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The Spanish nationality of the inhabitants of Western Sahara

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Summary: Western Sahara ceased to be under Spanish sovereignty on 26 February 1976. As a result, all citizens born in the territory before that date claim Spanish nationality. The Saharawis understand that they were born in an area that, at that time, was part of Spain. But the judiciary does not agree, since in June 2020, a Supreme Court ruling denied this theoretical right to the Saharawis and established that having been born in Western Sahara before that date did not entitle them to obtain Spanish nationality of origin, since it was not considered to be national territory.

Keywords: Spanish nationality, recognition by possession of state, recovery of nationality, Sahara.

The main and most serious consequence of the questionable way in which the decolonisation of the Sahara was carried out is that the territory was abandoned to its fate, without a succession of states, which has left the Sahara in a situation of indefinition on an international level ever since, One of the most serious consequences is that the Saharawis have no nationality, because in many cases they could not opt for Spanish nationality, in view of the harsh conditions of the 1976 Decree, nor can they have their own nationality because the Sahara is still not, to this day, a state[1] . This has resulted in the statelessness of these citizens who were once subjects of the Spanish state.[2] The case of the Sahara has been considered in the doctrine as a case of atypical decolonisation, unsatisfactory in terms of the procedure followed and the result achieved, with a clear responsibility of the Spanish state in this matter.[3]

The legal regime applicable to the acquisition of Spanish nationality is regulated in the Royal Decree of 24 July 1889 publishing the Civil Code[4] (hereinafter, CC), which has to be integrated, as regards the provision of the requirements legally demanded and that have to be fulfilled to obtain residence with the discipline provided for in Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social

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1 *Vid.* J.L. Argudo Périz and J.J. Pérez Milla, "Vinculación nacional y nacionalidad de los habitantes de los territorios descolonizados del África española", in *Acciones e Investigaciones Sociales*, Nº. 1, 1991, pp. 167-202.

2 *See* J. Soroeta Liceras, "La problemática de la nacionalidad de los habitantes de los territorios dependientes y el caso del Sáhara Occidental", in *Anuario Español de Derecho Internacional*, vol. XV, 1999, pp. 655-633.

3 *Vid.* C. Ruiz Miguel, "Nacionalidad española de ciudadanos saharauis: Secuela de una descolonización frustrada (y frustrante)", in *Revista General de Derecho*, No. 663, 1999, pp. 14237 and 14238.

4 Royal Decree of 24 July 1889 publishing the Civil Code (Gaceta de Madrid *No.* 206, 25 July 1889).

integration[5] . With regard to the Sephardim we must take into account Law 12/2015, of 24 June, on the granting of Spanish nationality to Sephardim originating in Spain[6] , by which access to Spanish nationality has been facilitated for Sephardim in the name of the historical link to Spain. For the development of Law 40/1975, of 19 November 1975, on the decolonisation of the Sahara[7], Royal Decree 2258/1976, of 10 August 1976, on the option of Spanish nationality by Saharan natives[8], was approved, by virtue of which a period of one year was granted so that they could opt for Spanish nationality by fulfilling certain requirements. The same Decree stipulates that, once the one-year period has elapsed, the passports and personal identification documents granted by the Spanish authorities to Saharans who do not exercise their right to opt for Spanish nationality are annulled. Thus, it has been understood that Saharawis who have not exercised the right of option established in Decree 2258/1976 would lack Spanish nationality. Despite this, requests have been made on numerous occasions for the recognition or recovery of Spanish nationality by Saharawis who did not make use of this right of option, particularly in relation to persons who were not in a position to opt for it during the one-year period established in the Decree because they were neither in Spanish territory nor in foreign territory, a fact that can be seen in the Judgment of the Provincial Court of Barcelona of 11 November 2019, under study, which upholds the appeal filed and recognises Spanish nationality on the basis of Article 18 of the CC.[9] It is worth bearing in mind, in this regard, the Judgment of the Provincial Court of Bilbao[10], of 9 June 2021, which confirms the decision of instance appealed against, arguing, in summary, that at the date of the applicant's birth in 1971 in Hagunia (Western Sahara) this territory was a Spanish province and that therefore Mr. Norberto was born Spanish, having Spanish nationality. Norberto was born Spanish, and has a family record book issued by the Spanish Administration itself; that he has been deprived of Spanish nationality without having any other nationality in return, since Spain does not recognise the Sahrawi State and therefore does not recognise Sahrawi nationality either, making him stateless; and that the fact that he has a Moroccan passport does not mean that he is a national of the issuing country. He refers to the STS of 28 October 1998 and cites the doctrine that he understands to be applicable to the case, arguing a violation of Article 24 EC and also Article 14 EC, as other judicial bodies have upheld claims such as the one at the origin of this case. He invokes the provisions of art. 96 of the Civil Register Act of 8 June 1957 and also arts. 2 and 15 of the Universal Declaration of Human Rights; and the Judgement[11]

