



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

COURT (CHAMBER)

CASE OF SALVADOR TORRES v. SPAIN

(Application no. 21525/93)

JUDGMENT

STRASBOURG

24 October 1996

In the case of De Salvador Torres v. Spain¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A² (2), as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mrs E. PALM,

Mr I. FOIGHEL,

Mr R. PEKKANEN,

Mr A.N. LOIZOU,

Mr J.M. MORENILLA,

Mr L. WILDHABER,

Mr G. Mifsud BONNICI,

Mr P. KURIS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 26 April and 26 September 1996,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 29 May 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 21525/93) against the Kingdom of Spain lodged with the Commission under Article 25 (art. 25) on 11 January 1993 by a Spanish national, Mr José Antonio de Salvador Torres. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Spain recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

¹ The case is numbered 50/1995/556/642. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

the respondent State of its obligations under Article 6 paras. 1 and 3 (a) of the Convention (art. 6-1, art. 6-3-a).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30). The President of the Court gave the lawyers in question leave to use the Spanish language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr J.M. Morenilla, the elected judge of Spanish nationality (Article 43 of the Convention) (art. 43) and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 8 June 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr C. Russo, Mrs E. Palm, Mr R. Pekkanen, Mr A.N. Loizou, Mr L. Wildhaber, Mr G. Mifsud Bonnici and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently, Mr I. Foighel, substitute judge, replaced Mr Russo, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Spanish Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 24 January 1996 and the applicant's memorial on 25 January. On 10 April 1996 the Commission produced various documents from the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the decision of the President, who had also given the Agent of the Government leave to use the Spanish language (Rule 27 para. 2), the hearing took place in public in the Human Rights Building, Strasbourg, on 24 April 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. BORREGO BORREGO, Head of the Legal Department for the
European Commission and Court of Human Rights, Ministry
of Justice and of the Interior, *Agent;*

(b) for the Commission

Mr F. MARTÍNEZ, *Delegate;*

(c) for the applicant

Mr J. PIQUÉ VIDAL, *abogado, Counsel,*
Mr E. ROULAND-LEMINET, *Adviser.*

The Court heard addresses by Mr Martínez, Mr Piqué Vidal and Mr Borrego Borrego.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

6. The applicant, Mr de Salvador Torres, was born in 1928 and is resident in Barcelona.

7. In June 1966, in his capacity as head administrator of a public hospital in Barcelona (Hospital Clínico y Provincial), the applicant made an agreement with a bank to the effect that interest on deposits would be paid at a higher rate than that applicable by law. The applicant arranged for payment into his personal account of the excess amounts corresponding to the difference between the legal rate of interest and that of the additional interest (*extratipos*) paid by the bank on the sums deposited. Between 1966 and 1983 a total sum of 147,614,565 pesetas were thus transferred to the applicant.

8. In 1983 criminal proceedings were brought against the applicant. By a decision of 16 March 1984 (*auto de procesamiento*), Barcelona investigating judge no. 2 found that the facts established by him disclosed the offence of embezzlement of public funds (*malversación de caudales públicos*) under Article 394 para. 4 of the Criminal Code (see paragraph 15 below), carried out not by a civil servant *stricto sensu* but by a person entrusted with funds belonging to a public institution (Article 399 of the Criminal Code - see paragraph 16 below). The applicant was subsequently committed for trial in the Barcelona Audiencia Provincial. The public prosecutor and the hospital, acting as a private prosecutor, lodged submissions which essentially endorsed the findings of the investigating judge and requested, *inter alia*, that the applicant be sentenced to fifteen years' imprisonment. State Counsel (*Abogado del Estado*), appearing also as a private prosecutor on behalf of the State finances, submitted that the facts of the case constituted the offence of corruption of a civil servant.

