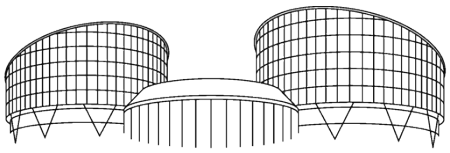

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF DEL RÍO PRADA v. SPAIN

(Application no. 42750/09)

JUDGMENT

STRASBOURG

21 October 2013

In the case of Del Río Prada v. Spain,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Elisabeth Steiner,
George Nicolaou,
Luis López Guerra,
Ledi Bianku,
Ann Power-Forde,
Işıl Karakaş,
Paul Lemmens,
Paul Mahoney,
Aleš Pejchal,
Johannes Silvis,
Valeriu Griţco,
Faris Vehabović, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 20 March 2013 and 12 September 2013,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 42750/09) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Ms Inés del Río Prada ("the applicant"), on 3 August 2009.

2. The applicant was represented by Mr S. Swaroop, Mr M. Muller and Mr M. Ivers, lawyers practising in London, Mr D. Rouget, a lawyer practising in Bayonne, Ms A. Izko Aramendia, a lawyer practising in Pamplona and Mr U. Aiartza Azurtza, a lawyer practising in San Sebastián. The Spanish Government ("the Government") were represented by their Agent, Mr F. Sanz Gandásegui, and their co-Agent, Mr I. Salama Salama, State Counsel.

3. The applicant alleged in particular that, since 3 July 2008, her continued detention had been neither "lawful" nor "in accordance with a procedure prescribed by law" as required by Article 5 § 1 of the

Convention. Relying on Article 7, she also complained that what she considered to be the retroactive application of a new approach adopted by the Supreme Court after her conviction had increased the length of her imprisonment by almost nine years.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 19 November 2009 the President of the Third Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention). On 10 July 2012 a Chamber of that Section, composed of Josep Casadevall, President, Corneliu Bîrsan, Alvina Gyulumyan, Egbert Myjer, Ján Šikuta, Luis López Guerra and Nona Tsotsoria, judges, and Santiago Quesada, Section Registrar, gave judgment. They unanimously declared the complaints under Article 7 and Article 5 § 1 of the Convention admissible and the remainder of the application inadmissible, then proceeded to find a violation of those provisions.

5. On 4 October 2012 the Court received a request from the Government for the case to be referred to the Grand Chamber. On 22 October 2012 a panel of the Grand Chamber decided to refer the case to the Grand Chamber (Article 43 of the Convention).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed further observations (Rule 59 § 1) on the merits.

8. In addition, third-party comments were received from Ms Róisín Pillay on behalf of the International Commission of Jurists (ICJ), who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 March 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr I. SALAMA SALAMA, *Co-Agent*,
Mr F. SANZ GANDÁSEGUI, *Agent*,
Mr J. REQUENA JULIANI,
Mr J. NISTAL BURON, *Advisers*;

(b) *for the applicant*

Mr M. MULLER,
Mr S. SWAROOP,
Mr M. IVERS, *Counsel*,
Mr D. ROUGET,
Ms A. IZKO ARAMENDIA,
Mr U. AIARTZA AZURTZA, *Advisers*.

The Court heard addresses by Mr Muller, Mr Swaroop, Mr Ivers and Mr Salama Salama, as well as replies from Mr Muller, Mr Swaroop, Mr Ivers and Mr Sanz Gandásegui to its questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1958. She is serving a prison sentence in the region of Galicia.

11. In eight separate sets of criminal proceedings before the *Audiencia Nacional*[1], the applicant was sentenced as follows.

(a) In judgment no. 77/1988 of 18 December 1988: for being a member of a terrorist organisation, to eight years' imprisonment; for illegal possession of weapons, to seven years' imprisonment; for possession of explosives, to eight years' imprisonment; for forgery, to four years' imprisonment; and for using forged identity documents, to six months' imprisonment.

(b) In judgment no. 8/1989 of 27 January 1989: for damage to property, in conjunction with six counts of grievous bodily harm, one of causing bodily harm and nine of causing minor injuries, to sixteen years' imprisonment.

(c) In judgment no. 43/1989 of 22 April 1989: for a fatal attack and for murder, to twenty-nine years' imprisonment on each count.

(d) In judgment no. 54/1989 of 7 November 1989, for a fatal attack, to thirty years' imprisonment; for eleven murders, to twenty-nine years for each murder; for seventy-eight attempted murders, to twenty-four years on each count; and for damage to property, to eleven years' imprisonment. The *Audiencia Nacional* ordered that in accordance with Article 70.2 of the Criminal Code of 1973, the maximum term to be served (*condena*) should be thirty years.

1. Court with jurisdiction in terrorist cases, among other things, sitting in Madrid.

(e) In judgment no. 58/1989 of 25 November 1989: for a fatal attack and two murders, to twenty-nine years' imprisonment in respect of each charge. The *Audiencia Nacional* ordered that in accordance with Article 70.2 of the Criminal Code of 1973, the maximum term to be served (*condena*) should be thirty years.

(f) In judgment no. 75/1990 of 10 December 1990: for a fatal attack, to thirty years' imprisonment; for four murders, to thirty years' imprisonment on each count; for eleven attempted murders, to twenty years' imprisonment on each count; and on the charge of terrorism, to eight years' imprisonment. The judgment indicated that for the purposes of the custodial sentences the maximum sentence provided for in Article 70.2 of the Criminal Code of 1973 should be taken into account.

(g) In judgment no. 29/1995 of 18 April 1995: for a fatal attack, to twenty-eight years' imprisonment, and for attempted murder, to twenty years and one day. The court again referred to the limits provided for in Article 70 of the Criminal Code.

(h) In judgment no. 24/2000 of 8 May 2000: for an attack with intent to murder, to thirty years' imprisonment; for murder, to twenty-nine years' imprisonment; for seventeen attempted murders, to twenty-four years' imprisonment on each count; and for damage to property, to eleven years' imprisonment. The judgment stated that the sentence to be served should not exceed the limit provided for in Article 70.2 of the Criminal Code of 1973. In determining which criminal law was applicable (the Criminal Code of 1973, which was applicable at the material time, or the later Criminal Code of 1995), the *Audiencia Nacional* considered that the more lenient law was the 1973 Criminal Code, because of the maximum term to be served as provided for in Article 70.2 of that Code, combined with the remissions of sentence for work done in detention as provided for in Article 100.

12. In all, the terms of imprisonment to which the applicant was sentenced for these offences, committed between 1982 and 1987, amounted to over 3,000 years.

13. The applicant was held in pre-trial detention from 6 July 1987 to 13 February 1989 and began to serve her first sentence after conviction on 14 February 1989.

14. By a decision of 30 November 2000, the *Audiencia Nacional* notified the applicant that the legal and chronological links between the offences of which she had been convicted made it possible to group them together (*acumulación de penas*) as provided for in section 988 of the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) in conjunction with Article 70.2 of the 1973 Criminal Code, in force when the offences were committed. The *Audiencia Nacional* fixed the maximum term to be served by the applicant in respect of all her prison sentences combined at thirty years.

15. By a decision of 15 February 2001, the *Audiencia Nacional* set the date on which the applicant would have fully discharged her sentence (*liquidación de condena*) at 27 June 2017.

16. On 24 April 2008, taking into account the 3,282 days' remission to which she was entitled for the work she had done since 1987, the authorities at Murcia Prison, where the applicant was serving her sentence, proposed to the *Audiencia Nacional* that she be released on 2 July 2008. Documents submitted to the Court by the Government show that the applicant was granted ordinary and extraordinary remissions of sentence by virtue of decisions of the judges responsible for the execution of sentences (*Jueces de Vigilancia Penitenciaria* at first instance and *Audiencias Provinciales* on appeal) in 1993, 1994, 1997, 2002, 2003 and 2004, for cleaning the prison, her cell and the communal areas and undertaking university studies.

17. However, on 19 May 2008 the *Audiencia Nacional* rejected that proposal and asked the prison authorities to submit a new date for the applicant's release, based on a new precedent (known as the "Parot doctrine") set by the Supreme Court in its judgment no. 197/2006 of 28 February 2006. According to this new approach, sentence adjustments (*beneficios*) and remissions were no longer to be applied to the maximum term of imprisonment of thirty years, but successively to each of the sentences imposed (see "Relevant domestic law and practice", paragraphs 39-42 below).

18. The *Audiencia Nacional* explained that this new approach applied only to people convicted under the Criminal Code of 1973 to whom Article 70.2 thereof had been applied. As that was the applicant's case, the date of her release was to be changed accordingly.

19. The applicant lodged an appeal (*súplica*) against that decision. She argued, *inter alia*, that the application of the Supreme Court's judgment was in breach of the principle of non-retroactive application of criminal-law provisions less favourable to the accused, because instead of being applied to the maximum term to be served, which was thirty years, remissions of sentence for work done in detention were henceforth to be applied to each of the sentences imposed. The effect, she argued, would be to increase the term of imprisonment she actually served by almost nine years. The Court has not been apprised of the outcome of this appeal.

20. By an order of 23 June 2008, based on a new proposal by the prison authorities, the *Audiencia Nacional* set the date for the applicant's final release (*licenciamiento definitivo*) at 27 June 2017.

21. The applicant lodged a *súplica* appeal against the order of 23 June 2008. By a decision of 10 July 2008 the *Audiencia Nacional* rejected the applicant's appeal, explaining that it was not a question of limits on prison sentences, but rather of how to apply reductions of sentence in order to determine the date of a prisoner's release. Such reductions were henceforth to be applied to each sentence individually. Lastly, the *Audiencia Nacional*

considered that the principle of non-retroactive application had not been breached because the criminal law applied in this case had been that in force at the time of its application.

22. Relying on Articles 14 (prohibition of discrimination), 17 (right to liberty), 24 (right to effective judicial protection) and 25 (principle of legality) of the Constitution, the applicant lodged an *amparo* appeal with the Constitutional Court. By a decision of 17 February 2009, the Constitutional Court declared the appeal inadmissible on the ground that the applicant had not demonstrated the constitutional relevance of her complaints.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

23. The relevant provisions of the Constitution read as follows:

Article 9

"...

3. The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities and the prohibition against arbitrary action on the part of the latter."

Article 14

"All Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance."

Article 17

"1. Every person has the right to liberty and security. No one may be deprived of his or her liberty except in accordance with the provisions of this Article and in the cases and in the manner prescribed by law.

..."

Article 24

"1. All persons have the right to obtain effective protection by the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.

..."

Article 25

"1. No one may be convicted or sentenced for any act or omission which at the time it was committed did not constitute a serious or petty criminal offence or administrative offence according to the law in force at that time.

2. Punishments entailing imprisonment and security measures shall be aimed at rehabilitation and social reintegration and may not consist of forced labour. While serving their sentence, convicted persons shall enjoy the fundamental rights set out in this Chapter, with the exception of those expressly limited by the terms of the sentence, the purpose of the punishment and the prison law. In all circumstances, they shall be entitled to paid employment and to the corresponding social-security benefits, as well as to access to cultural activities and the overall development of their personality.

..."

B. The law applicable under the Criminal Code of 1973

24. The relevant provisions of the Criminal Code of 1973, as in force at the time the offences were committed, read as follows:

Article 70

"When all or some of the sentences [*penas*] imposed ... cannot be served simultaneously by a convicted person, the following rules shall apply:

1. In imposing the sentences [*penas*], where possible the order to be followed for the purposes of their successive completion by the convicted person is that of their respective severity, the convicted person going on to serve the next sentence when the previous one has been served or extinguished by pardon ...

2. Notwithstanding the previous rule, the maximum term to be served [*condena*] by a convicted person shall not exceed three times the length of the most serious of the sentences [*penas*] imposed, the others ceasing to have effect once this maximum term, which may not exceed thirty years, is attained.

The above limit shall be applied even where the sentences [*penas*] have been imposed in different proceedings, if the facts, because they are connected, could have been tried as a single case."

Article 100 (as amended by Organic Law [*Ley Orgánica*] no. 8/1983)

"Once his judgment or conviction has become final, any person sentenced to imprisonment [*reclusión, prisión* or *arresto mayor*[2]] may be granted remission of sentence [*pena*] in exchange for work done while in detention. In serving the sentence [*pena*] imposed the prisoner shall be entitled, with the approval of the judge responsible for the execution of sentences [*Juez de Vigilancia*], to one day's remission for every two days worked in detention, and the time thus deducted shall be taken into account when granting release on licence. This benefit shall also apply, for the purposes of discharging [*liquidación*] the term of imprisonment to be served [*condena*], to prisoners who were held in pre-trial detention.

The following persons shall not be entitled to remission for work done in detention:

1. prisoners who escape or attempt to escape while serving their sentence [*condena*], even if they do not succeed.

2. prisoners who repeatedly misbehave while serving their sentence [*condena*]."

2. Prison sentence of between one month and one day and six months.

25. The relevant provision of the Criminal Procedure Act in force at the material time reads as follows:

Section 988

"... When a person found guilty of several criminal offences is convicted, in different sets of proceedings, of offences that could have been tried in a single case, in accordance with section 17 of this Act, the judge or court which delivered the last judgment convicting the person concerned shall, of their own motion or at the request of the public prosecutor or the convicted person, fix the maximum term to be served in respect of all the sentences imposed, in accordance with Article 70.2 of the Criminal Code ..."

26. The right to remission of sentence for work done in detention was provided for in the Prison Regulations of 2 February 1956, the relevant provisions of which (Articles 65-73) were applicable at the time the offences were committed, by virtue of the second transitional provision of the 1981 Prison Regulations. The provisions concerned read as follows:

Article 65

"1. Under Article 100 of the Criminal Code, once his judgment or conviction has become final, any person sentenced to [imprisonment] may be granted remission of sentence [*pena*] in exchange for work done while in detention.

...

3. The following persons shall not be entitled to remission for work done in detention:

(a) prisoners who escape or attempt to escape while serving their sentence [*condena*], even if they do not succeed.

(b) prisoners who repeatedly misbehave while serving their sentence [*condena*]. This provision applies to prisoners who commit a further serious or very serious disciplinary offence when they have not yet expunged a previous offence ..."

Article 66

"1. Whatever the regime to which he is subject, any prisoner may be granted remission of sentence for work done in detention provided that he meets the legal conditions. In such cases the detainee shall be entitled, for the purposes of his final release, to one day's remission for every two days' work done in detention. The total period of entitlement to remission shall also be taken into account when granting release on licence.

2. The prison's supervisory body shall submit a proposal to the *Patronato de Nuestra Señora de la Merced*. When the proposal is approved the days worked shall be counted retroactively in the prisoner's favour, from the day when he started to work.[3]"

3. By a transitional provision of the 1981 Prison Regulations the powers vested in the *Patronato de Nuestra Señora de la Merced* were transferred to the judges responsible for the execution of sentences (*Jueces de Vigilancia Penitenciaria*).

Article 68

"Be it paid or unpaid, intellectual or manual, done inside the prison or outside ..., any work done by prisoners must be useful."

Article 71

"...

3. Extraordinary remissions of sentence may be granted for special reasons of discipline and productivity at work ..., within the limit of one day for each day worked and 175 days per year of sentence actually served ..."

Article 72

"Remissions of sentence may be granted for intellectual work:

(1) for undertaking and succeeding in religious or cultural studies organised by the management;

(2) for joining an arts, literature or science club set up by the prison authorities;

(3) for engaging in intellectual activities;

(4) for producing original works of an artistic, literary or scientific nature.

..."

Article 73

"The following prisoners shall forfeit the right to remission of sentence for work done in detention:

(1) prisoners who escape or attempt to escape. They shall forfeit the right to earn any future remission of sentence;

(2) prisoners who commit two serious or very serious disciplinary offences ...

Any remission already granted, however, shall be counted towards reducing the corresponding sentence or sentences.

27. Article 98 of the Criminal Code of 1973, regulating the release of prisoners on licence, read as follows:

"Release on licence may be granted to prisoners sentenced to more than one year's imprisonment who:

(1) are in the final phase of the term to be served [*condena*];

(2) have already served three-quarters of the term to be served;

(3) deserve early release for good behaviour; and

(4) afford guarantees of social reintegration."

