



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

THIRD SECTION

CASE OF SAQUETTI IGLESIAS v. SPAIN

(Application no. 50514/13)

JUDGMENT

Art 2 P7 • Right of appeal in criminal matters • Heavy customs fine imposed without proportionality assessment and not open to challenge before “higher tribunal” • Whether penalty “criminal” under *Engel* criteria • Severity preventing offence from being regarded as minor, even where not punishable by imprisonment • Amount of fine almost equalling full sum which applicant had failed to declare on leaving country (over EUR 150,000) • “Highest tribunal” to be defined by reference to general hierarchy of courts, not by reference to claim value threshold for appeal • Individual application for constitutional relief not equatable to appeal, in view of the former’s limited purpose • No proportionality assessment carried out by sole court to hear applicant’s case

STRASBOURG

30 June 2020

FINAL

30/09/2020

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Saquetti Iglesias v. Spain,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President*,

Helen Keller,

Alena Poláčková,

María Elósegui,

Gilberto Felici,

Erik Wennerström,

Lorraine Schembri Orland, *judges*,

and Milan Blaško, *Section Registrar*,

Having deliberated in private on 3 June 2020,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 50514/13) 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, Mr Martín Saquetti Iglesias (“the applicant”), on 29 July 2013.

2. The applicant was represented by Mr J. E. Raschetti Rocca, a lawyer practising in Madrid. The Spanish Government (“the Government”) were represented by their Agent, Mr R.-A. León Caveró, who is a government legal officer and head of the human rights legal service at the Ministry of Justice.

3. On 13 June 2014 and 2 October 2019 the Government were given notice of the complaint under Article 2 § 1 of Protocol No. 7 to the Convention and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

FACTS

I. CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1948 and lives in Madrid and Buenos Aires.

5. On 20 March 2011 the applicant underwent a security screening at Terminal 4, International Departures, of Madrid-Barajas Airport as he was preparing to board a flight to Buenos Aires, Argentina, where he intended to take up residence. Civil Guard officers working in airport security detected objects possibly containing money in the applicant’s checked luggage, whereas he had not declared himself to be transporting any sums of money when passing through the security checkpoint. They opened the applicant’s bags at airport customs, in his presence, and found 154,800 euros (EUR) concealed amidst magazines and shoes. They seized almost the entire sum –

EUR 153,800 – under the Prevention of Money Laundering (Declaration of Movements of Means of Payment) Order (Order EHA/1439/2006 of 3 May 2006).

6. During the customs search the applicant stated that he was the owner of the sum in question, which he had brought into Spain over the course of various journeys he had made starting in 2002 at the time of the Argentine *corralito*¹, and that he had filled out the required import declarations (“S1 declarations”, to be precise) upon each entry into Spain. He stated that he was unaware that he also had to declare the sums when leaving the country, and added that he had the documents proving entry in his possession. In particular, he provided the following breakdown of the sums imported: EUR 100,000 on 21 January 2002; EUR 50,000 on 22 February 2004; EUR 45,000 on 10 April 2004; EUR 40,000 on 25 September 2004; and EUR 42,000 on 24 October 2004. He also specified the sums that had been imported by his wife (EUR 25,000 on 16 September 2002) and mother-in-law (EUR 25,000 on 16 September 2002). In addition, the applicant mentioned that he owned a fleet of eight taxi cabs in Argentina, and further stated that he had sold a building there. The total of EUR 327,000 recorded in the aforesaid import declarations had not drawn any comment from the Commission for the Prevention of Money Laundering and Currency Offences at the times in question.

7. On 22 March 2011 the Standing Committee of the Commission for the Prevention of Money Laundering and Currency Offences started proceedings against the applicant. By a decision of 30 August 2011 the Treasury and Financial Policy Department of the Ministry of the Economy fined him EUR 153,800 – the full amount seized – for commission of a serious offence under sections 2(1)(v), 52(3) and 57(3) of the Money Laundering and Terrorist Financing (Prevention) Act (Law no. 10/2010 of 28 April 2010) and Article 2 § 3 of Royal Decree no. 925/1995 of 9 June 1995 as amended by Royal Decree no. 54/2005 of 21 January 2005, approving rules for the implementation of the Money Laundering (Specific Preventive Measures) Act (Law no. 19/1993 of 28 December 1993).

8. To challenge that decision, the applicant could elect either to submit an application for reconsideration (*reposición*) to the authority that had issued it, namely the aforementioned Department, or to bring a claim for judicial review in the Madrid High Court of Justice.

