governing territories' (1958 and 1959). Furthermore, the aforementioned 1961 Law, in so far as it based the subsidiary application of Spanish substantive and procedural legislation on no specifically regulated procedure, was highlighting the homogeneous nature of the territory ('substantive and procedural legislation to be generally applied throughout the rest of the national territory,' Art. 2). It should therefore come

as no surprise that the Supreme Court (Courtroom number one, Judgement delivered on 22 February 1977 [*RJ* 1997\612]), stated that, on the date of birth being examined here, El Aaiun 'was a Spanish province and Spain ruled throughout all of its national territory.'

Fourth: However, compliance with the demands levied by the political and juridical reality based on international public law and especially the United Nation's doctrine on 'decolonisation,' encouraged the Spanish government to recognise the 'colonial nature' of these lands and subsequently the differentiation of 'territories' which was finally made perfectly clear by the 19 November 1975 Law (*RCL* 1975\2315 and *ApNDL* 12250) on the 'decolonisation' of the Sahara. The Preamble to this Law states 'that the Spanish State has had full administrative authority over the non-autonomous territory of the Sahara which, during a number of years, was subject to a special administrative regime similar to that applicable in the provinces. It goes on to insist however, that the Sahara 'has never formed part of national territory.'

Fifth: Being things as they may, there is no doubt that the Saharan people had Spanish nationality during the time that our country exercised control over the Western Sahara territory (some provisions make reference to 'indigenous Spaniards'). In compliance with the general regulations of nationality law 'those who are from the colonial territory have no nationality different from the one offered by the colonising State due to the fact that they do not have their own state organisation' (...).

Sixth: (...) What needs to be examined in this case is not the validity or applicability of the 10 August 1976 Decree (*RCL* 1976\1843 and *NDL* 26954) (whether it is wide-ranging enough, whether it infringes or not on the principle of regulatory hierarchy, whether it is null and void, whether it is nullified by the Spanish Constitution, if defects in its publication hinder its application, etc.) but rather, even recognising its validity and temporary applicability, whether it is the regulation that should be applied to the case of Mr. Badadi Mohamed M.H. or if its application led to a case of unacceptable discrimination in compliance with Art. 14 of the Spanish Constitution. It is a fact that the above mentioned Decree recognises a false, or poorly named 'right of the Saharan people to choose Spanish nationality,' and establishes 'a period of one year' within which this right may be exercised in compliance with a number of requirements which specifically include 'appearance' before the Judge in charge of the Civil Registry or the Spanish Consul depending upon the case and location. It makes provisions for two perfectly defined groups of naturalised Saharans who, depending upon their residence status and whether they were in possession of certain documents, were in a legal position to exercise this option (given that it is technically impossible to speak of 'options' because they have no other nationality other than the one to which they are entitled due to the nature and circumstances of colonisation, the doctrine speaks of a 'collective charter'): A) Saharans who were residents

in national territory (this term should be understood as metropolitan territory after decolonisation) who must simply be in possession of 'general Spanish documentation.' Although this expression is very ambiguous, we interpret the term 'general documentation' to mean any document that serves as a connection or link with Spain (work card issued by the governing administration). B) Saharans who where residents outside of national territory who are in possession of specific documents such as the 'bilingual version of the National Identification Document issued by the Spanish authorities,' a 'Spanish passport' or those who 'are registered in the Spanish consular registers abroad.' Mr. Badadi Mohamed M.H. is not found in any of these groups as will be shown in the following legal ground.

Seventh: The data situate Mr. Badadi Mohamed M.H. in a '*tertium genus*' which is not comparable to either of the two groups described above. At that time he did not reside either in Spain or abroad but rather in the Sahara, a territory which, despite being decolonised, we do not think fits in the second case referred to in Art. one of the Decree because it links the concept to 'Spanish consular offices abroad' which are non-existent in the Sahara, a fact that has been accredited in this territory occupied by Morocco. Furthermore, if argumentation on this point is considered weak (and without examining the legal assessment of *force majeure* that kept some from filing their Spanish nationality applications within the established time limits), what is perfectly clear is that in no case were the situations of those who needed a simple document or a specific document permitting them to consolidate or fulfil their Spanish nationality similar to the situation of the complainant who not only had 'general documentation' and the two 'documents' only one of which was required of a foreign resident to consolidate his nationality but was also in possession of other documents that unequivocally provided accreditation in his favour allowing him to participate in activities on a par with Spanish nationals. In other words if, following the logic of the Decree, the characterisation 'indigenous Spaniard' were not, in and of itself grounds for Spanish nationality, the fact that he was the holder of documents by virtue of which Mr. Badadi Mohamed M.H. was granted specific and effective benefits of a citizen, comprise a different situation which does not fit into either of the two groups referred to above that warrant deferential treatment (...).

Eighth: Art. 18 of the Civil Code describes the concept of consolidation of nationality by virtue of its possession and ongoing use and the meeting of certain requirements (Law 18/1990, of 17 December). This precept answers to considerations linked to the 'possession of state' belonging to the general part of civil law especially in relation to the rights of individuals. This precept requires a 'title inscribed in the Civil Registry' independent of the fact that it was later annulled. In this case, the title referred to is the condition of 'indigenous Spaniard,' born in territory considered Spanish, in compliance with Art. 17.1, d) of the Civil Code, in accordance with an interpretation which is at the root of the precept, favouring the 'ius soli' to conclude with

systems of statelessness. If the territory under scrutiny, defined as Spanish, was later judged to be non-Spanish in accordance with the above-mentioned provisions, that does not mean that in accordance with the assessment in light of which the facts determining title ship developed or occurred, that that title ship is not legitimate despite the subsequent nullification of the supporting legal basis.