28. Article 59 of the 1981 Prison Regulations (Royal Decree no.1201/1981), which explained how to calculate the term of imprisonment (three-quarters of the sentence imposed) to be served in order for a prisoner to be eligible for release on licence, read as follows:

Article 59

"In calculating three-quarters of the sentence [*pena*], the following rules shall apply:

(a) for the purposes of release on licence, the part of the term to be served [*condena*] in respect of which a pardon has been granted shall be deducted from the total sentence [*pena*] imposed, as if that sentence had been replaced by a lesser one;

(b) the same rule shall apply to sentence adjustments [*beneficios penitenciarios*] entailing a reduction of the term to be served [*condena*];

(c) when a person is sentenced to two or more custodial sentences, for the purposes of release on licence the sum of those sentences shall be treated as a single term of imprisonment to be served [*condena*]. ..."

C. The law applicable following the entry into force of the Criminal Code of 1995

29. Promulgated on 23 November 1995, the Criminal Code of 1995 (Organic Law no. 10/1995) replaced the Criminal Code of 1973. It entered into force on 24 May 1996.

30. The new Code did away with remissions of sentences for work done in detention. However, the first and second transitional provisions of the new Code provided that prisoners convicted under the 1973 Code were to continue to enjoy that privilege even if their conviction was pronounced after the new Code entered into force. The transitional provisions concerned read as follows:

First transitional provision

"Crimes and lesser offences committed prior to the entry into force of the present Code shall be tried in conformity with the [Criminal Code of 1973] and other special criminal laws repealed by the present Code. As soon as this Code enters into force its provisions shall be applicable if they are more favourable to the accused."

Second transitional provision

"In order to determine which is the more favourable law, regard shall be had to the penalty applicable to the charges in the light of all the provisions of both Codes. The provisions concerning remission of sentence for work done in detention shall apply only to persons convicted under the old Code. They shall not be available to persons tried under the new Code ..."

31. Under the first transitional provision of the 1996 Prison Regulations (Royal Decree no. 190/1996), Articles 65-73 of the 1956 Regulations remained applicable to the execution of sentences imposed under the 1973 Criminal Code and to the determination of the more lenient criminal law.

32. The 1995 Criminal Code introduced new rules governing the maximum duration of prison sentences and the measures by which they could be adjusted (*beneficios penitenciarios*). Those rules were amended by Organic Law no. 7/2003 introducing reforms to ensure the full and effective

execution of sentences. The amended provisions of the Criminal Code which are relevant to the present case read as follows:

Article 75

"When some or all of the sentences [*penas*] for the different offences cannot be served concurrently, they shall, as far as possible, be served consecutively, in descending order of severity."

Article 76

"1. Notwithstanding what is set forth in the preceding Article, the maximum term to be served [*condena*] by a convicted person shall not exceed three times the length of the most serious of the sentences [*penas*] imposed, the others ceasing to have effect once this maximum term, which may not exceed twenty years, is attained. Exceptionally, the maximum limit shall be:

(a) twenty-five years when a person has been found guilty of two or more crimes and one of them is punishable by law with a prison sentence of up to twenty years;

(b) thirty years when a person has been found guilty of two or more crimes and one of them is punishable by law with a prison sentence exceeding twenty years;

(c) forty years when a person has been found guilty of two or more crimes and at least two of them are punishable by law with a prison sentence exceeding twenty years;

(d) forty years when a person has been found guilty of two or more crimes ... of terrorism ... and any of them is punishable by law with a prison sentence exceeding twenty years.

2. The above limit shall be applied even where the sentences [*penas*] have been imposed in different proceedings, if the facts, because they are connected or because of when they were committed, could have been tried as a single case."

Article 78

"1. If, as a result of the limitations provided for in Article 76 § 1, the term to be served is less than half the aggregate of all the sentences imposed, the sentencing judge or court may order that decisions concerning adjustments of sentence [*beneficios penitenciarios*], day-release permits, pre-release classification and the calculation of the time remaining to be served prior to release on licence should take into account all of the sentences [*penas*] imposed.

2. Such an order shall be mandatory in the cases referred to in paragraphs (a), (b), (c) and (d) of Article 76 § 1 of this Code when the term to be served is less than half the aggregate of all the sentences imposed.

..."

33. According to the explanatory memorandum on Law no. 7/2003, Article 78 of the Criminal Code is meant to improve the efficacy of punishment for the most serious crimes:

"... Article 78 of the Criminal Code is amended so that for the most serious crimes the sum total of all the sentences imposed is taken into account for the purposes of adjustments of sentence, day-release permits, pre-release classification and the calculation of the time remaining to be served prior to release on licence.

> The purpose of this amendment is to improve the efficacy of the penal system *vis-à-vis* people convicted of several particularly serious crimes, that is to say those provided for in Article 76 of the Criminal Code (namely twenty-five, thirty or forty years' actual imprisonment) when the term to be served amounts to less than half the total duration of all the sentences imposed. Where these limits are not applied, however, the courts may use their full discretion.
>
> In application of this rule a person sentenced to one hundred, two hundred or three hundred years' imprisonment will, in reality, effectively and fully serve the maximum term [*condena*] applicable."

34. Article 90 of the Criminal Code of 1995 (as amended by Organic Law no. 7/2003) regulates release on licence. It subjects release on licence to conditions similar to those provided for in the Criminal Code of 1973 (pre-release classification, completion of three-quarters of the sentence, good behaviour and good prospects of social reintegration), but it also requires offenders to have complied with their obligations in respect of civil liability. In order to have good prospects of social reintegration offenders convicted of terrorism or organised crime must have unequivocally demonstrated their disavowal of terrorist methods and have actively cooperated with the authorities. This could take the form of a statement expressly repudiating the offences they committed and renouncing violence, together with an explicit appeal to the victims to forgive them. Unlike the new rules on the maximum duration of the sentence to be served and the conditions for applying sentence adjustments in the event of multiple convictions (Articles 76 and 78 of the Criminal Code), Article 90 of the Code is applicable immediately, regardless of when the offences were committed or the date of conviction (single transitional provision of Law no. 7/2003).

D. The case-law of the Supreme Court

1. The case-law prior to the "Parot doctrine"

35. In an order of 25 May 1990 the Supreme Court considered that the combining of sentences in application of Article 70.2 of the Criminal Code of 1973 and section 988 of the Criminal Procedure Act concerned not the "execution" but the fixing of the sentence, and that its application was accordingly a matter for the trial court, not the judge responsible for the execution of sentences (*Jueces de Vigilancia Penitenciaria*).

36. In a judgment of 8 March 1994 (529/1994) the Supreme Court affirmed that the maximum term of imprisonment (thirty years) provided for in Article 70.2 of the Criminal Code of 1973 amounted to a "new sentence – resulting from but independent of the others – to which the sentence adjustments (*beneficios*) provided for by law, such as release on licence and remission of sentence, apply". The Supreme Court referred to Article 59 of the Prison Regulations of 1981, according to which the combination of two

custodial sentences was treated as a new sentence for the purposes of release on licence.

37. In an agreement adopted by the full court on 18 July 1996, following the entry into force of the Criminal Code of 1995, the Criminal Division of the Supreme Court explained that for the purpose of determining which was the more lenient law, regard had to be had to the system of remissions of sentence introduced by the old Code of 1973 when comparing the sentences to be served respectively under that Code and the new Criminal Code of 1995. It added that under Article 100 of the Criminal Code of 1973 a prisoner who had served two days of his sentence was irrevocably considered to have served three days. The application of this rule gave the beneficiary an acquired right.[4] The Spanish courts, which had to apply this criterion to compare the terms to be served respectively under the new and the old Criminal Code, took into account the remissions of sentence granted under the old Code. They accordingly considered that where the remainder of the sentence to be served after deduction of the remissions granted prior to the entry into force of the new Code did not exceed the length of the sentence provided for in the new Code, the latter could not be considered more lenient than the old Code. That approach was confirmed by the Supreme Court in various decisions, including judgments nos. 557/1996 of 18 July 1996 and 1323/1997 of 29 October 1997.

38. The Supreme Court continued to adopt that interpretation of the maximum term to be served as prescribed in Article 76 of the new Criminal Code of 1995. In judgment no. 1003/2005, delivered on 15 September 2005, it held that "this limit amounts to a new sentence – resulting from but independent of the others – to which the sentence adjustments (*beneficios*) provided for by law, such as release on licence, day-release permits and pre-release classification apply". In the same manner and terms, it stated in judgment no. 1223/2005, delivered on 14 October 2005, that the maximum term to be served "amounts to a new sentence – resulting from but independent of the others – to which the sentence adjustments (*beneficios*) provided for by law, such as release on licence, apply subject to the exceptions provided for in Article 78 of the Criminal Code of 1995".

2. The "Parot doctrine"

39. In judgment no. 197/2006 of 28 February 2006 the Supreme Court set a precedent known as the "Parot doctrine". The case concerned a terrorist member of ETA (H. Parot) who had been convicted under the Criminal Code of 1973. The plenary Criminal Division of the Supreme

4. Interpretation of the second transitional provision of the Criminal Code of 1995. See also the agreement adopted by the plenary Criminal Division of the Supreme Court on 12 February 1999, concerning the application of the new limit to the term of imprisonment to be served as laid down in Article 76 of the 1995 Criminal Code.

Court ruled that the remissions of sentence granted to prisoners were henceforth to be applied to each of the sentences imposed and not to the maximum term of thirty years provided for in Article 70.2 of the Criminal Code of 1973. The court's ruling was based in particular on a literal interpretation of Articles 70.2 and 100 of the Criminal Code of 1973 according to which that maximum term of imprisonment was not to be treated as a new sentence distinct from those imposed, or a distinct sentence resulting from those imposed, but rather as the maximum term a convicted person should spend in prison. This reasoning made a distinction between the "sentence" (*pena*) and the "term to be served" (*condena*); the former referred to the sentences imposed taken individually, to which remissions of sentence should be applied, while the latter referred to the maximum term of imprisonment to be served. The Supreme Court also used a teleological argument. The relevant parts of its reasoning read as follows:

> "... the joint interpretation of rules one and two of Article 70 of the Criminal Code of 1973 leads us to consider that the thirty-year limit *does not become a new sentence,* distinct from those successively imposed on the convict, or *another sentence resulting from all the previous ones*, but is the maximum term of imprisonment [*máximo de cumplimiento*] a prisoner should serve in prison. The reasons that lead us to this interpretation are: (a) first, a literal analysis of the relevant provisions leads us to conclude that the Criminal Code by no means considers the maximum term of thirty years to amount to a new sentence to which any reductions to which the prisoner is entitled should apply, for the simple reason that it says no such thing; (b) on the contrary, the sentence [*pena*] and the resulting term of imprisonment to be served [*condena*] are two different things; the wording used in the Criminal Code refers to the resulting limit as the 'term to be served' [*condena*], and fixes the different lengths of that maximum 'term to be served' [*condena*] in relation to the 'sentences' imposed. According to the first rule, that maximum is arrived at in one of two ways: the different sentences are served in descending order of severity until one of the two limits set by the system is attained (three times the length of the heaviest sentence imposed or, in any event, no more than thirty years); (c) this interpretation is also suggested by the wording of the Code, since after having served the successive sentences as mentioned, the prisoner *will no longer have to discharge* [i.e. serve] *the remaining ones* [in the prescribed order] *once the sentences already served reach the maximum length, which may not exceed thirty years* ...; (e) and from a teleological point of view, it would not be rational for the combination of sentences to reduce a long string of convictions to a single new sentence of thirty years, with the effect that an individual who has committed a single offence would be treated, without any justification, in the same way as someone convicted of multiple offences, as in the present case. Indeed, there is no logic in applying this rule in such a way that committing one murder is punished in the same way as committing two hundred murders; (f) were application for a pardon to be made, it could not apply to the resulting total term to be served [*condena*], but rather to one, several or all of the different sentences imposed; in such a case it is for the sentencing court to decide, and not the judicial body responsible for setting the limit (the last one), which shows that the sentences are not combined into one. Besides, the first rule of Article 70 of the Criminal Code of 1973 explains how, *in such a case*, the sentences must be served successively 'the convicted person going on to serve the next sentence when the previous one has been extinguished by pardon'; (g) lastly, from a procedural point of view section 988 of the Criminal Procedure Act clearly states that it is a matter of

setting the maximum limit of the *sentences* imposed (in the plural, in keeping with the wording of the law), '*fixing the maximum term to be served in respect of all the sentences*' (the wording is very clear).

Which is why the term 'combination [*refundición*] of the sentences to be served [*condenas*]' is very misleading and inappropriate. There is no merging of sentences into a single sentence, but the number of years an individual can be expected to serve in respect of multiple sentences is limited by law. This means that the prisoner serves the different sentences, with their respective specificities and with all the corresponding entitlements. That being so, the remissions of sentence for work done in detention as provided for in Article 100 of the Criminal Code of 1973 may be applied to the sentences successively served by the prisoner.

The total term to be served [*condena*] is thus served in the following manner: the prisoner begins by serving the heaviest sentences imposed. The relevant adjustments [*beneficios*] and remissions are applied to each of the sentences the prisoner serves. When the first [sentence] has been completed, the prisoner begins to serve the next one, and so on until the limits provided for in Article 70.2 of the Criminal Code of 1973 have been reached, at which point all of the sentences comprised in the total term to be served [*condena*] will have been extinguished.

Take, for example, the case of an individual given three prison sentences: thirty years, fifteen years and ten years. The second rule of Article 70 of the Criminal Code of 1973 ... limits the maximum term to be served to three times the most serious sentence or thirty years' imprisonment. In this case the actual term to be served would be thirty years. The prisoner would begin serving the successive sentences (the total term to be served), starting with the longest sentence (thirty years in this case). If he were granted a ten-year remission for whatever reason, he would have served that sentence after twenty years' imprisonment, and the sentence would be extinguished; next, the prisoner would start to serve the next longest sentence (fifteen years). With five years' remission that sentence will have been served after ten years. 20 + 10 = 30. [The prisoner] would not have to serve any other sentence, *any remaining sentences ceasing to have effect*, as provided for in the applicable Criminal Code, *once this maximum term, which may not exceed thirty years, is attained.*"

40. In the above-mentioned judgment the Supreme Court considered that there was no well-established case-law on the specific question of the interpretation of Article 100 of the Criminal Code of 1973 in conjunction with Article 70.2. It referred to a single precedent, its judgment of 8 March 1994 in which it had considered that the maximum duration provided for in Article 70.2 of the Criminal Code of 1973 amounted to "a new, independent sentence" (see paragraph 36 above). However, the Supreme Court departed from that interpretation, pointing out that that decision was an isolated one and could therefore not be relied on as a precedent in so far as it had never been applied in a consistent manner.

Even assuming that its new interpretation of Article 70 of the Criminal Code of 1973 could have been regarded as a departure from its case-law and from previous prison practice, the principle of equality before the law (Article 14 of the Constitution) did not preclude departures from the case-law, provided that sufficient reasons were given. Furthermore, the principle

that the criminal law should not be applied retroactively (Article 25 § 1 and Article 9 § 3 of the Constitution) was not meant to apply to case-law.

41. Judgment no. 197/2006 was adopted by a majority of twelve votes to three. The three dissenting judges appended an opinion stating that the sentences imposed successively were transformed or joined together into another sentence, similar in nature but different in so far as it combined the various sentences into one. That sentence, which they called "the sentence to be served", was the one resulting from the application of the limit fixed in Article 70.2 of the Criminal Code of 1973, which effectively extinguished the sentences that went beyond that limit. This new "unit of punishment" was the term the prisoner had to serve, to which remission for work done in detention was to be applied. Remissions would therefore affect the sentences imposed, but only once the rules on the consecutive serving of sentences had been applied to them "for the purposes of their completion". The dissenting judges also pointed out that for the purposes of determining the most lenient criminal law following the entry into force of the Criminal Code of 1995, all Spanish courts, including the Supreme Court (agreements adopted by the plenary Criminal Division on 18 July 1996 and 12 February 1999), had agreed to the principle that reductions of sentence should be applied to the sentence resulting from the application of Article 70.2 of the Criminal Code of 1973 (the thirty-year limit). In application of that principle no fewer than sixteen people convicted of terrorism had recently had their sentences reduced for work done in detention although they had each been given prison sentences totalling over a hundred years.