9. On 27 October 2011 the applicant brought a claim for judicial review of the aforesaid administrative decision. In a judgment of 17 January 2013 the Madrid High Court of Justice dismissed the claim. It found that the applicant had not discharged the duty to make the declaration prescribed for the export

¹ Informal name for the set of economic measures taken by the Minister of the Economy of Argentina during the country’s economic crisis in 2001 to stop a bank run and capital flight. For example, under the *corralito*, cash withdrawals were limited to 250 pesos per week and any transfer of funds abroad was prohibited.

of the funds, as required for all sums of EUR 10,000 or more – a duty of which he could not plead ignorance – and had not provided proof of the origin of the sums in question. As to the penalty imposed, the High Court determined that, given the amount in issue, it had been proportionate to the aim pursued, namely the control of international means of payment, and pointed out that the statute prescribed a penalty of anywhere from EUR 600 to twice the value of the means of payment used. The judgment of the High Court stated that, pursuant to section 86(2)(b) of the Judicial Review Act (Law no. 29/1998 of 13 July 1998), it could not be the subject of an appeal on points of law to the Supreme Court. That was because the section in question had been amended by the Expeditious Proceedings Act (Law no. 37/2011 of 10 October 2011), increasing the claim value threshold for such an appeal from EUR 150,000 to EUR 600,000.

10. The applicant launched *amparo* proceedings (proceedings for the protection of fundamental rights) in the Constitutional Court, relying on the principle of legality and the right to have his case reviewed by a higher court, and arguing that no reasons had been given for the decision to impose the penalty on him. He further complained that the events of the case had predated the amendment of Law no. 29/1998. By a decision of 29 April 2013, notified on 3 May 2013, the Constitutional Court refused to entertain the case on the ground that the applicant had not made an adequate showing of its “special constitutional importance”.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

11. The Money Laundering and Terrorist Financing (Prevention) Act (Law no. 10/2010 of 28 April 2010) provides in relevant part:

Section 2(1) – Persons and entities concerned

“1. This Act applies to the following persons and entities:

...

(v) natural persons effecting movements of means of payment, subject to the provisions of section 34.

...”

Section 34 – Duty to declare

“1. Any natural person who ... effects any of the following movements shall present a prior declaration in accordance with the provisions of this Chapter:

(a) Movements into or out of the national territory of means of payment whose value is equal to or greater than 10,000 euros ...

...”

Section 50 – Classification of offences

“The administrative offences for which this act makes provision are classified as minor, serious or very serious.”

Section 52(3) – Serious offences

“The following are serious offences under this Act:

- (a) Breach of the duty under section 34 to declare movements of means of payment.
...”

Section 57(3) – Penalties for serious offences

“Breach of the duty to make a declaration under section 34 shall be punished by a fine of no less than 600 euros and no more than twice the value of the means of payment used.”

Section 59 – Determination of penalties

“1. The penalty to be imposed in a given case shall be determined according to:

- (a) The size of the transactions affected by the breach [of the duty to declare];
- (b) The benefit obtained as a result of the acts or omissions that constituted the offence;
- (c) The fact that the offence has or has not been remedied voluntarily;
- (d) Any administrative penalties, imposed on the person or entity concerned in the last five years for any offences under this Act, which are no longer subject to appeal;
- (e) The degree of responsibility or intent ... with which the offence was committed;
- (f) The seriousness and duration of the offence;
- (g) Any loss caused to third parties by the breach [of the duty to declare];
- (h) Where the penalty is a fine, the financial resources of the person or entity proceeded against;
- (i) The extent to which the person or entity proceeded against has cooperated with the relevant authorities.

The penalty shall in every case be determined so as to ensure that the offender is not placed in a better position than had the offence not been committed.

2. In determining which of the penalties prescribed by sections 56(3), 57(2) and 58 is to be imposed, regard shall be had to:

- (a) The degree of responsibility or intent ... with which the offence was committed;
- (b) The prior conduct of the person or entity in question ...;
- (c) The nature of any arrangement whereby the person or entity in question acts on behalf of another party;
- (d) Where the penalty is a fine, the financial resources of the person or entity in question;
- (e) The benefit obtained as a result of the acts or omissions that constituted the offence;
- (f) Any loss caused to third parties by the breach [of the duty to declare];
- (g) The extent to which the person or entity proceeded against has cooperated with the relevant authorities.

3. In determining the penalty that is to be imposed for a breach of the duty to declare under section 34, regard shall be had to:

- (a) The fact that the movement is of a substantial sum, which is defined as any sum equivalent to at least twice the level of the declaration threshold;
- (b) Failure to provide evidence of the lawful origin of the means of payment;
- (c) The fact that the amount being moved is not consistent with the activity in which the person is engaged;
- (d) The fact that the place or circumstances of discovery of the means of payment disclose a clear intent to conceal them;
- (e) Any administrative penalties, imposed in the last five years for breach of the duty to declare, which are no longer subject to appeal;
- (f) The degree of intent, on the part of the person in question, with which the offence was committed.”

12. Section 86(2)(b) of the Judicial Review Act (Law no. 29/1998 of 13 July 1998) was amended by the Expeditious Proceedings Act (Law no. 37/2011 of 10 October 2011) to read:

“(b) [no appeal on points of law to the Supreme Court shall lie against] a judgment given in any proceedings in which the value of the claim does not exceed 600,000 euros, unless it is a judgment given in special proceedings for the defence of fundamental rights, in which case such an appeal shall lie irrespective of the value of the claim.”