5 Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (BOE *no.* 10, of 12 January 2000).

6 Law 12/2015, of 24 June, on the granting of Spanish nationality to Sephardim originating in Spain (BOE *no.* 151, of 25 June 2015).

7 Law 40/1975 of 19 November 1975 on the decolonisation of the Sahara (BOE *no.* 278 of 20 November 1975).

8 Royal Decree 2258/1976, of 10 August 1976, on the option of Spanish nationality for Saharan nationals (BOE *No.* 23, of 28 September 1976).

9 *Vid. In* a broad sense, A. Álvarez Rodríguez, "Nociones básicas de Registro Civil y problemas frecuentes en materia de nacionalidad", Ediciones GPS, Madrid, 2015; A. Ortega Giménez, (Dir.) and L. Heredia Sánchez, (Coord.), "Manual práctico Orientativo de Derecho de la Nacionalidad", Editorial Thomson Reuters Aranzadi, Cizur Menor (Navarra), 2017; and J.C. Alonso Burón, (Dir.), A. Ortega Giménez, (Coord.) and others, "Código básico de Extranjería y Nacionalidad", Ediciones Laborum, Murcia, 2007.

10 Judgment of the Provincial Court of Bilbao, Fifth Section, no. 149/2021, of 9 June 2021.

11 Judgment of the Provincial Court of Bilbao, Fifth Section, no. 292/2020, of 9 December 2020. The hearing reasoned, following the doctrine contained in the recent STS of 29 May 2020, ratified in the more

of the Bilbao Provincial Court, Fifth Section, of 9 December 2020, which confirms the decision of the court of first instance that rejected the claim filed by Mr. Silvio against the Directorate General of Civil Registry of 8 June 1957. Silvio against the Directorate General of Registries and Notaries, claiming, on the basis of Articles 17, 18 and 22 of the Civil Code, to have his Spanish nationality declared from the date of his birth.

During the period of European colonialism that began in the 19th century and continued during the first half of the 20th century, the territory of the Sahara remained under Spanish domination, a situation that continued until Law 40/1975 of 19 November 1975 on the decolonisation of the Sahara put an end to it in order to comply with the provisions of Resolution 1514 (XV) of the United Nations General Assembly of 14 December 1960 on the granting of independence to colonial countries and peoples. The case of the Sahara has been considered in the doctrine as a case of atypical decolonisation and not at all satisfactory due to the way it was carried out. As a result, we find ourselves with a people, the Saharawi, who have been robbed of their homeland and forced to live outside it. A people with its own sovereignty of origin, which, as a Spanish possession, was colonised by means of agreements with Spain, which came to be considered to all intents and purposes a Spanish province from 1958 to 1976, and which later sought its decolonisation and independence.

In view of the foregoing, it seems that there could be strong arguments to recognise that Sahara natives born when this territory was under Spanish administration had Spanish nationality at that time, until, at a later time, with Law 40/1975 and RD 2258/1956, they were deprived of such nationality for not exercising the right of option provided for in the Royal Decree. This approach, however, is contrary to the position maintained by the DGRN and does not find clear support in the judicial sphere, because the STS of 28 October 1998 recognised access to nationality through Article 18 of the CC, in the same sense the appeal lodged by the appellant in the Judgment of the Provincial Court of Barcelona of 11 November 2019, which is the subject of analysis, was upheld.