42. The dissenting judges considered that the method applied by the majority was not provided for in the Criminal Code of 1973 and therefore amounted to retroactive implicit application of the new Article 78 of the Criminal Code of 1995, as amended by Organic Law no. 7/2003 introducing measures to ensure the full and effective execution of sentences. This new interpretation to the convicted person's detriment was based on a policy of full execution of sentences which was alien to the Criminal Code of 1973, could be a source of inequalities and was contrary to the settled case-law of the Supreme Court (judgments of 8 March 1994, 15 September 2005 and 14 October 2005). Lastly, the dissenting judges considered that criminal policy reasons could on no account justify such a departure from the principle of legality, even in the case of an unrepentant terrorist murderer as in the case concerned.

3. Application of the "Parot doctrine"

43. The Supreme Court confirmed the "Parot doctrine" in subsequent judgments (see, for example, judgment no. 898/2008 of 11 December 2008). In its judgment no. 343/2011 of 3 May 2011 it referred to the departure from previous case-law in judgment no. 197/2006 in the following terms:

> "In the present case it was initially considered that the appellant would have finished serving the ljjegal maximum term of imprisonment on 17 November 2023, and that situation has not changed. It is the way sentence adjustments [*beneficios penitenciarios*] are applied that has changed. Until judgment no. 197/2006 (cited above) they were applied to the maximum term a prisoner could serve. This judgment and others that followed deemed that to be an error, and considered that the adjustment should be applied to the sentences actually imposed, which were to be served in succession, one after the other, until the limit provided for by law had been reached."

44. According to information supplied by the Government, the "Parot doctrine" has been applied to ninety-three convicted members of ETA and thirty-seven other people found guilty of particularly serious crimes (drug traffickers, rapists and murderers).

E. The case-law of the Constitutional Court

45. In its judgment no. 174/1989 of 30 October 1989 the Constitutional Court noted that the remissions of sentence for work done in detention provided for in Article 100 of the Criminal Code of 1973 were periodically validated by the judges responsible for the execution of sentences (*Jueces de Vigilancia Penitenciaria*) further to a proposal by the prison authorities. It explained that remissions of sentence which had already been approved had to be taken into account by the trial court required to rule on the discharge (*liquidación*) of the term of imprisonment to be served (*condena*), and that remissions already accrued in application of the law could not subsequently be revoked to correct any errors or permit the application of a new interpretation. It added that where there was no appeal against a decision by a judge responsible for the execution of sentences, that decision became final and binding in conformity with the principle of legal certainty and the right not to have final judicial decisions overruled. It considered that the right to remissions of sentence for work done in detention was not conditional under the relevant law, as demonstrated by the fact that prisoners who misbehaved or attempted to escape lost that right only in respect of future adjustments, not in respect of those already granted.

46. In judgment no. 72/1994 of 3 March 1994 the Constitutional Court explained that the remissions of sentence for work done in detention provided for in Article 100 of the Criminal Code of 1973 reflected the principle enshrined in Article 25 § 2 of the Constitution that punishments entailing imprisonment must be aimed at the rehabilitation and social reintegration of the offender.

47. Various people who had suffered the effects of the "Parot doctrine" lodged *amparo* appeals with the Constitutional Court. The public prosecutor supported the cases of some of the individuals concerned, who complained in their appeals of violations of the principles of legality and non-retroactive interpretation of the law to the detriment of the accused. In his submissions

he maintained that the principle of legality – and the principle of non-retroactivity it entailed – should apply to the execution of sentences. In a series of judgments of 29 March 2012 the Constitutional Court, sitting as a full court, ruled on the merits of these *amparo* appeals.

48. In two of those judgments (nos. 39/2012 and 57/2012), the Constitutional Court allowed the appeals, holding that there had been a violation of the right to effective judicial protection (Article 24 § 1 of the Constitution) and of the right to liberty (Article 17 § 1 of the Constitution). It considered that the new method of applying remissions of sentence as a result of the Supreme Court's departure from its case-law in 2006 had challenged final judicial decisions concerning the interested parties. It noted that the *Audiencia Nacional* which had adopted the decisions in question had considered that the Criminal Code of 1973 (which provided for a maximum term of imprisonment of thirty years) was more favourable to the persons concerned than the Criminal Code of 1995 (where the limit was twenty-five years) because they would have lost the right to remissions of sentence from the time the Criminal Code of 1995 entered into force had it been applied to them. Observing that the *Audiencia Nacional* had based its finding on the principle that the remissions of sentence provided for under the old Code should be deducted from the legal maximum term of imprisonment (namely thirty years), it held that final judicial decisions could not be altered by a new judicial decision applying another method. It concluded that there had been a violation of the right to effective judicial protection, and more specifically of the right not to have final judicial decisions overruled (the "intangibility" of final judicial decisions, or the principle of *res judicata*). Concerning the right to liberty, it considered that, regard being had to the Criminal Code of 1973 and the method of applying remissions of sentence adopted in the judicial decisions cited above, the prisoners concerned had completed their sentences, which meant that their continued detention after the release date proposed by the prison authorities (in conformity with the formerly applicable rules) had no legal basis. In both decisions it referred to the Court's judgment in *Grava v. Italy* (no. 43522/98, §§ 44-45, 10 July 2003).

49. In a third case (judgment no. 62/2012), the Constitutional Court allowed an *amparo* appeal, holding that there had been a violation of the right to effective judicial protection (Article 24 § 1 of the Constitution) because the *Audiencia Nacional* had changed the date of the prisoner's final release, thereby disregarding its own firm and final judicial decision given a few days earlier.

50. The Constitutional Court rejected *amparo* appeals in twenty-five cases (judgments nos. 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 61, 64, 65, 66, 67, 68 and 69/2012), because the decisions of the ordinary courts fixing the prisoners' final release date based on the new approach introduced in 2006 had not contradicted the final decisions

previously reached in those cases. Those decisions had not explicitly mentioned the manner of applying remissions of sentence for work done in detention, and that issue had not been decisive as regards the choice of the applicable Criminal Code.

51. Both in the judgments in favour of the appellants and in those against, the Constitutional Court rejected the complaint under Article 25 of the Constitution (principle of legality) because the question of the application of remissions of sentence for work done in detention concerned the execution of the sentence and on no account the application of a harsher sentence than that provided for in the applicable criminal law, or a sentence exceeding the limit allowed by law. The Constitutional Court referred to the Court's case-law establishing a distinction between measures constituting a "penalty" and those relating to the "execution" of a sentence for the purposes of Article 7 of the Convention (*Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports 46, p. 231; *Grava*, cited above, § 51; and *Gurguchiani v. Spain*, no. 16012/06, § 31, 15 December 2009).

52. In the parts of its judgment no. 39/2012 concerning the principle of legality, for example, the Constitutional Court stated:

> "3. ... It must first be observed that the question under examination does not fall within the scope of the fundamental right enshrined in Article 25 § 1 of the Constitution – namely the interpretation and application of criminal charges, the classification of the facts established in respect of the offences concerned and the application of the corresponding penalties ... – but rather concerns the execution of custodial sentences, that is to say the application of remissions of sentence for work done in detention, and the interpretation we are required to examine cannot lead to the serving of sentences heavier than those provided for in respect of the criminal offences concerned, or to imprisonment in excess of the legal limit. In a similar manner, contrary to what the prosecution have argued, the European Court of Human Rights also considers that, even when they have an impact on the right to liberty, measures concerning the execution of the sentence – rather than the sentence itself – do not fall within the scope of the principle of no punishment without law enshrined in Article 7 § 1 of the Convention provided that they do not result in the imposition of a penalty harsher than that provided for by law. In its judgment in the case of *Grava v. Italy* (§ 51) of 10 July 2003, the European Court of Human Rights reached this conclusion in a case concerning remission of sentence, citing *mutatis mutandis Hogben v. the United Kingdom* (no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports (DR) 46, pp. 231, 242, relating to release on licence). More recently, in its judgment of 15 December 2009 in the case of *Gurguchiani v. Spain* (§ 31), the Court stated: 'both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the 'penalty'. In consequence, where the nature and purpose of a measure relate to a remission of sentence or a change in a regime for early release, this does not form part of the 'penalty' within the meaning of Article 7.'
>
> The court must also reject the complaint concerning the alleged violation of the principle of no punishment without law (Article 25 § 1 of the Constitution) as a result of the retroactive application of Article 78 of the Criminal Code of 1995 (in its initial

wording and as amended by Organic Law no. 7/2003), authorising the sentencing judge or court to order that 'decisions concerning adjustments of sentence, day-release permits, pre-release classification and the calculation of the time remaining to be served prior to release on licence should take into account all of the sentences imposed' in certain situations where sentences were grouped together (Article 78 § 1 of the Criminal Code). The law obliges the courts to take into account all the sentences in cases where particularly heavy multiple sentences were imposed. There are certain exceptions to this obligation, however (Article 78 §§ 2 and 3 of the Criminal Code currently in force). That said, the impugned decisions and the Supreme Court decision cited in them did not involve any retroactive application of that rule (which in any event is not applicable to remissions of sentence for work done in detention, as the Criminal Code of 1995 did away with such remissions). They simply applied the provisions that were in force at the time the offences of which the applicant was convicted were committed (Articles 70.2 and 100 of the Criminal Code of 1973), but with a new interpretation which, although based on the method of calculation expressly provided for in Article 78 of the Criminal Code of 1995, was possible, they explained, in view of the wording of Articles 70.2 and 100 of the Criminal Code of 1973. That being so, if one follows the reasoning of the judicial bodies and the applicable rules, the appellant's complaint lacks any factual basis as the principle of the non-retroactive application of a harsher criminal law enshrined in Article 25 § 1 of the Constitution is breached only where a criminal law has been applied retroactively to acts committed before its entry into force ..."

Concerning the right to liberty, the Constitutional Court held:

"4. ... In our case-law remissions of sentence for work done in detention directly affect the fundamental right to liberty guaranteed by Article 17 § 1 of the Constitution, as the duration of the term of imprisonment depends *inter alia* on how they are applied, regard being had to Article 100 of the Criminal Code of 1973 ... That provision states that 'the prisoner shall be entitled, with the approval of the judge responsible for the execution of sentences, to one day's remission for every two days worked', as calculated periodically by the judges responsible for the execution of sentences, based on proposals made by the prison authorities, said remission then being taken into account, for the purposes of the term of imprisonment to be served, by the sentencing court ...

We have also held that remissions of sentence for work done in detention are in the spirit of Article 25 § 2 of the Constitution and the rehabilitational purpose of custodial sentences ... While it is true that Article 25 § 2 embodies no fundamental right protected by the *amparo* remedy, it does establish a penal and prison policy guideline for the legislature, as well as a principle regarding the interpretation of the rules on the imposition and execution of prison sentences, and both the guideline and the principle are enshrined in the Constitution ...

Also, having noted that the right guaranteed by Article 17 § 1 of the Constitution authorises deprivation of liberty only 'in the cases and in the manner prescribed by law', we have found that it cannot be ruled out that the manner in which the sentence to be served is calculated may undermine that right in the event of failure to comply with the legal provisions relating to the consecutive or concurrent serving of different sentences that might have given rise to a reduction of the duration of the detention, where failure to apply the rules concerned leads to the unlawful extension of the detention and, consequently, of the deprivation of liberty ... In a similar vein the European Court of Human Rights has also found a violation of the right to liberty guaranteed by Article 5 of the Convention in a case where a prisoner served a longer sentence 'than the sentence [he] should have served under the domestic law, taking

into account the remission to which he was entitled. The additional time spent in prison accordingly amounted to unlawful detention within the meaning of the Convention' (*Grava v. Italy*, ECHR, 10 July 2003, § 45)."

After having found a violation of the right to effective judicial protection, the Constitutional Court had the following to say concerning the consequences of that violation as regards the right to liberty:

"8. However, we cannot limit ourselves to the mere finding of a violation [of Article 24 § 1 of the Constitution] arrived at above. We must also consider the consequences of that violation in terms of the right to liberty (Article 17 § 1 of the Constitution).

Bearing in mind the binding nature of the order of 28 May 1997 adopted by the court responsible for the execution of sentences (whose role it was to determine how the sentence should be served and when it should end) and the legal situation created by the aforesaid decision in respect of the calculation of remissions of sentence for work done in detention, the sentence was served for years as prescribed in the order in question: application of the former Criminal Code and the rules governing remissions of sentence for work done in detention, according to which the prisoner was entitled to one day's remission for every two days worked, and deduction of the resulting remission, as periods of sentence discharged, from the maximum actual term of thirty years to be served following the combination of the sentences. That was confirmed by unequivocal acts by the prison authorities, who drew up charts showing provisional lengths of sentence taking into account remission for work done in detention, approved periodically by the judge responsible for the execution of sentences further to proposals by the prison authorities, and in particular one chart of 25 January 2006 which served as a basis for the proposal to release the prisoner on 29 March 2006, submitted to the judge by the prison governor.

It follows that, under the legislation in force at the time of the offence, and taking into account the remissions of sentence for work done in detention as calculated according to the firm and binding criteria established by the judge responsible for the execution of sentences, the appellant had already discharged the sentence he was given. That being so, and although the appellant was deprived of his liberty in a lawful manner, his deprivation of liberty fell outside the cases provided for by law once he had finished serving his sentence in the conditions outlined above, as the legal basis for his continuing detention had ceased to exist. It follows that the additional time the appellant served in prison amounted to unlawful deprivation of liberty in breach of the fundamental right to liberty guaranteed by Article 17 § 1 of the Constitution (see *Grava v. Italy*, ECHR 10 July 2003, §§ 44 and 45).

In a State where the rule of law prevails it is unacceptable to extend a prisoner's incarceration once he has served his sentence. The courts should accordingly take the necessary steps, as soon as possible, to put a stop to the violation of the fundamental right to liberty and arrange for the appellant's immediate release."

53. The judgments of the Constitutional Court prompted separate opinions – concurring or dissenting – from certain judges. In the dissenting opinion she appended to judgment no. 40/2012, Judge A. Asua Batarrita stated that the fact that the new interpretation of the rule for calculating the term of imprisonment to be served had been applied while the sentence was already under way shed doubt on an established legal situation and distorted projections based on the consistent interpretation of the applicable rules.

She described the arrangements for remissions of sentence introduced by the Criminal Code of 1973 and the distinction traditionally made between the "nominal duration" and the "actual duration" of the sentence, which the courts took into account when fixing sentences. She pointed out that remissions of sentence for work done in detention differed from other measures entailing adjustment of sentences, such as release on licence, and that the granting of such remissions was not left to the discretion of the courts, which were not bound by criteria such as the prisoner's good conduct or how dangerous he or she was considered to be. The judge concluded that remissions of sentence for work done in detention were mandatory by law. She stated that, under the Criminal Code of 1973, the principle of legality should apply not only to offences but also to the punitive consequences of their commission, that is to say the nominal limit of the prison sentences and their actual limit after deduction of the remissions of sentence for work done in detention as provided for in Article 100 of the Criminal Code of 1973. Noting that the limits set under Article 70.2 of the Criminal Code of 1973, combined with the remissions of sentence for work done in detention, had effectively reduced the maximum nominal sentence (thirty years) to a shorter actual term of imprisonment (twenty years), except in the event of misconduct or attempted escape, she expressed the view that the "Parot doctrine" had established an artificial distinction between the "sentence" (*pena*) and the "term of imprisonment to be served" (*condena*) that had no basis in the Criminal Code, and had subjected the application of the thirty-year limit to a new condition – not provided for by Article 70.2 of the Criminal Code of 1973 – according to which, during that period, the sentence was to be served "in a prison", thereby preventing the application of the rules on remissions of sentence for work done in detention. In her view that was tantamount to imposing a nominal maximum term of forty-five years (that is, thirty years' actual imprisonment plus fifteen years corresponding to work done in detention).

She considered that neither the teleological arguments nor the criminal policy considerations underlying the "Parot doctrine" could justify such a departure from the case-law concerning the interpretation of a law – the Criminal Code of 1973 – that had been repealed over ten years earlier. In view of all these considerations she concluded that the interpretation by the Supreme Court in its judgment of 2006 had not been foreseeable and that there had been a violation of Article 25 § 1 (principle of legality), Article 17 § 1 (right to liberty) and Article 24 § 1 (right to effective judicial protection) of the Constitution.