13. The same section before it was amended read:

“(b) [no appeal on points of law to the Supreme Court shall lie against] a judgment given in any proceedings in which the value of the claim does not exceed 150,000 euros, unless it is a judgment given in special proceedings for the defence of fundamental rights, in which case such an appeal shall lie irrespective of the value of the claim.”

14. Law no. 37/2011 contains the following transitional provision:

“In proceedings pending before a court at the time of the entry into force of this Act, the law as it stood before the entry into force of this Act shall continue to apply until the court delivers its judgment.”

15. Section 54 of the Constitutional Court (Organisation) Act provides:

“A Division, or in appropriate cases a Section, hearing *amparo* proceedings against a decision of a court shall confine itself to determining whether there has been a violation of the rights and liberties of the person seeking *amparo* relief, and to upholding and restoring those rights and liberties, and shall refrain from any further scrutiny of the courts’ actions.”

16. The relevant passages of the Explanatory Report on Protocol No. 7 to the Convention are as follows:

“17. [Article 2 of Protocol No. 7] recognises the right of everyone convicted of a criminal offence by a tribunal to have his conviction or sentence reviewed by a higher tribunal. It does not require that in every case he should be entitled to have both his conviction and sentence so reviewed. Thus, for example, if the person convicted has pleaded guilty to the offence charged, the right may be restricted to a review of his sentence. As compared with the wording of the corresponding provisions of the United

Nations Covenant (Article 14, paragraph 5), the word ‘tribunal’ has been added to show clearly that this provision does not concern offences which have been tried by bodies which are not tribunals within the meaning of Article 6 of the Convention.

18. Different rules govern review by a higher tribunal in the various member States of the Council of Europe. In some countries, such review is in certain cases limited to questions of law, such as the *recours en cassation*. In others, there is a right to appeal against findings of facts as well as on the questions of law. The article leaves the modalities for the exercise of the right and the grounds on which it may be exercised to be determined by domestic law. ...

20. Paragraph 2 of [Article 2] permits exceptions to this right of review by a higher tribunal:

- for offences of a minor character, as prescribed by law;
- in cases in which the person concerned has been tried in the first instance by the highest tribunal, for example by virtue of his status as a minister, judge or other holder of high office, or because of the nature of the offence;
- where the person concerned was convicted following an appeal against acquittal.

21. When deciding whether an offence is of a minor character, an important criterion is the question of whether the offence is punishable by imprisonment or not.”

17. The “Interpretation of treaties” section of the 1969 Vienna Convention on the Law of Treaties provides:

Article 31 – General rule of interpretation

“ ...

4. A special meaning shall be given to a term if it is established that the parties so intended.”

Article 32 – Supplementary means of interpretation

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”

LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 7 TO THE CONVENTION

18. The applicant complained that he had not been afforded the opportunity to have the judgment of the Madrid High Court of Justice reviewed by a higher tribunal. He relied in that connection on Article 2 of Protocol No. 7 to the Convention, which reads:

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

A. Admissibility

19. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Whether the penalty imposed on the applicant was criminal in nature; applicability of Article 2 of Protocol No. 7

20. The Government submitted that the application was incompatible *ratione materiae* with the Convention on the ground that the penalty imposed on the applicant could not be regarded as falling within the purview of the criminal law and was instead an administrative penalty. They pointed out in this connection that currency offences had been removed from the Spanish Criminal Code in 1996 and that, in any event, the language of the Money Laundering and Terrorist Financing (Prevention) Act (Law no. 10/2010 of 28 April 2010) made no provision for custodial sanctions. They added that it was the administrative and not the criminal courts that were tasked with enforcing the penalty.

21. The applicant argued that there was nothing to prevent the penalty imposed on him from being regarded as criminal in nature, since in his view the Spanish Criminal Code provided, broadly speaking, for two types of penalty – custodial penalties and money penalties (fines) – both of which involved restrictions on fundamental rights.

22. The Court observes that the concept of “criminal offence” used in the first paragraph of Article 2 of Protocol No. 7 corresponds to that of “criminal charge” in Article 6 § 1 of the Convention (see *Gurepka v. Ukraine*, no. 61406/00, § 55, 6 September 2005, and *Zaicevs v. Latvia*, no. 65022/01, § 53, 31 July 2007). The Court has consistently held that the applicability of the criminal limb of Article 6 of the Convention falls to be assessed on the basis of three criteria, commonly referred to as the “*Engel* criteria”, which are (a) the classification of the offence under domestic law, (b) the nature of the offence and (c) the degree of severity of the penalty which the offence carries (see, among many other authorities, *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X). The indications afforded by the domestic law of the respondent State have only relative value

(see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22, and *Öztürk v. Germany*, 21 February 1984, § 52, Series A no. 73). For Article 6 of the Convention to apply, it is enough that the offence in issue is by nature criminal or carries a penalty which by its nature and degree of severity belongs in general to the criminal sphere (*A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 105 and 107, 15 November 2016).