If we analyse this issue from the distance that separates us from the turbulent decolonisation, and in a State with already consolidated constitutional principles, it can be considered that those Sahrawis who were born during the provincialisation period were once Spanish nationals and could therefore recover Spanish nationality if they accredit the necessary legal requirements, in accordance with the following titles of attribution: a) Right of option to Spanish nationality, established by the Decolonisation Law of 19 November 1975, which recognised the right to opt for Spanish nationality

recent STS of 21 July 2020, as follows: "(...) With regard to the possible attribution of Spanish nationality to the plaintiff on the basis of the provisions of art. 18 Cc, it should be stressed here that, as reasoned by the court a quo, the possibility of recognising Spanish nationality to a Saharawi by application of the aforementioned art. 18 requires that the Saharawis in question have been unable to exercise the right of option provided for in the RD of 10 August 1976 during its period of validity according to the STS of 28 October 1998, this ruling being understood that those who continued to live in the Sahara during that period could not exercise the right of option, since there were no "Spanish representations abroad" before which the right of option could be exercised. Well, the burden of proof of this impossibility falls on the person who invokes it and, in the opinion of this Chamber, the residence of the plaintiff's parents in the Sahara during the period of validity of the Royal Decree of 10 August 1976 has not been sufficiently justified, which would have prevented them from exercising this option not only for themselves but also for their minor son".

for Sahara natives who were on that date residing in national territory and were in possession of "general Spanish documentation"; or who, being outside Spanish national territory, were in possession of a Spanish passport or were included in the registers of the Spanish representations abroad, which they could do within one year of the entry into force of the Decree, by appearing before the civil registrar of their residence; b) Acquisition of Spanish nationality by residence, on the basis of Article 22.2.a) of the Civil Code, which establishes a period of one year's residence for those "born in Spanish territory"; c) Consolidation of Spanish nationality, in accordance with Article 18 of the CC.

In this sense, the Judgment of the Provincial Court of Barcelona of 11 November 2019 upholds the appeal lodged and revokes a Resolution of the DGRN of 22 July 2014, ordering the registration of the applicant, born in Villa Cisneros in 1975, recognising him as a Spaniard for having consolidated the aforementioned Spanish nationality in the terms required by Article 18 of the CC.

And, finally, based on the interpretation of Article 17.1.c)[12] of the CC, which considers "those born in Spain of foreign parents, if both lack nationality or if the legislation

[12] *Vid*. Judgment of the Provincial Court of Bilbao no. 177/2021, of 2 July 2021. In this Judgment an appeal against the decision to deny Spanish nationality is rejected, according to the Court: "(...) having assessed the evidence, the claim must be dismissed on the grounds that: a.- according to art. 17 no. 1 Cc. the following are Spanish by origin: section a) those born of a Spanish father and mother and section c) those born in Spain of foreign parents. In its current wording and if we take into account the wording in force at the date of the C.C.C. actor, in some documents it is the day of birth. In some documents it is on 1 January 1971 (NIE and certificate of registration Moroccan passport (doc. nº 4 and 5 demand) and in others on 10 May 1970 (doc. nº 7 Libro de familia, f.41, it is necessary that: .- his father or mother were Spanish and this is not the case, since both were born, and this is not a disputed fact, in Western Sahara, and no significance has been given by the aforementioned doctrine of the Supreme Court, First Chamber, to the possession by them of documents issued by the Spanish authority in the said territory (doc. No. 7 of the application), even though these and other considerations have been determined by the existence in the judgment of the Plenary of a joint dissenting opinion of three of its Judges - or that the plaintiff, Mr. Leopoldo, as his parents were not Spanish, was born in Spain, but this is not the case as he was born in Western Sahara, in La Ayoune (Ayoun) (doc. Nos. 5 and 7 of the application). On the other hand, there is no evidence that the parents of the plaintiff, then a minor, being natives of the Sahara, had opted for Spanish nationality within one year after the entry into force of Royal Decree 2258/12976 of 10 August, provided that they met certain requirements, which it is up to the applicant to prove. b. - according to art. 18 Cc. according to art. 18 Cc. 'The possession and continued use of Spanish nationality for ten years, in good faith and based on a title registered in the Civil Registry, is a cause for consolidation of nationality, even if the title that gave rise to it is annulled'. It is clear from the proceedings and from what has been concluded so far that the plaintiff has used his Moroccan passport to carry out his formalities and to gain access to his stay in Spain, arrogating this nationality to himself, without proving that he is holding it for humanitarian reasons, and that he is not a stateless person, not having a title registered in the Civil Registry with recognition of Spanish nationality and if the order of the Judge in charge of the Civil Registry of Tudela dated 5 June 2015, which recognises it as such with the value of simple presumption, is deemed to be such, it is not possible to register it if it is not final, which it is obvious that it is not, as the DGRN appealed by the Ministry in its decision of 10 September 2019, the order is rendered null and void, not possessing or using Spanish nationality continuously within the legal period without having any documentation as a Spaniard or any other type of proof. Finally, the dismissal of the complaint in no way determines a violation of art. 11 EC because the plaintiff has not been the holder of Spanish nationality, nor can it be considered that with him in relation to other Saharawis who are said to have been granted nationality, he is given discriminatory treatment that violates the principle of equality of art. 14 EC, as the judicial response depends on the factual assumptions in each case, and, furthermore, the Chamber, as it has already considered in previous judgments cited above, has applied the regulations on the matter and its jurisprudential interpretation