54. In the concurring opinion he appended to judgment no. 39/2012, Judge P. Perez Tremps referred to the Court's case-law concerning Article 5 of the Convention, and in particular the requirement that the law be foreseeable (*M. v. Germany*, no. 19359/04, § 90, ECHR 2009). He specified that this requirement should apply to the real and effective duration of the

deprivation of liberty. Having noted that the legislation interpreted by the Supreme Court – the Criminal Code of 1973 – was no longer in force in 2006 and could therefore be brought into play only if it worked in the convicted person's favour, he concluded that a sudden, unforeseeable departure from the case-law was incompatible with the right to liberty. He also doubted that legislation that made no explicit provision for the means of calculating remissions of sentence, and could be interpreted in two radically different ways, met the required standard of quality of the law.

55. In the dissenting opinion he appended to judgment no. 41/2012, Judge E. Gay Montalvo stated that the application of Articles 70.2 and 100 of the Criminal Code of 1973 in conformity with the "Parot doctrine" had led to the imposition of a penalty exceeding the thirty-year limit if one added the sentence actually served to the time the law deemed to have been served in other ways. He concluded that there had been a violation of the principle of no punishment without law, on the one hand, and of the right to liberty on the other, because the prisoner's detention had been unlawfully extended.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

56. The applicant alleged that what she considered to be the retroactive application of a departure from the case-law by the Supreme Court after she had been convicted had extended her detention by almost nine years, in violation of Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The Chamber judgment

57. In its judgment of 10 July 2012, the Chamber found that there had been a violation of Article 7 of the Convention.

58. It reached that finding after having noted, first of all, that although the provisions of the Criminal Code of 1973 applicable to remissions of sentence and the maximum term of imprisonment a person could serve – namely thirty years under Article 70 of that Code – were somewhat

ambiguous, in practice the prison authorities and the Spanish courts tended to treat the maximum legal term of imprisonment as a new, independent sentence to which adjustments such as remission of sentence for work done in detention should be applied. It concluded that at the time when the offences had been committed and at the time when the decision to combine the sentences had been adopted (on 30 November 2000), the relevant Spanish law, taken as a whole, including the case-law, had been formulated with sufficient precision to enable the applicant to discern to a reasonable degree the scope of the penalty imposed and the manner of its execution (see paragraph 55 of the Chamber judgment, with a reference, by contrast, to *Kafkaris v. Cyprus* [GC], no 21906/04*,* § 150, ECHR 2008).

59. Secondly, the Chamber observed that in the applicant's case the new interpretation by the Supreme Court in 2006 of the way in which remissions of sentence should be applied had led, retroactively, to the extension of the applicant's term of imprisonment by almost nine years, by depriving her of the remissions of sentence for work done in detention to which she would otherwise have been entitled. That being so, it considered that this measure not only concerned the execution of the applicant's sentence, but also had a decisive impact on the scope of the "penalty" for the purposes of Article 7 (see paragraph 59 of the Chamber judgment).

60. Thirdly, the Chamber noted that the Supreme Court's change of approach had no basis in the case-law, and that the Government themselves had acknowledged that the previous practice of the prisons and the courts would have been more favourable to the applicant. It pointed out that the departure from previous practice had come about after the entry into force of the new Criminal Code of 1995, which had done away with remissions of sentence for work done in detention and established new – stricter – rules on the application of sentence adjustments to prisoners sentenced to several lengthy terms of imprisonment. It emphasised that the domestic courts must not, retroactively and to the detriment of the individual concerned, apply the criminal policy behind legislative changes brought in after the offence was committed (see paragraph 62 of the Chamber judgment). It concluded that it had been difficult, or even impossible, for the applicant to imagine, at the material time and also at the time when all the sentences were combined and a maximum term of imprisonment fixed, that the Supreme Court would depart from its previous case-law in 2006 and change the way remissions of sentence were applied, that this departure from case-law would be applied to her case and that the duration of her incarceration would be substantially lengthened as a result (see paragraph 63 of the Chamber judgment).

B. The parties' submissions to the Grand Chamber

1. The applicant

61. The applicant submitted that the thirty-year maximum term of imprisonment set by the decision of 30 November 2000 to combine the sentences and place an upper limit on the term to be served amounted to a new sentence and/or the final determination of her sentence. She agreed with the Chamber's finding that practice at the time gave her a legitimate expectation, while serving her prison sentence, that the remissions of sentence to which she was entitled for the work done since 1987 would be applied to the maximum legal term of thirty years' imprisonment.

62. That being so, she submitted that the application to her case of the Supreme Court's departure from case-law in its judgment no. 197/2006 amounted to the retroactive imposition of an additional penalty that could not merely be described as a measure relating to the execution of the sentence. As a result of this change of approach the thirty-year term fixed by the decision of 30 November 2000, of which she had been notified the same day, had ceased to be treated as a new, independent and/or final sentence and the various sentences imposed on her between 1988 and 2000 (totalling over 3,000 years' imprisonment) in eight trials had, in a manner of speaking, been restored. The applicant submitted that by applying the remissions of sentence to each of her sentences individually the Spanish courts had deprived her of the remissions of sentence she had earned and added nine years to her imprisonment. In so doing, the courts concerned had not simply altered the rules applicable to remissions of sentence, but had also redefined and/or substantially changed the "penalty" she had been informed she would have to serve.

63. The applicant argued that the Supreme Court's departure from the case-law in its judgment no. 197/2006 had not been reasonably foreseeable in the light of the previous practice and case-law, and had deprived the remissions of sentence for work done in detention provided for in the Criminal Code of 1973 of any meaning for people in her situation. In the applicant's submission the judgment concerned had resulted in the application to her case of the criminal policy behind the new Criminal Code of 1995, in spite of the fact that the intention of the drafters of the Code had been to keep the remissions of sentence provided for in the Criminal Code of 1973 in place for anyone who had been convicted under that Code.

64. In the alternative, there was no denying that at the time the applicant had committed the offences Spanish law had not been formulated with sufficient precision to enable her to discern, to a degree that was reasonable in the circumstances, the scope of the penalty imposed and the manner of its execution (the applicant referred to *Kafkaris*, cited above, § 150). In the applicant's submission, the Criminal Code of 1973 was ambiguous in that it did not specify whether the maximum term of thirty years' imprisonment

was a new, independent sentence, whether the individual sentences continued to exist once they had been combined together, and to which sentence the remissions of sentence for work done should be applied. Judgment no. 197/2006 had not clarified the question of sentencing as the Supreme Court had not expressly set aside its order of 25 May 1990 according to which the combining of sentences provided for in Article 70.2 of the Criminal Code of 1973 was the means of determining the sentence.

Besides, had that order still been in force the *Audiencia Nacional* would have had to choose between the various sentences to which the remissions of sentence could potentially have been applied, namely the thirty-year maximum term or the individual sentences. In conformity with the *Scoppola v. Italy (no. 2)* judgment ([GC], no. 10249/03, 17 September 2009), the *Audiencia Nacional* would have been obliged to apply the more lenient criminal law, regard being had to the particular circumstances of the case.

65. Also, the distinction between the penalty and its execution was not always clear in practice. It was for the Government, when relying on that distinction, to demonstrate that it was applicable in a particular case, notably when the lack of clarity was due to the way in which the State had drafted or applied its laws. The present case should be distinguished from cases concerning discretionary measures of early release or measures that did not result in a redefinition of the penalty (the applicant referred to *Hogben*, cited above, *Hosein v. the United Kingdom*, no. 26293/95, Commission decision of 28 February 1996; *Grava*, cited above; and *Uttley v. the United Kingdom* (dec.), no. 36946/03, 29 November 2005). In the alternative, from the point of view of the quality of the law the present case was more like the above-cited *Kafkaris* judgment in terms of the uncertainty as to the scope and substance of the penalty, due in part to the way in which the rules on remissions of sentence had been interpreted and applied. In any event, it was clear from *Kafkaris* that the "quality of law" requirement applied both to the scope of the penalty and to the manner of its execution, particularly when the substance and the execution of the penalty were closely linked.

66. Lastly, regarding the case-law in criminal matters, even assuming that it was legitimate for the courts to alter their approach to keep abreast of social changes, the Government had failed to explain why the new approach had been applied retroactively. In any event, neither the Government nor the courts had claimed that the new 2006 approach had been applied to the applicant in response to "new social realities".

2. The Government

67. The Government reiterated that the applicant was a member of the ETA criminal organisation and had taken part in numerous terrorist attacks from 1982 until her detention in 1987. They added that for her crimes the applicant had been sentenced between 1988 and 2000 to imprisonment totalling over 3,000 years, for twenty-three murders, fifty-seven attempted

murders and other offences. They submitted that the different judgments convicting the applicant had been based on the Criminal Code of 1973, which had been in force at the times when the offences had been committed and which gave a very clear definition of the different offences and the penalties they entailed. Five of the judgments by which the applicant had been convicted, as well as the decision of 30 November 2000 to combine the sentences and set a maximum term of imprisonment, had expressly informed the applicant that, in accordance with Article 70.2 of the Criminal Code, the total duration of the prison sentence she would have to serve was thirty years. They also pointed out that on 15 February 2001, the date of the *Audiencia Nacional*'s decision setting 27 June 2017 as the date on which the applicant would have finished serving her sentence, the applicant had already accrued over four years' remission of sentence for work done in detention. And as she had not appealed against that decision, she was considered to have acquiesced to the release date fixed by the *Audiencia Nacional*.

68. It was perfectly clear under the provisions of the Criminal Code of 1973 that the maximum term of thirty years was not to be regarded as a new penalty but rather as a measure placing an upper limit on the total term of imprisonment in respect of the various sentences imposed, to be served successively in order of decreasing severity, the residual sentences being extinguished accordingly. The sole purpose of combining and placing an upper limit on the sentences had been to fix the duration of the actual term to be served as a result of all the sentences imposed in the different sets of proceedings. Besides, Article 100 of the Criminal Code of 1973 made it just as clear that remissions of sentence for work done in detention were to be applied to the "sentence imposed", in other words to each of the sentences imposed until the maximum term had been reached.

69. While it was true that prior to the adoption by the Supreme Court of judgment no. 197/2006 the Spanish prisons and courts had tended, in practice, to apply remissions of sentence for work done in detention to the thirty-year maximum term of imprisonment, that practice did not concern the determination of the penalty, but rather its execution. Furthermore, that practice had no basis in the case-law of the Supreme Court in the absence of any established principle as to the manner of applying remissions of sentence for work done in detention. The sole judgment delivered on this issue by the Supreme Court in 1994 did not suffice to set an authoritative precedent under Spanish law. The Supreme Court's case-law in the matter had not been settled until its Criminal Division had adopted judgment no. 197/2006. What is more, the Government argued, that case-law had been endorsed by the full Constitutional Court in several judgments delivered on 29 March 2012, containing numerous references to the Court's case-law concerning the distinction between a "penalty" and its "execution".

70. In the Government's submission, the Chamber had mistakenly considered that the application of the "Parot doctrine" had deprived of all purpose the remissions of sentence for work done in detention granted to convicted prisoners under the Criminal Code of 1973. Remissions of sentence continued to be applied, but to each of the sentences individually, until the maximum term had been reached. Only in the case of the most serious crimes, such as those committed by the applicant, would the thirty-year limit be reached before the remissions of sentence granted for work done in detention had significantly reduced the sentences imposed. Similarly, the Chamber had mistakenly considered that the Supreme Court had retroactively applied the policy behind the legislative reforms of 1995 and 2003. It was plain to see that the reforms in question made no mention of the means of applying remissions of sentence for work done in detention, the Criminal Code of 1995 having done away with them. Had the criminal policy behind the 2003 law been applied retroactively, the applicant would have been liable to a maximum term of imprisonment of forty years.

71. In its judgment the Chamber had departed from the Court's case-law concerning the distinction between measures that amounted to a "penalty" and those relating to the "execution" of a penalty. Under that case-law a measure concerning remission of sentence or a change in the system of release on licence was not an integral part of the "penalty" within the meaning of Article 7 (the Government referred to *Grava*, § 51; *Uttley*; *Kafkaris*, § 142; and *Hogben*, all cited above). In *Kafkaris*, the Court had acknowledged that a prison-law reform which was applied retroactively, excluding prisoners serving life sentences from earning remissions of sentence for work done in detention, concerned the execution of the sentence as opposed to the "penalty" imposed (§ 151). In the present case the Government submitted that there had been no change in prison law. The only effect of Supreme Court judgment no. 197/2006 concerning remissions of sentence for work done in detention had been to prevent the date of the applicant's release being brought forward nine years, not to increase the penalty imposed on her.

72. The present case differed from cases which clearly concerned the penalty as opposed to its execution (the Government cited *Scoppola (no. 2)*; *Gurguchiani*; and *M. v. Germany*, all cited above). The disputed measure concerned remissions of sentence or "early release", not the maximum term that could be served in respect of the sentences imposed, which had not changed. Remissions of sentence for work done in detention did not pursue the same aims as the penalty as such, but were measures relating to its execution in so far as they allowed prisoners to be released before all their sentences had been served, provided that they demonstrated a willingness to return to the social mainstream through work or other paid activities. That being so, remissions of sentence for work done in detention could not be likened to measures imposed following conviction for a "criminal offence";

instead, they were measures relating to the prisoner's conduct while serving the sentence. In any event there was no question of any "severity" as they always benefited the prisoner concerned by bringing forward the date of release.

73. The Government further submitted that the Chamber judgment was inconsistent with the Court's case-law on the question of to what extent a person should be able, when committing an offence, to predict the exact term of imprisonment he or she would incur. As remissions of sentence for work done in detention were purely a prison matter, the Supreme Court could not be criticised for having departed from previous practice with regard to the application of remissions of sentence, as the change had had no effect on the rights enshrined in Article 7. The Court had never held that the foreseeability requirement extended to the exact length of the sentence to be served taking into account sentence adjustments, remissions, pardons or any other factors affecting the execution of the sentence. Such factors were impossible to foresee and to calculate *ex ante.*

74. Lastly, the Government submitted that the implications of the Chamber judgment were open to dispute as they shed doubt on the value and purpose the Court itself had attributed to case-law in criminal and prison matters (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II). The Chamber had considered that a single judgment given in 1994 – faulty, albeit confirmed by administrative practice – should prevail over case-law established by the Supreme Court and endorsed by the Constitutional Court, even though the latter case-law was more in keeping with the wording of the law in force at the material time. A judicial interpretation respectful of the letter of the applicable law could not, as a matter of principle, be said to be unforeseeable.

C. Third-party observations

75. The International Commission of Jurists pointed out that the principle of no punishment without law enshrined in Article 7 of the Convention and in other international agreements was an essential component of the rule of law. It submitted that, in conformity with that principle, and with the aim and purpose of Article 7 prohibiting any arbitrariness in the application of the law, the autonomous concepts of "law" and "penalty" must be interpreted sufficiently broadly to preclude the surreptitious retroactive application of a criminal law or a penalty to the detriment of a convicted person. It argued that where changes to the law or the interpretation of the law affected a sentence or remission of sentence in such a way as to seriously alter the sentence in a way that was not foreseeable at the time when it was initially imposed, to the detriment of the convicted person and his or her Convention rights, those changes, by their

very nature, concerned the substance of the sentence and not the procedure or arrangements for executing it, and accordingly fell within the scope of the prohibition of retroactivity. The International Commission of Jurists submitted that certain legal provisions classified at domestic level as rules governing criminal procedure or the execution of sentences had serious, unforeseeable effects detrimental to individual rights, and were by nature comparable or equivalent to a criminal law or a penalty with retroactive effect. For this reason the prohibition of retroactivity should apply to such provisions.

76. In support of its argument that the principle of non-retroactivity should apply to procedural rules or rules governing the execution of sentences which seriously affected the rights of the accused or convicted person, the International Commission of Jurists referred to various sources of international and comparative law (statutes and rules of procedure of international criminal courts, as well as Portuguese, French and Netherlands legislation and case-law).

D. The Court's assessment

1. Principles established by the Court's case-law

(a) *Nullum crimen, nulla poena sine lege*

77. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, § 32, Series A no. 335-C; and *Kafkaris*, cited above, § 137).

78. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage (concerning the retrospective application of a penalty, see *Welch v. the United Kingdom*, 9 February 1995, § 36, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 35, Series A no. 317-B; *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 36, ECHR 2001-II; and *Mihai Toma v. Romania*, no. 1051/06, §§ 26-31, 24 January 2012). It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege* – see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must

not be extensively construed to an accused's detriment, for instance by analogy (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; for an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 42-43, ECHR 1999-IV).

79. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V, and *Kafkaris*, cited above, § 140).

80. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see *Coëme and Others*, cited above, § 145, and *Achour v. France* [GC], no. 67335/01, § 43, ECHR 2006-IV).

(b) The concept of a "penalty" and its scope

81. The concept of a "penalty" in Article 7 § 1 of the Convention is, like the notions of "civil rights and obligations" and "criminal charge" in Article 6 § 1, an autonomous Convention concept. To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch*, § 27, and *Jamil*, § 30, both cited above).

82. The wording of the second sentence of Article 7 § 1 indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *Welch*, § 28; *Jamil*, § 31; *Kafkaris*, § 142; and *M. v. Germany*, § 120, all cited above). The severity of the order is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Welch*, cited above, § 32, and *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV).

83. Both the European Commission of Human Rights and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and

purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, among other authorities, *Hogben*, cited above; *Hosein*, cited above; *L.-G.R. v. Sweden,* no. 27032/95, Commission decision of 15 January 1997; *Grava*, cited above, § 51; *Uttley*, cited above; *Kafkaris*, cited above, § 142; *Monne v. France* (dec.), no. 39420/06, 1 April 2008; *M. v. Germany*, cited above, § 121; and *Giza v. Poland* (dec.), no. 1997/11, § 31, 23 October 2012). In *Uttley*, for example, the Court found that the changes made to the rules on early release after the applicant's conviction had not been "imposed" on him but were part of the general regime applicable to prisoners and, far from being punitive, the nature and purpose of the "measure" were to permit early release, so they could not be regarded as inherently "severe". The Court accordingly found that the application to the applicant of the new regime for early release was not part of the "penalty" imposed on him.

84. In *Kafkaris*, where changes to the prison legislation had deprived prisoners serving life sentences – including the applicant – of the right to remissions of sentence, the Court considered that the changes related to the execution of the sentence as opposed to the penalty imposed on the applicant, which remained that of life imprisonment. It explained that although the changes in the prison legislation and in the conditions of release might have rendered the applicant's imprisonment harsher, these changes could not be construed as imposing a heavier "penalty" than that imposed by the trial court. It reiterated in this connection that issues relating to release policies, the manner of their implementation and the reasoning behind them fell within the power of the States Parties to the Convention to determine their own criminal policy (see *Achour*, cited above, § 44, and *Kafkaris*, cited above, § 151).

85. However, the Court has also acknowledged that in practice the distinction between a measure that constitutes a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty" may not always be clear-cut (see *Kafkaris*, § 142; *Gurguchiani*, § 31; and *M. v. Germany*, § 121, all cited above). In *Kafkaris* it accepted that the manner in which the Prison Regulations concerning the execution of sentences had been understood and applied in respect of the life sentence the applicant was serving went beyond the mere execution of the sentence. Whereas the trial court had sentenced the applicant to imprisonment for life, the Prison Regulations explained that what that actually meant was twenty years' imprisonment, to which the prison authorities might apply any remissions of sentence. The Court considered that "the distinction between the scope of a life sentence and the manner of its execution was therefore not immediately apparent" (see *Kafkaris*, § 148).

86. In *Gurguchiani* (cited above), the Court considered that the replacement of a prison sentence – while it was being served – by expulsion

combined with a ten-year ban on entering the country amounted to a penalty just like the one imposed when the applicant had been convicted.

87. In *M. v. Germany* (cited above), the Court considered that the extension of the applicant's preventive detention by the courts responsible for the execution of sentences, by virtue of a law enacted after the applicant had committed his offence, amounted to an additional sentence imposed on him retrospectively.

88. The Court would emphasise that the term "imposed", used in the second sentence of Article 7 § 1, cannot be interpreted as excluding from the scope of that provision all measures introduced after the pronouncement of the sentence. It reiterates in this connection that it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 175, ECHR 2012, and *Scoppola (no. 2)*, cited above, § 104).

89. In the light of the foregoing, the Court does not rule out the possibility that measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may result in the redefinition or modification of the scope of the "penalty" imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7 § 1 *in fine* of the Convention. Otherwise, States would be free – by amending the law or reinterpreting the established regulations, for example – to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person's detriment, when the latter could not have imagined such a development at the time when the offence was committed or the sentence was imposed. In such conditions Article 7 § 1 would be deprived of any useful effect for convicted persons, the scope of whose sentences was changed *ex post facto* to their disadvantage. The Court points out that such changes must be distinguished from changes made to the manner of execution of the sentence, which do not fall within the scope of Article 7 § 1 *in fine.*

90. In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, the Court must examine in each case what the "penalty" imposed actually entailed under the domestic law in force at the material time or, in other words, what its intrinsic nature was. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time (see *Kafkaris*, cited above, § 145).

(c) Foreseeability of criminal law

91. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a

concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Kokkinakis*, cited above, §§ 40-41; *Cantoni*, cited above, § 29; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Kokkinakis*, cited above, § 40, and *Cantoni*, cited above, § 31). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Kafkaris*, cited above, § 141).

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (*ibid.*). The progressive development of criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom*, cited above, § 36; *C.R. v. the United Kingdom*, cited above, § 34; *Streletz, Kessler and Krenz*, cited above, § 50; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, 22 March 2001; *Korbely v. Hungary* [GC], no. 9174/02, § 71, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010). The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights (see, concerning the constituent elements of the offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; as regards the penalty, see *Alimuçaj v. Albania*, no. 20134/05, §§ 154-62, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated.

2. Application of the above principles to the present case

94. The Court notes at the outset that the legal basis for the applicant's various convictions and prison sentences was the Criminal Code of 1973, the criminal law applicable at the time when the offences were committed (between 1982 and 1987), which the applicant has not disputed.

95. The Court observes that the parties' submissions mainly concern the calculation of the total term of imprisonment the applicant should serve in accordance with the rules concerning the maximum term of imprisonment in respect of combined sentences, on the one hand, and the system of remissions of sentence for work done in detention as provided for in the Criminal Code of 1973, on the other. The Court notes in this connection that, by a decision adopted on 30 November 2000 on the basis of section 988 of the Criminal Procedure Act and Article 70.2 of the Criminal Code of 1973, the *Audiencia Nacional* fixed the maximum term of imprisonment the applicant should serve in respect of all her prison sentences at thirty years (see paragraph 14 above). It further notes that, after having deducted from that thirty-year maximum term the remissions of sentence granted to the applicant for work done in detention, on 24 April 2008 the Murcia Prison authorities proposed 2 July 2008 to the *Audiencia Nacional* as the date for the applicant's final release (see paragraph 16 above). On 19 May 2008 the *Audiencia Nacional* asked the prison authorities to change the proposed date and calculate a new date for the applicant's release based on the new approach – the so-called "Parot doctrine" – adopted by the Supreme Court in judgment no. 197/2006 of 28 February 2006, according to which any applicable adjustments and remissions of sentence should be applied successively to each individual sentence until such time as the prisoner had finished serving the thirty-year maximum term of imprisonment (see paragraphs 17, 18 and 39-42 above). Lastly, the Court observes that in application of this new case-law the *Audiencia Nacional* fixed the date of the applicant's final release at 27 June 2017 (see paragraph 20 above).

(a) Scope of the penalty imposed

96. It is the Court's task in the present case to establish what the "penalty" imposed on the applicant entailed under the domestic law, based in particular on the wording of the law, read in the light of the accompanying interpretative case-law. In so doing, it must also have regard to the domestic law as a whole and the way it was applied at the material time (see *Kafkaris*, cited above, § 145).

97. It is true that when the applicant committed the offences, Article 70.2 of the Criminal Code of 1973 referred to a limit of thirty years' imprisonment as the maximum term to be served (*condena*) in the event of multiple sentences (see paragraph 24 above). There thus seems to have been

a distinction between the concept of the "term to be served" (*condena*) and the individual sentences (*penas*) actually pronounced or imposed in the various judgments convicting the applicant. At the same time, Article 100 of the Criminal Code of 1973, on remission of sentence for work done, established that in discharging the "sentence imposed" the detainee was entitled to one day's remission for every two days' work done (see paragraph 24 above). However, that Article contained no specific guidance on how to apply remissions of sentence when multiple sentences were combined as provided for under Article 70.2 of the Criminal Code and a maximum total term of imprisonment was fixed, as in the applicant's case, where sentences totalling 3,000 years' imprisonment were reduced to thirty years in application of that provision. The Court observes that it was not until Article 78 of the new Criminal Code of 1995 was introduced that the law expressly stated, with regard to the application of sentence adjustments, that in exceptional cases the total duration of the sentences imposed could be taken into account, rather than the maximum term provided for by law (see paragraph 32 above).

98. The Court must also consider the case-law and practice regarding the interpretation of the relevant provisions of the Criminal Code of 1973. It notes that, as the Government have acknowledged, prior to the Supreme Court's judgment no. 197/2006, when a person was given several prison sentences and it was decided to combine them and fix a maximum term to be served, the prison authorities and the Spanish courts applied the remissions of sentence for work done in detention to the maximum term to be served under Article 70.2 of the Criminal Code of 1973. The prison and judicial authorities thus took into account the maximum legal term of thirty years' imprisonment when applying remissions of sentence for work done in detention. In a judgment of 8 March 1994 (its first ruling on this question – see paragraph 36 above), the Supreme Court referred to the maximum legal term of thirty years' imprisonment as a "new, independent sentence" to which the possibilities of adjustment provided for by law, such as release on licence and remission of sentence, should be applied. The Spanish courts, including the Supreme Court, took the same approach when comparing the sentences to be served respectively under the Criminal Code of 1995 and the previous Code, taking into account any remissions of sentence already granted under the previous Code, in order to determine which was the most lenient criminal law (see paragraphs 37, 41 and 48 above). Lastly, until the Supreme Court's judgment no. 197/2006 this approach was applied to numerous prisoners convicted under the Criminal Code of 1973, whose remissions for work done in detention were deducted from the maximum term of thirty years' imprisonment (see paragraph 41 above).

99. Like the Chamber, the Grand Chamber considers that in spite of the ambiguity of the relevant provisions of the Criminal Code of 1973 and the

fact that the Supreme Court did not set about clarifying them until 1994, it was clearly the practice of the Spanish prison and judicial authorities to treat the term of imprisonment to be served (*condena*), that is to say the thirty-year maximum term of imprisonment provided for in Article 70.2 of the Criminal Code of 1973, as a new, independent sentence to which certain adjustments, such as remissions of sentence for work done in detention, should be applied.

100. That being so, while she was serving her prison sentence – and in particular after the *Audiencia Nacional* decided on 30 November 2000 to combine her sentences and fix a maximum term of imprisonment – the applicant had every reason to believe that the penalty imposed was the thirty-year maximum term, from which any remissions of sentence for work done in detention would be deducted. Indeed, in its last judgment convicting the applicant, on 8 May 2000, delivered before the decision to combine the sentences was taken, the *Audiencia Nacional* took into account the maximum term of imprisonment provided for in the Criminal Code of 1973, combined with the system of remissions of sentence for work done in detention provided for in Article 100 of the same Code, in determining which Criminal Code – the one in force at the material time or the Criminal Code of 1995 – was the more favourable to the applicant (see paragraph 11 above). In these circumstances, contrary to what the Government have suggested, the fact that the applicant did not challenge the decision of the *Audiencia Nacional* of 15 February 2001 fixing the date on which she would have finished serving her sentence (*liquidación de condena*) at 27 June 2017 is not decisive, as that decision did not take into account the remissions of sentence already earned and was therefore unrelated to the question of how remissions of sentence should be applied.

101. The Court further notes that remissions of sentence for work done in detention were expressly provided for by statutory law (Article 100 of the Criminal Code of 1973), and not by regulations (compare *Kafkaris*, cited above). Moreover, it was in the same Code that the sentences were prescribed and the remissions of sentence were provided for. The Court also notes that such remissions of sentence gave rise to substantial reductions of the term to be served – up to a third of the total sentence – unlike release on licence, which simply provided for improved or more lenient conditions of execution of the sentence (see, for example, *Hogben* and *Uttley*, both cited above; see also the dissenting opinion of Judge A. Asua Batarrita appended to judgment no. 40/2012 of the Constitutional Court, paragraph 53 above). After deduction of the remissions of sentence for work done in detention periodically approved by the judge responsible for the execution of sentences (*Juez de Vigilancia Penitenciaria*), the sentence was fully and finally discharged on the date of release approved by the sentencing court. Furthermore, unlike other measures that affected the execution of the sentence, the right to remissions of sentence for work done in detention was

not subject to the discretion of the judge responsible for the execution of sentences: the latter's task was to fix the remissions of sentence by simply applying the law, on the basis of proposals made by the prison authorities, without considering such criteria as how dangerous the prisoner was considered to be, or his or her prospects of reintegration (see paragraph 53 above; compare *Boulois v. Luxembourg* [GC], no. 37575/04, §§ 98-99, ECHR 2012, and *Macedo da Costa v. Luxembourg* (dec.), no. 26619/07, 5 June 2012). It should be noted in this connection that Article 100 of the Criminal Code of 1973 provided for the automatic reduction of the term of imprisonment for work done in detention, except in two specific cases: when the prisoner escaped or attempted to escape, and when the prisoner misbehaved (which, according to Article 65 of the 1956 Prison Regulations, meant committing two or more serious or very serious breaches of discipline; see paragraph 26 above). Even in these two cases, remissions of sentence already allowed by the judge could not be taken away retroactively, as days of remission of sentence already granted were deemed to have been served and formed part of the prisoner's legally acquired rights (see paragraphs 26 and 45 above). The present case should be distinguished in this respect from *Kafkaris*, where the five years' remission of sentence granted to life prisoners at the beginning of their incarceration was conditional on their good conduct (see *Kafkaris*, cited above, §§ 16 and 65).

102. The Court also considers it significant that, although the Criminal Code of 1995 did away with remissions of sentence for work done in detention for people convicted in the future, its transitional provisions authorised prisoners convicted under the old Criminal Code of 1973 – like the applicant – to continue to enjoy the benefits of the scheme if it was to their advantage (see paragraph 30 above). Law no. 7/2003, on the other hand, introduced harsher conditions of release on licence, even for prisoners convicted before its entry into force (see paragraph 34 above). The Court infers from this that in opting, as a transitional measure, to maintain the effects of the rules concerning remissions of sentence for work done in detention and for the purposes of determining the most lenient criminal law, the Spanish legislature considered those rules to be part of substantive criminal law, that is to say of the provisions which affected the actual fixing of the sentence, not just its execution.

103. In the light of the foregoing the Grand Chamber considers, like the Chamber, that at the time when the applicant committed the offences that led to her prosecution and when the decision to combine the sentences and fix a maximum prison term was taken, the relevant Spanish law, taken as a whole, including the case-law, was formulated with sufficient precision to enable the applicant to discern, to a degree that was reasonable in the circumstances, the scope of the penalty imposed on her, regard being had to the maximum term of thirty years provided for in Article 70.2 of the Criminal Code of 1973 and the remissions of sentence for work done in

detention provided for in Article 100 of the same Code (contrast *Kafkaris*, cited above, § 150). The penalty imposed on the applicant thus amounted to a maximum of thirty years' imprisonment, and any remissions of sentence for work done in detention would be deducted from that maximum penalty.