23. Turning to the circumstances of the present case, the Court observes in respect of the first criterion that the applicant's alleged offence – a violation of section 52(3) of the Money Laundering and Terrorist Financing (Prevention) Act (Law no. 10/2010 of 28 April 2010) – amounted under section 50 of that Act to an “administrative offence”. It fell within the jurisdiction of the administrative, not the criminal, courts and was not in any case punishable by a custodial sentence (see, conversely, *Stanchev v. Bulgaria*, no. 8682/02, § 45, 1 October 2009). The conduct in issue was classified by the Act as a “serious offence” and the maximum penalty under section 57 was a fine. In no circumstances could the fine be converted into a custodial sentence (see, *mutatis mutandis*, *Kurdov and Ivanov v. Bulgaria*, no. 16137/04, § 44, 31 May 2011).

24. However, that is merely a starting point for the Court's analysis, which must also take into account the nature of the offence and the type and severity of the penalty that may be incurred.

25. As regards the second criterion, namely the nature of the offence itself, the Court has always had regard to the group of persons at whom the rule infringed is directed, the type and nature of the interests protected and the existence of a deterrent and punitive purpose (see *Kadubec v. Slovakia*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI; *Lauko v. Slovakia*, 2 September 1998, § 58, *Reports* 1998-VI; *Ezeh and Connors*, cited above, §§ 103-105; *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 55, ECHR 2009; and *Tsonyo Tsonev v. Bulgaria* (No. 2), no. 2376/03, § 49, 14 January 2010).

26. The Court notes in this connection that the Money Laundering and Terrorist Financing (Prevention) Act is of general application. The provision that served as the legal basis for the penalty imposed on the applicant is directed at any natural or legal person crossing a border and engaged in one of the capital movement-related activities described in section 2(1) of the Act (see *Jussila v. Finland* [GC], no. 73053/01, § 38, ECHR 2006-XIV; and see, conversely, *Stanchev*, cited above, § 45).

27. As to the interest which the law sought to protect in the present case, the Court would point out that, although customs offences are concerned with the interest of State governments in controlling international means of payment (as stressed by the Madrid High Court of Justice in the sixth legal ground of its judgment), it has already had occasion to hold that the criminal limb of Article 6 of the Convention may be applicable to such offences (see *Salabiaku v. France*, 7 October 1988, Series A no. 141-A). In the present

case, the imposition of the fine was not aimed at preventing a potential loss of funds by the State (prevention having been the aim, for instance, in *Butler v. the United Kingdom* (dec.), no. 41661/98, ECHR 2002-VI), but necessarily served a purpose of deterrence and punishment in response to the applicant's breach of the statutory duty to make a declaration (*Nadtochiy v. Ukraine*, no. 7460/03, § 21, 15 May 2008). That aspect may by itself suffice to confer on the offence a criminal character which attracts the operation of the specific guarantees afforded by Article 6 of the Convention (see *Jussila*, cited above, § 38).

28. The Court observes in this connection that the case is distinguishable in several respects from previous cases in which it has had occasion to decide whether the penalties imposed on the applicants were criminal in nature:

- In the *Butler* case, cited above, concerning a smuggling offence committed by the applicant, the Court declared the application inadmissible under Article 1 of Protocol No. 1 after observing that the applicant already had a criminal record (see, conversely, paragraph 41 below), that the authorities had reasonable circumstantial evidence that he was involved in smuggling (see, conversely again, paragraph 6, above, as to the origin of the sums that the applicant in this case had in his possession when he was screened by airport security) and that the domestic authorities had undertaken an assessment concerning proportionality and the applicant's individual circumstances, a step that was lacking in the present case.

- In *Inocêncio v. Portugal* ((dec.), no. 43862/98, ECHR 2001-I), the Court had to rule on whether a EUR 2,500 penalty imposed on the applicant for work done on his house without the required permit had been a criminal penalty. It held that the criminal limb of Article 6 of the Convention did not apply. Not only was *Inocêncio* not a customs case, but the penalty in issue was much lighter than in the present case.

29. Regarding the third of the “*Engel* criteria”, namely the severity of the penalty that may be incurred, the Court observes that the Money Laundering and Terrorist Financing (Prevention) Act (Law no. 10/2010) provides for different types of penalty according to the seriousness of the offence. Section 56 of the Act, for instance, sets out the penalties for the most reprehensible offences, which it classifies as “very serious”. The maximum penalty so prescribed is a fine or, where relevant, disqualification from holding public office. Thus the penalty imposed cannot be converted into a custodial sentence in the event of failure to pay the fine (see paragraph 11 above). In the present case the applicant was charged with a “serious” offence which, under the statute, carried a fine of between EUR 600 and twice the value of the means of payment used. He was fined EUR 153,800 – almost the entire sum discovered during the customs search. The Court is therefore of the view that the severity of the penalty that might be incurred was such as to confer on the proceedings in this case the criminal character required to trigger the application of Article 2 of Protocol No. 7 to the Convention.

30. On consideration of the various aspects of the case, the offence in issue has to be regarded as criminal (see, *mutatis mutandis*, *Valico S.r.l. v. Italy* (dec.), no. 70074/01, ECHR 2006-III).