of neither of them attributes a nationality to the child" to be Spaniards of origin, the attribution of Spanish nationality *iure soli* in order to avoid situations of statelessness. Also interesting are the Supreme Court Judgement[13], of 7 October 2021, where the High Court reiterates the doctrine established by the plenary judgement 207/2020, of 29 May, i.e. that those born in Western Sahara before its decolonisation are not Spanish nationals of origin under Art. 17.1 c) of the Civil Code; the Judgement[14] of the Provincial Court of Palma de Mallorca, of 26 May 2017, in which the word Spain in Art. 17.1 c) of the Civil Code includes Western Sahara.c) Cc includes Western Sahara "once it is accredited that the applicant was born there in 1973"; and the Judgment of the Provincial Court of Madrid, of 20 September 2018[15], in which an appeal filed against a judgment issued by the Court of First Instance rejecting an application for Spanish nationality with the value of simple presumption is upheld, overturning that decision: 'the natives of the colonial territory lack a nationality distinct from those of the colonising State, given that they do not have their own state organisation'". Finally, it is worth noting that, in the same vein, the Supreme Court has recently reiterated that those born in a territory such as Western Sahara, during the period when it was a Spanish colony, are not born in Spain[16].

established by the judgment of the Plenary of the Supreme Court, First Chamber of 29 May 2020, ratified in subsequent resolutions (...). The foregoing legal grounds lead to the dismissal of the appeal and the confirmation of the contested decision, notwithstanding which it is not considered appropriate to impose costs in this appeal, with each party having to bear its own costs and the common costs, if any, in equal shares (art. 398 no. LEC), given the legal doubts raised by the disputed matter until the judgment of the Plenary of the Supreme Court, First Chamber of 29 May 2020, handed down subsequent to that of the appeal of 3 February 2020 and the lodging of the appeal on 4 March 2020".

13 Judgment of the Supreme Court, No. 681/2021, 7 October 2021.

14 Judgment of the Provincial Court of Palma de Mallorca, Third Section, no. 168/2017, of 26 May 2017.

15 *Vid*. Judgment of the Provincial Court of Madrid, Eighteenth Section, no. 322/2018, of 20 September 2018. In relation to the case under appeal, the Court holds that : "consider it accredited by the plaintiff that she was born in the Sahara on ... 1974, at a time when the said territory was under Spanish administration, specifically in El Aaiún, to a father born in the Western Saharan town of Tan Tan in 1935 and a mother born in El Aaiún on ... 1956, and with both parents domiciled at the time of the appellant's birth in El Aaiún, according to the birth certificate of the Cheranic Court of El Aaiún of the promoter (...), which refers to the details of the parents, the registration of the mother's birth in the said Cheranic Court (...), and the family certificate of the maternal grandfather dated 12 May 1972 as recorded in the Civil Registry of Laayoune and from which it appears that her mother was born in 1956, the daughter of Stanislaus and Marie-Louise, in Laayoune (...); it must be held that the appellant's parents were born in El Ayoun (...); for the purposes examined, the applicant's status as an original Spaniard must be affirmed, even though she currently holds Moroccan nationality, in accordance with the provisions of Art. 17.1º Cc.

16 *Vid*. Order of the Supreme Court, Civil Division, First Section, of 11 May 2022.