(b) Whether the application of the "Parot doctrine" to the applicant altered only the means of execution of the penalty or its actual scope

104. The Court must now determine whether the application of the "Parot doctrine" to the applicant concerned only the manner of execution of the penalty imposed or, on the contrary, affected its scope. It notes that in its decisions of 19 May and 23 June 2008, the court that convicted the applicant – that is, the *Audiencia Nacional* – rejected the proposal by the prison authorities to set 2 July 2008 as the date of the applicant's final release, based on the old method of applying remissions of sentence (see paragraphs 17, 18 and 20 above). Relying on the "Parot doctrine" established in judgment no. 197/2006, given by the Supreme Court on 28 February 2006 – well after the offences had been committed, the sentences combined and a maximum term of imprisonment fixed – the *Audiencia Nacional* moved the date back to 27 June 2017 (see paragraph 20 above). The Court notes that in judgment no. 197/2006, the Supreme Court departed from the interpretation it had adopted in a previous judgment of 1994 (see paragraph 40 above). The majority of the Supreme Court considered that the new rule by which remissions of sentence for work done in detention were to be applied to each of the individual sentences – rather than to the thirty-year maximum term as previously – was more in conformity with the actual wording of the provisions of the 1973 Criminal Code, which distinguished between the "sentence" (*pena*) and the "term to be served" (*condena*).

105. While the Court readily accepts that the domestic courts are the best placed to interpret and apply domestic law, it reiterates that their interpretation must nevertheless be in keeping with the principle, embodied in Article 7 of the Convention, that only the law can define a crime and prescribe a penalty.

106. The Court also notes that the calculation of the remissions of sentence for work done in detention by the applicant – that is to say, the number of days worked in detention and the number of days' remission deductible from her sentence – was never in dispute. As determined by the prison authorities, the duration of these remissions of sentence – 3,282 days in all – was accepted by all the courts which handled the case. For example, in its decision applying the Supreme Court's "Parot doctrine", the *Audiencia Nacional* did not change the quantum of the remissions of sentence granted to the applicant for work done in detention. The decision did not concern whether she deserved the remissions, for example in view of her conduct or circumstances relating to the execution of her sentence. The aim of the

decision was to determine the element of the penalty to which the remissions of sentence should be applied.

107. The Court notes that the application of the "Parot doctrine" to the applicant's situation deprived of any useful effect the remissions of sentence for work done in detention to which she was entitled by law and in accordance with final decisions by the judges responsible for the execution of sentences. In other words, the applicant was initially sentenced to a number of lengthy terms of imprisonment, which were combined and limited to an effective term of thirty years, on which the remissions of sentence to which she was meant to be entitled had no effect whatsoever. It is significant that the Government have been unable to specify whether the remissions of sentence granted to the applicant for work done in detention have had – or will have – any effect at all on the duration of her incarceration.

108. That being so, although the Court agrees with the Government that arrangements for granting adjustments of sentence as such fall outside the scope of Article 7, it considers that the way in which the provisions of the Criminal Code of 1973 were applied in the present case went beyond mere prison policy.

109. Regard being had to the foregoing and to Spanish law in general, the Court considers that the recourse in the present case to the new approach to the application of remissions of sentence for work done in detention introduced by the "Parot doctrine" cannot be regarded as a measure relating solely to the execution of the penalty imposed on the applicant as the Government have argued. This measure taken by the court that convicted the applicant also led to the redefinition of the scope of the "penalty" imposed. As a result of the "Parot doctrine", the maximum term of thirty years' imprisonment ceased to be an independent sentence to which remissions of sentence for work done in detention were applied, and instead became a thirty-year sentence to which no such remissions would effectively be applied.

110. The measure in issue accordingly falls within the scope of the last sentence of Article 7 § 1 of the Convention.

(c) Whether the "Parot doctrine" was reasonably foreseeable

111. The Court notes that the *Audiencia Nacional* used the new method of application of remissions of sentence for work done in detention introduced by the "Parot doctrine" rather than the method in use at the time of the commission of the offences and the applicant's conviction, thus depriving her of any real prospect of benefiting from the remissions of sentence to which she was nevertheless entitled in accordance with the law.

112. This change in the system for applying remissions of sentence was the result of the Supreme Court's departure from previous case-law, as opposed to a change in legislation. That being so, it remains to be

determined whether the new interpretation of the relevant provisions of the Criminal Code of 1973, long after the offences were committed and the applicant convicted – and even after the decision of 30 November 2000 to combine the sentences and set a maximum term of imprisonment – was reasonably foreseeable for the applicant, that is to say whether it could be considered to reflect a perceptible line of case-law development (see *S.W. v. the United Kingdom*, § 43, and *C.R. v. the United Kingdom*, § 41, both cited above). To establish that, the Court must examine whether the applicant could have foreseen at the time of her conviction, and also when she was notified of the decision to combine the sentences and set a maximum term of imprisonment – if need be, after taking appropriate legal advice – that the penalty imposed might turn into thirty years of actual imprisonment, with no reduction for the remissions of sentence for work done in detention provided for in Article 100 of the Criminal Code of 1973.

In so doing it must have regard to the law applicable at the time, and in particular the judicial and administrative practice prior to the "Parot doctrine" introduced by the Supreme Court's judgment of 28 February 2006. The Court observes in this connection that the only relevant precedent cited in that judgment was a judgment of 8 March 1994 in which the Supreme Court had taken the opposite approach, namely that the maximum prison term of thirty years was a "new, independent sentence" to which all the remissions of sentence provided for by law were to be applied (see paragraph 36 above). In the Court's view, the fact that a single judgment does not serve as an authority under Spanish law (see paragraph 40 above) cannot be decisive. What is more, as the dissenting judges observed in the judgment of 28 February 2006, an agreement adopted by the plenary Supreme Court on 18 July 1996 had established that remissions of sentence granted under the Criminal Code of 1973 were to be taken into account when comparing the sentences to be served under the new and the old Criminal Codes respectively (see paragraphs 37 and 41 above). Following the entry into force of the Criminal Code of 1995, the Spanish courts were required to use this criterion, on a case-by-case basis, to determine which Criminal Code was the more lenient, taking into account the effects on sentencing of the system of remissions of sentence for work done in detention.

113. The Government themselves have admitted that it was the practice of the prison and judicial authorities prior to the "Parot doctrine" to apply remissions of sentence for work done in detention to the maximum term of thirty years' imprisonment, even though the first decision of the Supreme Court on the question was not delivered until 1994.

114. The Court also attaches importance to the fact that the Supreme Court did not depart from its case-law until 2006, ten years after the law concerned had been repealed. In acting thus the Supreme Court gave a new interpretation of the provisions of a law that was no longer in force, namely

the Criminal Code of 1973, which had been superseded by the Criminal Code of 1995. In addition, as indicated above (see paragraph 102), the transitional provisions of the Criminal Code of 1995 were intended to maintain the effects of the system of remissions of sentence for work done in detention set in place by the Criminal Code of 1973 in respect of people convicted under that Code – like the applicant – precisely so as to comply with the rules prohibiting retroactive application of the more stringent criminal law. However, the Supreme Court's new interpretation, which rendered ineffective any remissions of sentence already granted, led in practice to the applicant and other people in similar situations being deprived of the benefits of the remission system.

115. Moreover, the Court cannot accept the Government's argument that the Supreme Court's interpretation was foreseeable because it was more in keeping with the letter of the Criminal Code of 1973. The Court reiterates that its task is not to determine how the provisions of that Code should be interpreted in the domestic law, but rather to examine whether the new interpretation was reasonably foreseeable for the applicant under the "law" applicable at the material time. That "law" – in the substantive sense in which the term is used in the Convention, which includes unwritten law or case-law – had been applied consistently by the prison and judicial authorities for many years, until the "Parot doctrine" set a new course. Unlike the judicial interpretations involved in *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom* (both cited above), the departure from case-law in the present case did not amount to an interpretation of criminal law pursuing a perceptible line of case-law development.

116. Lastly, the Court is of the view that the criminal-policy considerations relied on by the Supreme Court cannot suffice to justify such a departure from case-law. While the Court accepts that the Supreme Court did not retroactively apply Law no. 7/2003 amending the Criminal Code of 1995, it is clear from the reasoning given by the Supreme Court that its aim was the same as that of the above-mentioned law, namely to guarantee the full and effective execution of the maximum legal term of imprisonment by people serving several long sentences (see paragraph 33 above). In this connection, while the Court accepts that the States are free to determine their own criminal policy, for example by increasing the penalties applicable to criminal offences (see *Achour*, cited above, § 44), they must comply with the requirements of Article 7 in doing so (*Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 75, ECHR 2013). On this point, the Court reiterates that Article 7 of the Convention unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage.

117. In the light of the foregoing, the Court considers that at the time when the applicant was convicted and at the time when she was notified of the decision to combine her sentences and set a maximum term of

imprisonment, there was no indication of any perceptible line of case-law development in keeping with the Supreme Court's judgment of 28 February 2006. The applicant therefore had no reason to believe that the Supreme Court would depart from its previous case-law and that the *Audiencia Nacional*, as a result, would apply the remissions of sentence granted to her not in relation to the maximum thirty-year term of imprisonment to be served, but successively to each of the sentences she had received. As the Court has noted above (see paragraphs 109 and 111), this departure from the case-law had the effect of modifying the scope of the penalty imposed, to the applicant's detriment.

118. It follows that there has been a violation of Article 7 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

119. The applicant alleged that, since 3 July 2008, she had been kept in detention in breach of the requirements of "lawfulness" and "a procedure prescribed by law". She relied on Article 5 of the Convention, the relevant parts of which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ..."

A. The Chamber judgment

120. In its judgment the Chamber stated, in the light of the considerations that had led it to find a violation of Article 7 of the Convention, that at the material time the applicant could not have foreseen to a reasonable degree that the effective duration of her term of imprisonment would be increased by almost nine years, and that following a departure from case-law a new method of applying remissions of sentence would be applied to her retroactively. The Chamber accordingly found that, since 3 July 2008, the applicant's detention had not been "lawful" and was therefore in violation of Article 5 § 1 of the Convention (see paragraph 75 of the judgment).

B. The parties' submissions to the Grand Chamber

1. The applicant

121. The applicant submitted that Article 5 § 1 of the Convention also enshrined requirements as to the quality of the law, which meant that a

domestic law authorising deprivation of liberty had to be sufficiently clear and foreseeable in its application. She further submitted that Article 5 applied to the right of a convicted person to early release where the legal provisions establishing the right did not make it conditional or discretionary but applicable to anyone who met the legal conditions of entitlement (see *Grava*, cited above, §§ 31-46), irrespective of whether the measure related to the sentence proper or to its execution for the purposes of Article 7. She argued that the extension of the sentence and/or of its effective duration had not been reasonably foreseeable and, in the alternative, that the substance of the penalty imposed and/or the manner of its execution and/or its effective duration had not been reasonably foreseeable either.

2. The Government

122. The Government submitted that the Chamber judgment had departed from the Court's case-law concerning Article 5 of the Convention, in particular the *Kafkaris* and *M. v. Germany* judgments cited above. They argued that in the present case there was a perfect causal link between the penalties imposed for the numerous serious crimes the applicant had committed and the length of time she had spent in prison. The judgments by which she had been convicted had stated that she would have to spend thirty years in prison, as had the decision of 2000 to combine the sentences and fix a maximum term of imprisonment and the decision of 2001 setting the date of the applicant's release at 27 June 2017.

C. The Court's assessment

1. Principles established by the Court's case-law

123. Sub-paragraphs (a) to (f) of Article 5 § 1 of the Convention contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *M. v. Germany*, cited above, § 86). Article 5 § 1 (a) permits "the lawful detention of a person after conviction by a competent court". Having regard to the French text, the word "conviction", for the purposes of Article 5 § 1 (a), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence (see *Guzzardi v. Italy*, 6 November 1980, § 100, Series A no. 39), and the imposition of a penalty or other measure involving deprivation of liberty (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50).

124. Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction". In short, there must be a sufficient

causal connection between the two (see *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; *Kafkaris*, cited above, § 117; and *M. v. Germany*, cited above, § 88). However, with the passage of time the link between the initial conviction and the extension of the deprivation of liberty gradually becomes less strong (see *Van Droogenbroeck*, cited above, § 40). The causal link required under sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release, or to redetain a person, was based on grounds that were inconsistent with the objectives of the sentencing court, or on an assessment that was unreasonable in terms of those objectives. Where that was the case a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5 (see *Weeks*, cited above, § 49, and *Grosskopf v. Germany*, no. 24478/03, § 44, 21 October 2010).

125. It is well established in the Court's case-law on Article 5 § 1 that all deprivation of liberty must not only be based on one of the exceptions listed in sub-paragraphs (a) to (f) but must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Kafkaris*, cited above, § 116, and *M. v. Germany*, cited above, § 90). The "quality of the law" implies that where a national law authorises a deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III). The standard of "lawfulness" set by the Convention requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III; *M. v. Germany*, cited above, § 90; and *Oshurko v. Ukraine*, no. 33108/05, § 98, 8 September 2011). Where deprivation of liberty is concerned, it is essential that the domestic law define clearly the conditions for detention (see *Creangă v. Romania* [GC], no. 29226/03, § 120, 23 February 2012).

126. Lastly, the Court reiterates that although Article 5 § 1 (a) of the Convention does not guarantee, in itself, a prisoner's right to early release, be it conditional or final (see *Kalan v. Turkey* (dec.), no. 73561/01, 2 October 2001, and *Çelikkaya v. Turkey* (dec.), no. 34026/03, 1 June 2010), the situation may differ when the competent authorities, having no discretionary power, are obliged to apply such a measure to any individual

who meets the conditions of entitlement laid down by law (see *Grava*, cited above, § 43; *Pilla v. Italy*, no. 64088/00, § 41, 2 March 2006; and *Şahin Karataş v. Turkey*, no. 16110/03, § 37, 17 June 2008).

2. Application of the above principles to the present case

127. The Court observes first of all that as the applicant rightly pointed out, the distinction made for the purposes of Article 7 of the Convention between the "penalty" and the "execution" of the penalty is not decisive in connection with Article 5 § 1 (a). Measures relating to the execution of a sentence or to its adjustment can affect the right to liberty protected by Article 5 § 1, as the actual duration of deprivation of liberty depends on their application, among other things (see, for example, *Grava*, cited above, §§ 45 and 51, and, concerning the transfer of prisoners between States, *Szabó v. Sweden* (dec.), no. 28578/03, ECHR 2006-VIII). While Article 7 applies to the "penalty" as imposed by the sentencing court, Article 5 applies to the resulting detention.

128. In the present case the Court has no doubt that the applicant was convicted by a competent court in accordance with a procedure prescribed by law, within the meaning of Article 5 § 1 (a) of the Convention. Indeed, the applicant did not dispute that her detention was legal until 2 July 2008, the date initially proposed by the prison authorities for her final release. The Court must therefore establish whether the applicant's continued detention after that date was "lawful" within the meaning of Article 5 § 1 of the Convention.

129. The Court notes that in eight different sets of proceedings the *Audiencia Nacional* found the applicant guilty of various offences linked to terrorist attacks. In application of the Criminal Code in force at the time when the offences were committed, the applicant was given prison sentences totalling over 3,000 years (see paragraphs 11-12 above). In most of those judgments, as well as in its decision of 30 November 2000 to combine the sentences and set a maximum term of imprisonment, the *Audiencia Nacional* indicated that the applicant was to serve a maximum term of thirty years' imprisonment in accordance with Article 70.2 of the Criminal Code of 1973 (see paragraphs 11 and 14 above). The Court notes that the applicant's detention has not yet attained that maximum term. There is clearly a causal link between the applicant's convictions and her continuing detention after 2 July 2008, which resulted respectively from the guilty verdicts and the maximum thirty-year term of imprisonment fixed on 30 November 2000 (see, *mutatis mutandis*, *Kafkaris*, § 120).

130. However, the Court must examine whether the "law" authorising the applicant's continuing detention beyond 2 July 2008 was sufficiently foreseeable in its application. Compliance with the foreseeability requirement must be examined with regard to the "law" in force at the time of the initial conviction and throughout the subsequent period of detention.

In the light of the considerations that led it to find a violation of Article 7 of the Convention, the Court considers that at the time when the applicant was convicted, when she worked in detention and when she was notified of the decision to combine the sentences and set a maximum term of imprisonment, she could not have foreseen to a reasonable degree that the method used to apply remissions of sentence for work done in detention would change as a result of a departure from case-law by the Supreme Court in 2006, and that the new approach would be applied to her.