31. Accordingly, the Court concludes that Article 2 of Protocol no. 7 is applicable in the present case.

2. *Applicability to the present case of the exceptions under Article 2 § 2 of Protocol No. 7*

32. Having determined that the penalty imposed on the applicant was criminal in nature, the Court must now look at whether Article 2 of Protocol No. 7 entitled the applicant to an appellate review of the decision against him.

33. In this regard the Government sought to rely on the exception made for offences of a minor character under Article 2 § 2 of Protocol No. 7, on the ground that the penalty incurred could not in any circumstances have involved a deprivation of liberty.

34. The Government also relied on the exception for cases decided by the highest national tribunals, for which Article 2 § 2 of Protocol No. 7 likewise makes provision. It was their contention that, under the Spanish Constitution, the High Courts of Justice were the highest national tribunals in matters of judicial review within the Autonomous Communities and that the jurisdiction of the Supreme Court to hear appeals on points of law (*casación*) was limited to exceptional cases. They were thus of the view that *casación* was exceptional and could not be regarded as a tier of jurisdiction that counted for the purposes of this provision of the Protocol.

35. The applicant complained that the penalty had been disproportionate in that the amount seized had represented nearly the sum-total of his assets. He further maintained that his case had been heard at only a single level of jurisdiction.

36. The Court has first to ascertain that the offence of which the applicant was convicted was not an “offence of a minor character” within the meaning of Article 2 § 2 of Protocol No. 7, and that an appeal should therefore have lain in the case. In order to do so the Court must look at the words of the Explanatory Report on Protocol No. 7, which expressly states that, in deciding whether an offence is of a minor character, an important criterion is whether or not it is punishable by a term of imprisonment (see *Zaicevs*, cited above, § 55; *Grecu v. Romania*, no. 75101/01, § 82, 30 November 2006; and *Stanchev*, cited above, § 47). In the present case it was common ground that the penalty imposed on the applicant could not have been converted into a custodial sentence in the event of default. However, the absence of a penalty of imprisonment is neither a determining factor nor the only criterion to be taken into account, for the Court has already made known that the relative lightness of the penalty at stake cannot deprive an offence of its inherently criminal character (*Nicoleta Gheorghe v. Romania*, no. 23470/05, § 26, 3 April 2012).

37. The Court is mindful that the law governing customs penalties for failure to declare a sum of money varies widely among Contracting States. Regard for the subsidiarity principle and the margin of appreciation afforded to States in this sphere (see, for instance, *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, § 96 ECHR 2014 (extracts)) leads the Court to the view that, in deciding the relevance and weight to be accorded to each factor, consideration must be given to the specific circumstances of the case. It is true that the measure in issue will need to meet some severity threshold, but the domestic authorities will be responsible for assessing its proportionality and any especially serious consequences it may have in the light of the applicant's individual circumstances. Whether there is a penalty of imprisonment will therefore be a significant factor, but will not by itself be determinative, in the Court's decision as to whether the offence was of a minor character.

38. This interpretation of Article 2 § 2 of Protocol No. 7 and the related Explanatory Report is consistent with the general rules of interpretation laid down in Articles 31 § 4 and 32 of the Vienna Convention on the Law of Treaties (see paragraph 17 above).

39. The Court observes that the applicant in the present case was liable under the statute to a fine of between EUR 600 and twice the value of the means of payment used, and was ultimately required to pay the entirety of the sum seized, that is, EUR 153,800.

40. The Court notes that it is necessary to distinguish the circumstances of the present case from those examined in *Luchaninova v. Ukraine* (no. 16347/02, 9 June 2011), in which it ruled out a violation of Article 2 of Protocol No. 7 to the Convention on the ground that the petty theft of property worth less than EUR 1 of which the applicant had been convicted and for which he had been fined EUR 10 was a "minor offence" not punishable by a term of imprisonment.

41. In the present case the amount seized was much higher, equating to the sum-total of the personal savings which the applicant, who had no criminal record, had managed to salt away on his occasional visits to Spain. In that connection, and bearing in mind that the funds seized were not proved to have come from money-laundering-related activities, the Court observes that the penalty is meant to reflect the seriousness of the breach of duty established – in this case the breach of the duty to declare – rather than the seriousness of the potential breach of duty, as yet unestablished, of committing an offence such as money laundering or tax fraud (see, *mutatis mutandis*, in the context of Article 1 of Protocol No. 1 to the Convention, *Grifhorst v. France*, no. 28336/02, § 102, 26 February 2009). Moreover, on the subject of the applicant's conduct, the Government did not dispute that he had fulfilled the duty to declare the funds upon each entry into Spain (*ibid.*, §§ 95 et seq.).

42. The Court further observes that the judgment of the Madrid High Court of Justice contains no assessment of the proportionality of the measure in issue

– an assessment required by section 59(1), (2) and (3) of Law no. 10/2010 of 28 April 2010 (see paragraph 11 above). Specifically, the judgment gives no consideration to the applicant’s individual circumstances or the documents and evidence which he had provided. Such consideration is a requirement which the Court has had occasion to reiterate when examining customs offences through the lens of Article 1 of Protocol No. 1 (see *Ismayilov v. Russia*, no. 30352/03, §§ 34-38, 6 November 2008; *Gabrić v. Croatia*, no. 9702/04, §§ 36-40, 5 February 2009; *Moon v. France*, no. 39973/03, §§ 49-51, 9 July 2009; and *Boljević v. Croatia*, no. 43492/11, §§ 42-45, 31 January 2017).