(...)

Ninth: The case of Mr. Badadi Mohamed M.H. is therefore a matter of determining the concurrence or not of the factual elements comprising '*de facto* Spanish nationality' which he benefited from; a legal status that, as an equivalent of legal nationality, is recognised by the above cited precept and is based on the precedent of the 'Belgian Code of Nationality' (28 June 1984) or others like the 'French Code of Nationality' or the 'Portuguese Nationality Law.' In order to demonstrate the possession and ongoing use of Spanish nationality, evidence such as the 'signs of the possession of nationality' should be considered that indirectly accredit the factual data appearing in 'administrative documents' required of Spanish nationals or other documents that attest to the 'ongoing use of Spanish nationality': A) the complainant had a 'Spanish passport' in which he specifically figures as a Spanish national, issued on 21 December 1973 and expiring on 20 December 1978. It was issued in Aaiun (Sahara) which is also his place of birth and residence. This passport was used on a number of occasions to travel abroad. (...) B) The complainant possesses a bilingual national identity document (Sahara) that attests to the fact that he was born in Aaiun (region of Aaiun) on 19 March 1950 (mother's name Fatima, residence in Aaiun). Either of these two documents A) or B) sufficed as maximum required accreditation of a person from the Sahara who wishes to 'opt' for Spanish nationality. But not only is Mr. Badadi Mohamed M.H. in possession of these two documents but was also able to justify by means of documents. C) That for a period of more than three years he worked for the former General Government of the Spanish Sahara as an interpreter for the Territorial Court (from 1 January 1967 to 1 January 1970). He stopped working for the Territorial Court in order to lend his services as an auxiliary administrator in the Provincial Management of the Labour Promotion Program under the auspices of the Labour Ministry's Provincial Delegation (Sahara). He worked at that post from 1 March 1970 until 30 July 1975. E) The complainant's school card shows that he attended the 'National Institute of Secondary Education of Aaiun (Sahara).' And F) he was finally designated by the National Youth Delegate under the 'Secretary General of the Movement' as the Territorial Head of the Sahara Youth Organisation.' Among the 'promises' that he made in ascending to that post were 'to feel the responsibility of being Spanish within the necessary community of peoples;' 'to honour the memory of all of those who died in the struggle for a better Spain with the loyalty of *his* conduct' and 'to serve his country (Spain) and to promote unity among its land and among its peoples.' This validated

information assessed jointly shows that it is a 'proven fact' that the complainant was a Spanish national and made ongoing use of that status for a minimum period of ten years.

Tenth: Furthermore, Mr. Badadi Mohamed M.H. gained 'tractatus' and notoriety because both the national community as well as he himself acted as if he were Spanish with a positive attitude regarding use of his nationality. He considered himself Spanish both in the use of his rights as well as in the fulfilment of his duties to Spanish government institutions. The birth which accredited him as an 'indigenous Spaniard' was inscribed in the Civil Registry which, although no positive certification was provided, cannot be doubted in light of the tests that were done and in compliance with applicable legislation and after weighing all the specific circumstances. The first action that the complainant took in order to have his Spanish nationality recognised was to obtain his birth certificate which showed that he was born on 19 March 1950 in the city of El Aaiun, Sahara Province. A negative certification was initially issued (29 June 1993) by the Central Registry which simply stated that 'having examined the records at this Civil Registry, there is no information on file regarding the requested inscription.' (...)

Eleventh: A general assessment should be made of the Directorate General for Registries and Notarisations which is at the root of this suit and the basic contents of which are contained in the legal ground above. The above cited Resolution (9 September 1993 [*RJ* 1993\6864]) following a generic description in which a parallel (clearly mistaken) is drawn between the concept of 'inhabitant' of a territory and indigenous or native population (excluding mainland Spaniards or their descendants) concludes, without any background investigation or any indication regarding appeal, recourse or appropriate action, with a statement declaring that he does not have the right to Spanish nationality despite invoking his *de facto* nationality in addition to other arguments. This resolution, hurried and not well founded, invokes as a legal ground a regulation (already studied in another section) that has nothing to do, regarding the two groups it refers to (unless it has to do with the shared condition of being Saharan), with the 'allegedly real facts' under consideration. This is therefore a clear act of discrimination, disallowed by Art. 14 of the Spanish Constitution, which limits the right to equal application of the law. Not only is the resolution discriminatory in its treatment of Saharans who find themselves in a different legal situation; i.e. not only giving equal treatment to people who are different, but also giving unequal treatment to one who is equal, in comparative terms, to those that have a right to Spanish nationality in compliance with the Civil Code, and especially one who meets the provisions of Art. 18 of the legal text. (...)

Twelfth: Recognition of the appeal's principal motive infers that the appeal is allowed and therefore nullifies the appealed judgement that is replaced, in accordance with the legal grounds expressed above, with this judgement (Art. 1715 of the Code of Civil Procedure). Court costs are not attributable to

either of the two parties because the Court is of the opinion, in accordance with Paragraph one of Art. 523 of the Code of Civil Procedure, that the concurrence of exceptional circumstances warrants refrain from the expressed assigning of costs given the complexity of the issue and the existing legislative confusion. This reasoning is applicable to the second instance in compliance with the last paragraph of Art. 896 of the Code of Civil Procedure. Each of the two parties should pay their share of the costs associated with the Supreme Court appeal (Art. 1715 of the Code of Civil Procedure)".

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

XII. INTERNATIONAL ORGANISATIONS

XIII. EUROPEAN COMMUNITIES