131. The Court notes that the application of the departure from case-law to the applicant's situation effectively delayed the date of her release by almost nine years. She has therefore served a longer term of imprisonment than she should have served under the domestic legislation in force at the time of her conviction, taking into account the remissions of sentence she had already been granted in conformity with the law (see, *mutatis mutandis*, *Grava*, cited above, § 45).

132. The Court concludes that since 3 July 2008 the applicant's detention has not been "lawful", in violation of Article 5 § 1 of the Convention.

III. ARTICLE 46 OF THE CONVENTION

133. The relevant parts of Article 46 of the Convention read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> ..."

A. The Chamber judgment

134. Having regard to the particular circumstances of the case and to the urgent need to put an end to the violation of Article 7 and Article 5 § 1 of the Convention, the Chamber considered it incumbent on the respondent State to ensure that the applicant was released at the earliest possible date (see paragraph 83 of the judgment).

B. The parties' submissions to the Grand Chamber

1. The applicant

135. The applicant argued that the fact that the Court had never made use in a similar case of its exceptional power to indicate individual measures was irrelevant. She submitted that the Court had the power to indicate the measures to be taken and that when the nature of the violation found did not

leave "any real choice as to the measures required to remedy it", it could decide to indicate only one such measure. She also criticised the Government for not having indicated which remedies other than her release were available should the Court find violations of Articles 5 and 7 of the Convention.

2. The Government

136. The Government submitted that in similar cases concerning the retroactive application of legislative changes resulting in the extension of a convicted person's detention the Court had never used its exceptional power to indicate individual measures for the execution of its judgment (they referred to *M. v. Germany*, cited above). In this connection they pointed out that, although it had found a violation of Article 7 in *Kafkaris* (cited above) because the legislation failed to meet the requisite standard, the Court had not indicated any measure concerning the release of the applicant, who was still in prison when the judgment was delivered (the Government also referred to *Kafkaris v. Cyprus* (dec.), no. 9644/09, 21 June 2011).

C. The Court's assessment

137. By virtue of Article 46 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. This means that when the Court finds a violation, the respondent State is under a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see, among many other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 85, ECHR 2009; and *Scoppola (no. 2)*, cited above, § 147).

138. It is true that in principle the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta*, cited above, § 249). However, in certain particular situations, with a view to assisting the respondent State in fulfilling its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation that gave rise to the finding of a violation (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V, and *Stanev v. Bulgaria* [GC],

no. 36760/06, §§ 255-58, ECHR 2012). In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see *Assanidze v. Georgia* [GC], no. 71503/01, §§ 202-03, ECHR 2004-II; *Aleksanyan v. Russia*, no. 46468/06, §§ 239-40, 22 December 2008; and *Fatullayev v. Azerbaijan*, no. 40984/07, §§ 176-77, 22 April 2010).

139. The Grand Chamber agrees with the Chamber's finding and considers that the present case belongs to this last-mentioned category. Having regard to the particular circumstances of the case and to the urgent need to put an end to the violations of the Convention it has found, it considers it incumbent on the respondent State to ensure that the applicant is released at the earliest possible date.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

140. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

141. The applicant sought compensation for the non-pecuniary damage allegedly suffered and also the reimbursement of the costs and expenses incurred. The Government contested the claim in respect of non-pecuniary damage.

A. The Chamber judgment

142. In its judgment the Chamber awarded the applicant 30,000 euros (EUR) in respect of non-pecuniary damage. It also awarded her EUR 1,500 for costs and expenses incurred in the proceedings before it.

B. The parties' submissions to the Grand Chamber

1. The applicant

143. The applicant claimed EUR 60,000 for the non-pecuniary damage she had allegedly sustained, and the reimbursement of the costs and expenses incurred in the proceedings before the Grand Chamber, in addition to those already awarded by the Chamber. She submitted no receipts for the costs and expenses incurred in the proceedings before the Grand Chamber.

2. The Government

144. The Government submitted that an award of compensation by the Court to a person convicted of acts as murderous as those committed by the applicant – who had been found guilty in judicial proceedings that met all the requirements of a fair trial – would be difficult to understand. They argued that in the *Kafkaris* judgment (cited above), "having regard to all the circumstances of the case", the Court had considered that the finding of a violation of Article 7 of the Convention constituted in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered.

C. The Court's assessment

1. Non-pecuniary damage

145. The Court accepts that in the *Kafkaris* judgment it considered that a finding of a violation constituted in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered. In that judgment, however, it had found no violation of Article 5 § 1, and its finding of a violation of Article 7 concerned only the quality of the law. The present case is different, the Court having found that the applicant's continued detention after 2 July 2008 is in breach of Article 5 § 1, and that she has had to serve a heavier penalty than the one that was imposed, in disregard of Article 7 of the Convention (see, *mutatis mutandis*, *M. v. Germany*, cited above, § 141). This must have caused the applicant non-pecuniary damage which cannot be compensated solely by these findings of violations.

146. Having regard to all the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 30,000 under this head.

2. Costs and expenses

147. According to the Court's case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

148. The Grand Chamber notes that the applicant was awarded EUR 1,500 for costs and expenses incurred in the proceedings before the Chamber. As she has submitted no documentary evidence of the costs and expenses incurred in the proceedings before the Grand Chamber (compare *Tănase v. Moldova* [GC], no. 7/08, § 193, ECHR 2010), she should be awarded EUR 1,500 in respect of all costs and expenses.

3. Default interest

149. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, by fifteen votes to two, that there has been a violation of Article 7 of the Convention;

2. *Holds*, unanimously, that since 3 July 2008 the applicant's detention has not been "lawful", in violation of Article 5 § 1 of the Convention;

3. *Holds*, by sixteen votes to one, that the respondent State is to ensure that the applicant is released at the earliest possible date;

4. *Holds*, by ten votes to seven, that the respondent State is to pay the applicant, within three months, EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

5. *Holds*, unanimously, that the respondent State is to pay the applicant, within three months, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

6. *Holds*, unanimously, that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the amounts indicated in points 4 and 5 above at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 October 2013.

Michael O'Boyle
Deputy Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Nicolaou;

(b) Joint partly dissenting opinion of Judges Villiger, Steiner, Power-Forde, Lemmens and Griţco;

(c) Joint partly dissenting opinion of Judges Mahoney and Vehabović;

(d) Partly dissenting opinion of Judge Mahoney.

D.S.
M.O'B.

CONCURRING OPINION OF JUDGE NICOLAOU

1. I have voted with the majority on all aspects of the case but, in so far as the finding of a violation of Article 7 of the Convention is concerned, I rely on reasoning which is not identical to that of the majority. This difference also affects the manner of coming to a conclusion on Article 5 § 1.

2. What I regard as the essential elements that bear on the Article 7 issue may be shortly stated. In eight different sets of criminal proceedings, concluded between 18 December 1988 and 8 May 1990, the applicant was convicted of a multitude of offences, including some of the most grave, committed in the context of terrorist activity during the period 1982-87. The applicant was sentenced to various terms of imprisonment, receiving a considerable number of thirty-year terms for murder. The total length of imprisonment would have exceeded 3,000 years if the sentences were to have run consecutively.

3. National systems deal, each in its own way, with the problem posed by a series of prison sentences that may be imposed either in the same or in different proceedings. It is obviously necessary for a decision to be taken on what such sentences entail. Should they be consecutive or concurrent and should there be a ceiling? In this regard rules must take into account the public-interest purpose of criminal-law enforcement, including the protection of life, while at the same time allowing for a fair and humane approach. Further, where the law provides for life sentences, rules are also expected to be in place for achieving a balance between the interests involved.

4. In whichever way a system is constructed, both principle and the Court's case-law require that a distinction be maintained between, on the one hand, provisions concerning the penalty allowed by the law pre-dating the offences, seen always in the light of any subsequent more lenient law since the actual sentence cannot, consistently with Article 7, exceed the limit set by the *lex mitior* (see *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, 17 September 2009); and, on the other hand, provisions which regulate the subsequent manner of enforcement or execution of the sentence, principally those relating to remission. As has been said, the dividing line may not always be clear cut (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 142, ECHR 2008). When that is the case, it is all the more necessary to specify where that line is to be drawn and to explain why. There is also another distinction which needs to be made, but I shall come to that later.

5. At the time when the offences were committed, the position was governed by the Criminal Code of 1973, Article 70.2 of which was viewed by the courts as providing, firstly, that whatever the aggregate of the years of imprisonment imposed might be, it would be converted to a maximum of only thirty years; and, secondly, the figure so fixed would then form the sole

basis for applying the law on remission of sentence. According to Article 100 of that Code (as amended by Law no. 8/1983), a convicted person was entitled to one day's remission for every two days of work in detention; and although this was subject to the approval of the judge supervising the execution of sentence, approval was certain in the absence of fault on the prisoner's part. In the present case, in each of the last five sets of criminal proceedings, the *Audiencia Nacional*, as the trial court, directed its attention to how the various sentences should be approached and, following established judicial practice, concluded that the sentence was finally to be one of thirty years' imprisonment. When all eight sets of proceedings had been concluded, the *Audiencia Nacional*, acting under the power given to it by section 988 of the Criminal Procedure Act, examined, in the light of the totality of the sentences, what the final unified sentence should be under the provisions of Article 70.2 of the 1973 Criminal Code. By a decision of 30 November 2000 it fixed the maximum term of imprisonment at thirty years, to which, *inter alia*, the rules on remission of sentence based on work done in prison would apply.

6. It is germane to note that prior to the time when the applicant's maximum term of imprisonment was finally fixed, the Supreme Court itself had stated, in an order dated 25 May 1990, that the competent court for applying Article 70.2 of the Criminal Code of 1973, in pursuance of section 988 of the Criminal Procedure Act, was the trial court (the *Audiencia Nacional*). It explained that this was so because the matter concerned the fixing of the sentence and not its execution, responsibility for which lay with another judge specifically assigned to that task. The high-water mark was reached when the existing judicial practice was upheld by the Supreme Court in a judgment handed down on 8 March 1994. The Supreme Court affirmed, after having specifically reviewed the matter in question, that the maximum thirty-year term provided for by Article 70.2 of the Criminal Code was a "new sentence – resulting from but independent of the others – to which the sentence adjustments (*beneficios*) provided for by the law, such as release on licence and remission of sentence, apply"; and it pointed out that this understanding of the law was also reflected in Article 59 of the Prison Regulations of 1981. The judicial conclusion that any sentence adjustments (*beneficios*) should take as a starting-point the "new sentence" meant, of course, that the most severe penalty a convicted person could face was imprisonment for thirty years minus any possible remission. In two subsequent judgments, one delivered on 15 September 2005 and the other on 14 October 2005, although the Supreme Court did not specifically revisit the point, it reiterated, using essentially the same language in both, that the length of imprisonment arrived at by converting the sentences originally imposed constituted a new and independent sentence resulting from them and that sentence adjustments (*beneficios*),

provided for by the law, were to be applied to the new sentence, not to the original ones.

7. The matters in issue in the present case make it unnecessary to comment either on the scope and adequacy of the relevant legal provisions or on the view taken by the judicial authorities as to how they should be interpreted. What is significant is that, for persons within the State's jurisdiction, the criminal law was authoritatively defined by a judicial decision whose temporal effect reached back in time to when Article 70.2 of the Criminal Code of 1973 came into force. The Supreme Court judgment of 8 March 1994 affirmed the interpretation that had already been given to that provision and the resulting clear and constant judicial practice which pre-dates the commission of the offences in the present case. There was never any hint of uncertainty. Whatever the number of infringements of the criminal law and whatever their gravity and the respective penalties provided for in respect of each, the real penalty to be incurred would in no case exceed a maximum imprisonment of thirty years, this being the uppermost limit of the final new and independent sentence, to which the remission system would then be applied in the execution of the sentence, thereby leading to a reduction of that limit as well. This is the crucial point in the present case. Any subsequent change that introduced retrospectively a higher penalty, whether by statute or by case-law, could not but fall foul of the protection afforded by Article 7 of the Convention.

8. In fact, in the present case, at a certain point in time the applicant was credited with an amount of work which, if the law had remained unaltered, would have required her release from prison well before the end of the thirty-year term. But the situation had by then changed. Statute law introduced stricter provisions for serious crime; and then came the judicial reversal of the previous case-law already described. The new Criminal Code of 1995, with effect from 1996, provided for higher conversion penalties and abolished the remission of sentence for work done in prison. However, it also contained transitional provisions predicated on the most lenient law for persons already convicted under the Criminal Code of 1973. More stringent provisions were subsequently added by Law no.7/2003, intended to ensure that in the most serious cases the prisoner served the whole of the term fixed as a result of converting the sentences originally imposed. A short time later, in the context of the provisions of the Criminal Code of 1973 on remission entitlement that were still applicable, the Supreme Court adopted a new interpretative approach regarding the meaning and purpose of the sentence that resulted from conversion. By a judgment handed down on 28 February 2006, it reversed the previous case-law on the interpretation of Article 70.2 of the Criminal Code of 1973, by reading that provision as meaning that "the thirty-year limit does not become a new sentence, distinct from those successively imposed on the convict, or another sentence

resulting from all the previous ones, but is the maximum term of imprisonment [*máximo de cumplimiento*] a prisoner should serve in prison".

9. Thus, the Supreme Court reverted to the several sentences which had originally been imposed and declared their continuing significance. Consequently, the sentence which resulted from Article 70.2 was no longer the real maximum penalty for the totality of the offences but merely the limit of the period to be actually served when the remission system was applied successively to the original sentences, as part of the manner of execution. In enunciating this new judicial position – the "Parot doctrine" – the Supreme Court felt unfettered by previous authority. It gave detailed reasons for the new interpretation. It derived support from, *inter alia*, the wording of the relevant provisions of the Criminal Code of 1973, paying particular attention to the term *pena* (the sentence imposed) and *condena* (the sentence to be served), and it drew conclusions on the basis of the difference between them. As I have already stated, this Court should refrain from expressing anything resembling a choice between domestic interpretations. It is in fact quite irrelevant whether that interpretation was sound or, in any event, warranted. It is also irrelevant whether the Supreme Court was, as it explained, free to depart from its previous judgment of 8 March 1994 and justified in doing so.

10. In my opinion there are two relevant questions to be asked from the Convention point of view. The first is whether there was, at the time of the commission of the offences, a judicial approach creating a firm and constant practice that gave statute law a meaning that was both tangible and certain. The answer to this must be in the affirmative, particularly when the matter is seen in the light of the interpretation given, at a certain point in time, by the Supreme Court in its judgment of 8 March 1994. The Supreme Court's new interpretation of 28 February 2006 was quite obviously not the result of a gradual and foreseeable clarification of case-law in the sense of *S.W. v. the United Kingdom* (22 November 1995, Series A no. 335-B), *C.R. v. the United Kingdom* (22 November 1995, Series A no. 335–C), and later case-law (cited in paragraph 93 of the present judgment). The second question is whether it was, in any event, possible to change that view of the law with retroactive effect. The former view of the law could, indeed, be changed; but the retroactive operation of the judgment, a feature also found in other jurisdictions, is not compatible with Article 7 of the Convention, in the same way that it would not be compatible in the case of statutory retroactivity as, for example, in *Welch v. the United Kingdom* (9 February 1995, Series A no. 307-A).

11. I have so far been addressing the Article 7 issue, which, in my view, turns entirely on what can be taken to have been the real maximum penalty to which the applicant was liable at the time the offences were committed. I have tried to explain why, in terms of Article 7 § 1, the penalty "imposed" was to be equated with the converted maximum sentence under Article 70.2

of the Criminal Code of 1973. The analysis of this matter focuses on the way the sentence in question was defined and, although the object of arriving at such a definition concerned the effect that it would have on how the remission system was applied, that system did not itself acquire any intrinsic Article 7 significance. This is not to say, however, that the judicial change did not have an impact on the applicant's rights. In fact it did. But only on the applicant's Article 5 § 1 rights.

12. It is at this point that the next distinction becomes relevant. Provisions concerning the manner of enforcement or execution of sentences must be distinguished not only from those which bear on Article 7 but also from those which bear on Article 5 § 1. Changes within the general prison regime, that is to say those that affect the manner in which the sentence is executed, may adversely affect the person in detention, as for example in *Hogben v. the United Kingdom*, (no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports 46, p. 231), and *Uttley v. the United Kingdom* ((dec.), no. 36946/03, 29 November 2005), but they will not be inconsistent with either Article 7 or Article 5 § 1. There may nevertheless be changes which go beyond that. A problem will then arise under one or both of those Articles. A change subsequent to the passing of a final lawful sentence – the one effectively imposed – does not, in my view, raise an Article 7 issue. It can, however, call into question the Article 5 § 1 lawfulness of detention in respect of a given period.