43. What is more, the Court notes that under the applicable provision (section 34 of Law no. 10/2010 of 28 April 2010) the lawful export of funds had only, in principle, to be declared – so that the relevant checks could be carried out to prevent money laundering and terrorist financing – and did not require prior authorisation.

44. Consequently, the Court is of the view that the seizure of virtually the entire sum discovered during the customs inspection performed in this case, in the absence of a proportionality assessment by the domestic authorities, prevents the offence from being regarded as “minor” within the meaning of Article 2 of Protocol No. 7 (see the Court’s finding under Article 1 of Protocol No. 1 in *Togrul v. Bulgaria*, no. 20611/10, § 45 *in fine*, 15 November 2018), and that, as a result, the exception to the right of appeal for offences of a minor character, under paragraph 2 of the provision relied upon, is not applicable in the particular circumstances of the case.

45. Since the exception under Article 2 § 2 of Protocol No. 7 is not, therefore, applicable in the present case, the Court finds that the applicant was entitled to an appellate review of the decision against him.

46. The same outcome holds for the exception raised by the Government relating to the highest court in matters of judicial review of administrative decisions (see paragraph 34 above), since, under the amendment introduced by Law no. 37/2011 of 10 October 2011, the Supreme Court is part of the hierarchy of ordinary courts to which an appeal may lie from the High Court of Justice in judicial review cases in which the value of the claim is more than EUR 600,000 (see paragraph 9 above).

3. *Whether the applicant was afforded an appeal*

47. Having so concluded, the Court must now ascertain whether the applicant was actually afforded a review by a higher tribunal within the meaning of Article 2 of Protocol No. 7.

48. The Government submitted that the applicant’s complaints had been examined at first instance by the Treasury and Financial Policy Department of the Ministry of the Economy, and on appeal by the Madrid High Court of Justice. They argued that the proceedings in the High Court of Justice had

consequently amounted to a review by a “higher tribunal” as required by Protocol No. 7 to the Convention.

49. Regarding the scope of the Constitutional Court’s *amparo* review, the Government contended that the jurisdiction vested in that court by the Constitutional Court (Organisation) Act to set aside the decision impugned in the *amparo* proceedings meant that the review it had conducted had satisfied the requirements of the right of appeal under Article 2 § 1 of Protocol No. 7 to the Convention.

50. The applicant replied, first, that the Treasury and Financial Policy Department of the Ministry of the Economy was an administrative body under the authority of the Spanish government and therefore lacked the independence and impartiality of a tribunal.

51. The applicant also complained that the legislative amendment concerning the threshold for an appeal on points of law to the Supreme Court had been enacted after the events of the case. He noted that the judgment of 17 January 2013 of the Madrid High Court of Justice in the case had stated that it could not be the subject of such an appeal.

52. As regards the Constitutional Court, the applicant further observed that it was not part of the Spanish judicial branch and that its operation was consequently governed by a special organisational statute (Law no. 2/1979) instead of the Judicature Act (Law no. 6/1985). It therefore did not constitute a further tier in the hierarchy of the Spanish courts, since it had a limited remit.

53. The Court would begin by noting that, in the words of paragraph 17 of the Explanatory Report on Protocol No. 7 to the Convention, bodies “which are not tribunals within the meaning of Article 6 of the Convention” do not count as “tribunals” for present purposes. Such is the case of the body that imposed the fine in issue here, namely the Treasury and Financial Policy Department, which operates under the direct authority of the Ministry of the Economy (see *Grecu*, cited above, § 83).

54. Moreover, as regards the role of the Constitutional Court, it is of note that while paragraph 18 of the Explanatory Report says that courts of appeal or cassation may qualify as providing a “review by a higher tribunal”, no such mention is made of constitutional courts. It will therefore be necessary to examine the role of the Constitutional Court in this case and the nature of the inquiry undertaken by it in *amparo* proceedings.

55. The Court observes that, under Spanish law, jurisdiction over questions of conformity to ordinary statute belongs to the courts which make up the judicial branch and which include the courts of appeal and cassation. Article 53 § 2 of the Constitution empowers the Constitutional Court to determine in *amparo* cases whether the administrative or judicial decisions at issue were compatible with the fundamental rights guaranteed in Articles 14 to 30 of the Constitution. In the specific case of *amparo* proceedings brought, as here, against a judicial decision, section 54 of the Constitutional Court (Organisation) Act limits the remit of the Constitutional Court to determining

whether there has been a violation of the rights and liberties of the person seeking *amparo* relief, and to upholding and restoring those rights and liberties. The provision makes it clear that the Constitutional Court is to refrain from any further scrutiny of the courts' actions.