13. In the present case, for the reasons I have stated, the retroactive change involving the application of the remission system did not, in itself, contravene Article 7. It was, however, incompatible with Article 5 § 1, for it deprived the applicant of an acquired right to earlier release. The majority in this case attribute importance to the lack of foreseeability at the time the applicant was convicted and at the time the applicant was notified of the change (see paragraphs 112 and 117 of the judgment) and they make that an integral part of the reasoning by which they arrive at the conclusion that there has been a violation of Article 7. I am unable to follow that reasoning. In my respectful opinion, the change in the application of the remission system after the Article 70.2 sentence had been fixed goes only to the Article 5 §1 issue; what is relevant in so far as Article 7 is concerned is, subject to the *lex mitior* rule, the change in the real maximum penalty which existed at the time the offences were committed. As to the rest, I gratefully adopt the majority's reasoning on Article 5 § 1.

JOINT PARTLY DISSENTING OPINION OF JUDGES VILLIGER, STEINER, POWER-FORDE, LEMMENS AND GRIŢCO

We voted against the majority in its award for non-pecuniary damage to the applicant. We acknowledge that, in principle, the Court's general practice is to award damages in cases where violations of human rights have been found. This is particularly so where the right to liberty has been breached (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 253, ECHR 2009).

The present case, however, is distinguishable from *A. and Others v. the United Kingdom* in which the Court found that it had not been established that any of the applicants had engaged, or attempted to engage, in any act of terrorist violence. The applicant, in the instant case, stands convicted of many serious terrorist offences that involved the murders and attempted murders of and the infliction of grievous bodily harm upon numerous individuals. Against that background, we prefer to adopt the approach of the Court in *McCann and Others v. the United Kingdom* (27 September 1995, § 219*,* Series A no. 324). Consequently, having regard to the special circumstances pertaining to the context of this case, we do not consider it appropriate to make an award for non-pecuniary or moral damage. In our view, the Court's finding of violations taken together with the measure indicated pursuant to Article 46 constitute sufficient just satisfaction.

JOINT PARTLY DISSENTING OPINION OF JUDGES MAHONEY AND VEHABOVIĆ

As concerns Article 7

We are unable to share the views of the majority of the Grand Chamber that the facts complained of by the applicant disclose a violation of Article 7 § 1, which provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The specific issue is whether the second sentence of this provision was breached as a result of the application in the applicant's case, some years after her conviction and sentence for various extremely serious crimes of violence, of the so-called "Parot doctrine", whereby the method used to calculate reductions of sentence obtained through work and studies accomplished in prison was changed, so as to deprive her in practice of her hitherto existing expectation of early release on the basis of such reductions in sentence. Our disagreement goes to the narrow point whether the measure complained of by the applicant gave rise to a modified "penalty" within the meaning of the second sentence of Article 7 § 1, so as to attract the protection of the safeguard afforded.

As the judgment states (at paragraph 83), the Convention case-law has consistently drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty".

In the early case of *Hogben v. the United Kingdom* (no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports 46, p. 231), the complainant was a convicted prisoner who, as a result of a change in the policy on release on parole, had to serve a substantially longer time in prison than he would otherwise have done. In its decision declaring the application inadmissible, the European Commission of Human Rights reasoned as follows:

> "The Commission recalls that the applicant was sentenced to life imprisonment in 1969 for committing a murder in the course of a robbery. It is clear that the penalty for this offence at the time it was committed was life imprisonment and thus no issue under Article 7 arises in this respect.
>
> Furthermore, in the opinion of the Commission, the 'penalty' for purposes of Article 7 § 1 must be considered to be that of life imprisonment. Nevertheless it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprisonment. Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of

> the sentence as opposed to the 'penalty' which remains that of life imprisonment. Accordingly, it cannot be said that the 'penalty' imposed is a heavier one than that imposed by the trial judge."

It is difficult to discern the difference in principle between the circumstances of that case and those of the present case, where the sentence ultimately imposed on the applicant for the commission of a series of crimes in Spain remains the same, namely thirty years' imprisonment, although in the meantime the date of eligibility for release has in practice changed to her disadvantage.

Similarly, in *Uttley v. the United Kingdom* ((dec.), no. 36946/03, 29 November 2005), the essence of the applicant's complaint was that a change in the regime for early release, brought about by intervening legislation (enacted in 1991), had the effect of imposing on him (when he was convicted in 1995) a further or additional "penalty" over and above the "penalty" that was applicable at the time when he had committed the offences (prior to 1983). Relying on *Hogben* (cited above) as well as *Grava v. Italy* (no. 43522/98, §§ 44-45, 10 July 2003), the Court held:

> "Although... the licence conditions imposed on the applicant on his release after eight years can be considered as 'onerous' in the sense that they inevitably limited his freedom of action, they did not form part of the 'penalty' within the meaning of Article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed.
>
> Accordingly, the application to the applicant of the post-1991 ... regime for early release was not part of the 'penalty' imposed on him, with the result that no comparison is necessary between the early-release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no 'heavier' penalty was applied than the one applicable when the offences were committed."

This line of reasoning was then confirmed by the Grand Chamber in *Kafkaris v. Cyprus* ([GC], no. 21906/04, ECHR 2008), where, as paragraph 84 of the present judgment puts it, changes to the prison legislation had deprived prisoners serving life sentences – including the applicant – of the right to remissions of sentence. The Grand Chamber stated (at § 151):

> "[A]s regards the fact that as a consequence of the change in the prison law ..., the applicant, as a life prisoner, no longer has a right to have his sentence remitted, the Court notes that this matter relates to the execution of the sentence as opposed to the 'penalty' imposed on him, which remains that of life imprisonment. Although the changes in the prison legislation and in the conditions of release may have rendered the applicant's imprisonment effectively harsher, these changes cannot be construed as imposing a heavier 'penalty' than that imposed by the trial court... In this connection, the Court would reiterate that issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the member States in determining their own criminal policy ... Accordingly, there has not been a violation of Article 7 of the Convention in this regard ..."

We see no cause to depart from this reasoning in the present case, especially given that in both *Uttley* and *Kafkaris* (both cited above) the "right" to obtain a remission of sentence was removed completely. We do not see it as being material for the purposes of the applicability of Article 7 that in the present case the removal of the "right" of remission was effected by a changed judicial interpretation of the applicable Spanish legislation rather than by an amendment of the legislation itself, as in *Kafkaris* and *Uttley*.

We naturally accept that the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" (see paragraph 81 of the present judgment); and that the term "imposed" in the second sentence of Article 7 § 1 cannot be interpreted as necessarily excluding from the scope of Article 7 § 1 measures adopted in regard to the prisoner after the pronouncement of the sentence (see paragraph 88 of the present judgment).

We also well understand the humanitarian thinking behind the reasoning of the majority and recognise that the circumstances of the present case are quite extraordinary and, indeed, disquieting from the point of view of the fairness of treatment of prisoners, especially those who have the prospect of spending a large part of their life incarcerated.

However, despite these extraordinary circumstances, we are not able to agree with the majority that the dividing line between the "penalty" imposed on the applicant for the commission of criminal offences (to which Article 7 of the Convention is applicable) and the measures subsequently taken for regulating the execution of her sentence (which, for their part, do not attract the application of Article 7) was crossed in the present case as a consequence of the application to her of the so-called "Parot doctrine" in the calculation of her release date. While it is undeniable that the dividing line between the two concepts (of a penalty and of a measure regulating the serving of the sentence) is not always easy to draw, this does not justify blurring the dividing line out of existence, even in the presence, as in the instant case, of serious issues as to compliance with legal certainty and respect of legitimate expectations in relation to measures regulating the serving of the sentence. Our difference of opinion with the majority is thus as to the side of the dividing line on which the impugned decision in the instant case falls.

In order to arrive at its conclusion regarding the applicability of the second sentence of Article 7 § 1 to the measure complained of, the majority has taken up the distinction between "the scope of the penalty" and "the manner of its execution", a distinction drawn in the *Kafkaris* judgment in relation to the lack of precision of the relevant Cypriot law applicable at the time of the commission of the offence (see paragraphs 81 et seq. of the present judgment).

As a matter of principle, the judgment appears to take a subsequent detrimental change in "the scope of the penalty" as being the determining factor for the application of Article 7. In the present case, "the scope of the penalty" imposed on the applicant is said to have been modified to her detriment by the changed judicial interpretation of the legislative provision on reduction of sentence on account of work done in prison (see paragraphs 109, 111 and 117 of the present judgment).

Even accepting recourse to the notion of the "scope of the penalty", which is presumably meant to be more extensive than that of a "penalty", we are not, however, convinced by the reasons given by the majority for being able to distinguish the circumstances of the present case from those of earlier cases, so as to take the present case outside the logic and rationale of the Court's well-settled case-law.

We do not read the present judgment as saying that the decisive factor for the application of Article 7 is the mere fact of prolonging, by means of changes to the remission system or parole system, the time that the prisoner could expect at the outset of his or her sentence to spend in prison. That is to say, prolonging "the penalty" in this sense. That would mean that any unforeseeable change in the remission or parole system, whether accomplished by a legislative or regulatory text, by executive practice or by judicial case-law, would be contrary to Article 7, because the actual time of expected incarceration had been increased.

The majority does, however, rely on the fact that "the applicant had every reason to believe that the penalty imposed was the thirty-year maximum sentence, from which any remissions of sentence for work done in detention would be deducted"; and that she "had no reason to believe that ... the *Audiencia Nacional* ... would apply the remissions of sentence granted to her not in relation to the maximum thirty-year term of imprisonment to be served, but successively to each of the sentences she had received" (see paragraphs 100 and 117 of the present judgment). The argument is that the (jurisprudential) change effected to the modalities of early release (in the instant case, the change in the method for calculating reductions of sentence for work done in prison) was such as to make the "penalty" imposed on the applicant "heavier". In effect, as paragraph 103 *in fine* of the present judgment would seem to suggest, such reasoning amounts to incorporating into the definition of the "penalty" the existence and modalities of a given remission system at the time of sentencing, as an element of the "penalty" determining its potential length.

It is the case that persons convicted of criminal offences and sentenced to imprisonment will take the sentence and the relevant remission or parole scheme together at the outset of their sentence, in the sense of making calculations as to whether, how and when they are likely to be released from prison and of planning their conduct in prison accordingly. In ordinary

language, they will take the sentence imposed and the possibilities and modalities of remission, parole or early release as a "packet".

It is, however, quite clear from the Court's settled case-law that Contracting States may, after the commission of the offence or even after sentencing, alter the prison regime in so far as it concerns the manner of serving the sentence, so as to make changes that have a negative impact on the early release of prisoners and thus on the length of time spent in prison, without entering into the scope of the specific protection afforded by Article 7 of the Convention. As shown by *Kafkaris*, such changes may include amending the legislation so as to remove completely for a given category of convicted prisoners any "right" to benefit from remission of sentence, as occurred in practice in relation to the present applicant as a result of the application to her of the "Parot doctrine". Yet the present judgment does not purport to overrule or depart from that well-settled case-law.

Furthermore, although this is another consideration relied on by the majority (see paragraph 101 of the present judgment), we are not convinced that the difference between an automatic entitlement under the law to remission days on a prisoner's satisfying certain conditions (such as work performed in prison), as in the present case, and discretionary release on parole for good behaviour is in itself decisive. There is a margin of appreciation available to the Contracting States with regard to how to regulate the prison system, in particular as regards the serving of sentences. The States may opt for rewards for good behaviour, or for measures facilitating reinsertion into society, or for schemes offering automatic credits for early release, and so on. It is up to the Contracting States whether they make the system chosen automatic or discretionary, executive or judicial in its operation, or a mixture. We do not understand how framing a condition for earlier release as an automatic consequence of a certain event, rather than as being discretionary or dependent on an assessment of conduct in prison or dangerousness, is in itself a factor capable of rendering Article 7 applicable.

Our analysis, on the basis of the Court's existing case-law, is that the contested decision in the present case represents a measure affecting the serving of the sentence (how and when early release can be obtained) and not the "penalty" as such – so that although issues as to the fair treatment of prisoners, notably under the head of the principles of legal certainty and legitimate expectations, may be raised, the application of Article 7 and the very specific guarantee that it sets out are not brought into play.

It is true that the Supreme Court, by adopting the "Parot doctrine", imposed a new method for calculating the reduction of prison sentences and overturned well-established case-law, thereby ultimately causing the time spent by the applicant in prison to be considerably extended; but this negative consequence is not the mischief that Article 7 is directed towards

preventing. Although the result is that her "imprisonment is effectively harsher" (to quote from *Hogben*, cited above) than if she had benefited from the previously existing interpretative case-law and practice regarding implementation of the relevant 1973 legal provision, the detriment suffered by her relates to the execution of the sentence as opposed to the "penalty", which remains one of thirty years' imprisonment. Accordingly, it cannot be said that the "penalty" has become heavier than it was when initially imposed. The impugned decision concerns exclusively the way in which the lawfully prescribed sentence is to be executed; it does not raise issues under the principle *nulla poena sine lege*, the basic principle at the core of Article 7. The applicable criminal legislation remains the same, as does the prison sentence imposed, even though, as a result of the Spanish courts correcting what they deemed to be a mistaken interpretation and, thus, a mistaken implementation of that criminal legislation over previous years, a different method for calculating the reduction of the applicant's prison sentence was applied. It is in this crucial respect that the circumstances of the present case are clearly distinguishable from those of other cases that have been held by the Court to come within the ambit of Article 7.

In short, we do not think that the applicant's "penalty", within the meaning of Article 7, was made heavier by the impugned decision, despite the latter's very significant impact on the time that she has to spend in prison before the expiry of the thirty-year sentence of imprisonment imposed on her. The second sentence of Article 7 § 1 is not applicable to the measures concerning the execution of the sentence and the method by which days of remission are to be calculated or allocated. Our concern is that the majority appear to have stretched the concept of a "penalty", even understood as being "the scope of a penalty", beyond its natural and legitimate meaning in order to bring a perceived instance of unfair treatment of convicted prisoners within the ambit of Article 7.

As concerns Article 5

Whether the facts complained of fall within the scope of Article 5 and, if so, whether the requirements of that Article were met is another question, and on that we agree with the reasoning of the judgment.

As concerns Article 41

As to whether, in the particular circumstances of this case, it is "necessary" – this being the condition imposed by Article 41 of the Convention for the award of just satisfaction – to afford the applicant any financial compensation by way of just satisfaction for the violations of the Convention found by the Court, we would respectfully agree with the

conclusion and reasoning expressed by Judges Villiger, Steiner, Power-Forde, Lemmens and Griţco in their separate opinion.

PARTLY DISSENTING OPINION OF JUDGE MAHONEY

Having voted against a violation of Article 7, I felt it appropriate also to vote against point 3 of the operative provisions, making a consequential order directing the respondent State to release the applicant at the earliest possible date. This was because I did not consider such an order to be warranted on the sole basis of the finding of a violation of Article 5 § 1 of the Convention on the ground of the defective "quality" of the applicable Spanish law.

In any event, the present case is not at all comparable to earlier cases such as *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 202-03, ECHR 2004-II) and *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, §§ 488-90, ECHR 2004-VII), where the deprivation of liberty found by the Court was not merely contrary to procedural safeguards laid down by the Convention but was the product of a flagrant denial of justice, wholly arbitrary and offensive to the rule of law. Nor, in my view, can any support be derived from *Aleksanyan v. Russia* (no. 46468/06, §§ 239-40, 22 December 2008) or *Fatullayev v. Azerbaijan* (no. 40984/07, §§ 175-77, 22 April 2010), cited in the present judgment (at paragraph 138 *in fine*), where the detention in question was characterised as "unacceptable", in the first case as "not serv[ing] any meaningful purpose under Article 5" and in the second as being the consequence of criminal convictions in relation to which "there existed no justification for imposing prison sentences".