56. The Constitutional Court has clarified in previous cases that it was not created to remedy breaches of statute but to restore and uphold the fundamental rights guaranteed by Article 53 § 2 where a violation of those rights has been actually and specifically alleged. An allegation of a violation of a provision of the Constitution is a necessary condition but not a sufficient one. That is to say that *amparo* cannot be likened to *casación en interés de ley* – proceedings on a reference by the State to the Supreme Court to correct a serious misstatement of the law made by a lower court in a decision that has already become final for the parties (see the judgment of the full Constitutional Court of 6 July 1995).

57. Considering the parameters of the Constitutional Court's jurisdiction in *amparo* proceedings, the Court is of the view that it cannot be regarded as a higher tribunal for the purposes of Article 2 of Protocol No. 7. Thus the only judicial authority to have examined the facts in issue in this case is the Madrid High Court of Justice in its judgment of 17 January 2013 (see, *mutatis mutandis*, *Grecu*, cited above, § 83).

58. No appeal lay against that judgment because of the amendment enacted after the events of the case. The Court notes in this connection that the Expeditious Proceedings Act (Law no. 37/2011 of 10 October 2011) entered into force, in accordance with its final provision, twenty days after its publication in the Official Gazette. The Court further notes that the transitional provision of that statute prescribed that, in any proceedings pending at the time it entered into force, such as the proceedings in this case, the law as it stood before the statute's entry into force would continue to apply until the relevant court delivered its judgment.

59. The Court observes that the applicant's judicial review claim was pending when the law was amended. Accordingly, the new wording of section 86(2)(b) of Law no. 29/1998 became applicable as of delivery of the Madrid High Court of Justice's judgment of 17 January 2013.

60. In the Court's view, these limits on the applicant's right of appeal, although in accordance with law, prevented him from having the decision against him reviewed by a higher tribunal and undermined the very essence of the right guaranteed by Article 2 of Protocol No. 7, thereby exceeding the margin of appreciation afforded to Contracting States in respect of that provision.

61. In the light of all the particular circumstances of case, including the severity of the penalty imposed on the applicant, the national authorities' failure to consider his individual circumstances and the lack of an appeal to a higher court, the Court concludes that there has been a violation of Article 2 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. 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.”

A. Damage

63. As at 15 December 2014 the applicant claimed a total of EUR 153,200 in respect of the pecuniary damage allegedly sustained – a sum equivalent to the difference between the amount seized and the minimum fine of EUR 600 which a serious offence under the statute would have carried in any event.

64. In addition, in respect of the non-pecuniary damage allegedly sustained, the applicant claimed EUR 13,788 per year elapsed between the seizure in issue and the date of adoption of the Court’s judgment. Under this head he claimed a total of EUR 124,092 reckoned by applying an interest rate of 9% per annum to the original pecuniary damage claim of EUR 153,200.

65. The Government objected to these claims. They argued that there was no causal nexus between the violation complained of and the damage alleged, and pointed out that the finding of a violation of the provision relied on did not in any way mean that the applicant, had he been afforded an appellate review, would have been acquitted and his penalty set aside. The Government therefore invited the Court to hold that the mere finding of a violation was sufficient just satisfaction.

66. The Court observes that the sole basis for an award of just satisfaction in this case is that the applicant was not afforded the benefit of the guarantees prescribed by Article 2 of Protocol No. 7. The Court cannot speculate as to what might have been the outcome of the proceedings had he been afforded the benefit of those guarantees, but it does not seem unreasonable to conclude that he suffered a loss of real opportunity and definite non-pecuniary damage which the finding of a violation arrived at in this judgment is not sufficient to remedy (see *Greco v. Romania*, no. 75101/01, § 90, 30 November 2006).

67. It is the opinion of the Court that the most appropriate form of redress is to ensure that the applicant is put, as far as possible, in the position in which he or she would have been but for the breach of Article 2 of Protocol No. 7 (see *Atutxa Mendiola and Others v. Spain*, no. 41427/14, §§ 50-52, 13 June 2017; *Teteriny v. Russia*, no. 11931/03, § 56, 30 June 2005; *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, § 53, ECHR 2006-XII; and *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 47, 17 July 2007). The Court is of the view that that principle applies in the present case.

68. Accordingly, having regard to the circumstances of the case and making its assessment on an equitable basis as required by Article 41 of the

Convention, the Court finds it appropriate to award the applicant the sum of EUR 9,600 in respect of non-pecuniary damage.

B. Costs and expenses

69. The applicant also claimed EUR 20,678.73 in domestic court costs and expenses and EUR 3,000 in costs and expenses related to the proceedings in this Court. He provided supporting documentation.

70. The Government argued that only the costs of lodging the application with the Court were recoverable since the costs of the domestic proceedings were unconnected, in their view, to the violation found.

71. According to the Court's case-law, an applicant's costs and expenses are recoverable only in so far as it has been shown that they were actually and necessarily incurred and were reasonable as to quantum. In this case, considering the documents before it and the principle just stated, the Court is of the view that only the costs of instituting the *amparo* proceedings in the Constitutional Court and of lodging the present application may be regarded as arising out of the violation found.

72. Consequently, the Court considers it reasonable to award the applicant EUR 2,000 in respect of the national proceedings and EUR 3,000 in respect of the proceedings here in Strasbourg.

C. Default interest

73. 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, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 2 of Protocol No. 7 to the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 9,600 (nine thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the claim for just satisfaction.

Done in French and notified in writing on 30 June 2020 pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

CONCURRING OPINION OF JUDGE LEMMENS

(Translation)

1. I agree with the finding of a violation of Article 2 of Protocol No. 7 made in this case.

I have reservations, however, about the reasoning used in the judgment to exclude the operation of the exception for offences of a minor character.

2. Article 2 § 2 of Protocol No. 7 provides that the right of appeal “may be subject to exceptions in regard to offences of a minor character, as prescribed by law ...”.

That exception means that national *lawmakers*, competent to lay down rules for the administration of appellate justice, may enact that no appeal lies in cases where a person is convicted only of an offence that is regarded as being of a “minor character”. It is, moreover, the definition of the offence prescribed “by law” that provides the starting point for answering the question as to whether the exception applies.

It follows that the offence must derive its “minor character”, or lack thereof, from the law. I agree with my esteemed colleagues that attention must be paid to more than just the definition of the offence. As is made clear, in particular, by the Explanatory Report on Protocol No. 7, the penalty that may be imposed on a person who is convicted of the offence is also a relevant consideration (see paragraph 36 of the judgment).

3. Where I have difficulties with the judgment is in that it espouses the view that regard must be had to “the specific circumstances of the case”, in particular “proportionality and any especially serious consequences ... in the light of the applicant’s individual circumstances” (paragraph 37 of the judgment).

That ground of the judgment seems to suggest that the applicability of the exception for offences of a minor character may vary from case to case according to the particular circumstances of the accused and the penalty imposed on him or her. If the judgment is read in this way it will mean that in cases where the penalty has serious consequences for the person concerned, he or she ought to be entitled to lodge an appeal, whereas in the absence of such consequences he or she may be precluded from appealing.

That the judgment may be read in this way is borne out by the criticism it levels at the decision handed down by the Madrid High Court of Justice in the present case for “contain[ing] no assessment of the proportionality of the measure in issue” (paragraph 42 of the judgment; see also paragraph 44).

4. I am of the view that a “subjective” approach of this kind, whereby the applicability of the exception for offences of a minor character turns on the outcome of an assessment undertaken by a criminal court in proceedings against a particular accused (concerning the existence of aggravating or mitigating circumstances, for example, or the identification of appropriate

sentencing criteria) would be at odds with the language and object of Article 2 of Protocol No. 7.

The (in)applicability of the exception for offences of a minor character must be ascertainable on the basis of objective criteria. It must be clearly known whether and on what conditions the judgment to be delivered – if it is one that convicts the accused – may be challenged before a higher tribunal. What this amounts to is a simple requirement of legal certainty and, accordingly, protection from arbitrariness.

To the extent that the severity of the penalty holds relevance, what matters in my view is the severity of the penalty that *may* be imposed, not the severity of the penalty that *has* been imposed. In other words, what must be considered are the *potential* effects of a *possible* penalty. Those effects are to be determined on the basis of the law, not on the basis of the judgment delivered in a particular person's case.

5. It is true that the offence in this case consisted “merely” of a failure to declare a sum of money. However, the statute itself classified the breach of the duty to declare movements of means of payment as a “serious offence”: section 52(3)(a) of the Money Laundering and Terrorist Financing (Prevention) Act (Law no. 10/2010 of 28 April 2010). That classification was already a significant indication that the offence in issue was not “of a minor character”.

Moreover, on the subject of the severity of the penalty, I turn to the Court's observation at paragraph 39 of the judgment that “the applicant in the present case was liable under the statute to a fine of between EUR 600 and twice the value of the means of payment used, and was ultimately required to pay the entirety of the sum seized, that is, EUR 153,800”.

The distinctive feature of the penalty scheme in place under Spanish law is that the statute does not put a fixed cap on the amount of the fine that may be imposed. The maximum fine is twice the value of the undeclared sums, which means that the actual fine imposed *may* be such that it has to be regarded as having a significant, even a very significant, impact on the person fined, just as a custodial sentence may have a significant impact. The events of the present case show that this is not just a hypothetical line of argument. The actual fine imposed was considerable, amounting to years' worth of the applicant's savings, whereas there was no indication that he had laundered money or committed tax fraud¹.

The conclusion that falls to be drawn, of course, is that the offence was not of a “minor character”.

6. Therefore it is on the basis of the law itself, irrespective of how it has been applied in a particular case – although the particular case may be used to

¹ The amount of the fine imposed is problematic from the standpoint of proportionality, an inherent requirement of the protection of property rights. But the applicant's complaint under Article 1 of Protocol No. 1 was ruled inadmissible concurrently with the giving of notice of the case to the Government (see paragraph 3 of the judgment).

bolster the conclusion reached on the basis of the law – that an exception for an “offence of a minor character” falls to be recognised or rejected.

I must admit that the judgment does not give pre-eminence to such an interpretation of Article 2 of Protocol No. 7, but I do not think that it stands in the way of it either.