9. In a judgment of 12 September 1988, the Audiencia Provincial, held that, although the applicant fell into the category provided for in Article 399, the sums embezzled by him were not "public funds" and, accordingly, Article 394 para. 4 was not applicable. It further held that, owing to his particular personal status in the hospital, the applicant could not be considered a civil servant *stricto sensu*. It therefore dismissed the charges of corruption. The applicant was nonetheless convicted of the offence of simple embezzlement (*apropiación indebida*) under Article 535 (see paragraph 17 below) and sentenced to eighteen months' imprisonment pursuant to Articles 528 and 529 para. 7 of the Criminal Code (see paragraphs 18 and 19 below). The Audiencia Provincial did not find any aggravating circumstance of general application (see paragraph 21 below).

10. The public prosecutor and the hospital appealed on points of law. They described the amounts in question as public funds and again requested the applicant's conviction for the offence of embezzlement of public funds under Articles 394 para. 4 and 399 of the Criminal Code. In his submissions, the public prosecutor stressed the fact that the Audiencia Provincial had clearly acknowledged that the applicant was a person entrusted with funds belonging to a public institution for the purposes of Article 399.

11. The applicant did not appeal, thereby accepting the facts as established by the Audiencia Provincial, their legal classification and the sentence.

12. In two subsequent decisions of 21 March 1990, the Supreme Court (Tribunal Supremo) found that, although the sums embezzled could be considered public, the offence under Article 394 para. 4 did not apply since the hospital was not legally entitled to those sums. Contrary to the Audiencia Provincial, the Supreme Court further held that:

"(...)

In any event, it is true that, even if Article 394 of the Criminal Code (embezzlement of public funds) cannot be applied, the fact remains that the accused Mr de Salvador is a civil servant and that he took advantage of his position in order to commit the offence of which he was found guilty. Therefore, ... the aggravating circumstance in Article 10 para. 10 must be applied. To put it in a graphic manner: if the offence of embezzlement of public funds cannot apply due to the lack of the objective element, the aggravating circumstance must apply given the offender's legal position."

The Supreme Court therefore quashed the judgment being appealed and convicted the applicant of the offence of simple embezzlement with the aggravating circumstance that he had taken advantage of the public nature of his position in performing the duties entrusted to him (Article 10 para. 10 of the Criminal Code - see paragraph 21 below). In doing so, the Supreme Court considered that a request to apply this aggravating circumstance could be inferred from the public prosecutor's submissions (see paragraph 10 above). In the exercise of its powers (see paragraph 22 below), the Supreme Court sentenced the applicant to five years' imprisonment, the maximum term of imprisonment for the offence of embezzlement under the rules for the determination of sentence set forth in Article 61 para. 2 of the Criminal Code (see paragraph 20 below).

13. Mr de Salvador Torres filed an amparo appeal in the Constitutional Court (Tribunal Constitucional). He asserted that he had not been informed of all the components of the charge against him and that, accordingly, his right to a fair trial had been violated (Article 24 of the Constitution - see paragraph 14 below). By a decision (auto) dated 20 July 1992, the appeal was declared inadmissible on the ground that it did not disclose any relevant issues of constitutional law. The Constitutional Court found that the applicant was well aware that the charges against him presupposed not only

that the offender's position was equivalent to that of a civil servant, but also that he had taken advantage of that position in the commission of the offence. He had therefore had the possibility to address that issue throughout the proceedings and his defence rights had not been forfeited.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

14. According to Article 24 of the Constitution:

"1. Everyone has the right to effective protection by the judges and courts in the exercise of his rights and his legitimate interests and in no circumstances may there be any denial of defence rights. 2. Likewise, everyone has the right ... to be informed of the charge against him, to have a ... trial ... attended by all the safeguards, to adduce the evidence relevant to his defence,

(...)"

B. The Criminal Code

1. The offence of embezzlement of public funds (malversación de caudales públicos)

15. By Article 394 of the Criminal Code:

"Any civil servant who embezzles or suffers others to embezzle public funds or other property entrusted to his care by virtue of his office shall be liable to: ... 4. a term of imprisonment ranging from twelve years and one day to twenty years (reclusión menor) if the amount embezzled exceeds 2,500,000 pesetas. ... In all cases, the offender shall also be permanently disqualified from public office."

16. By Article 399, the foregoing provision also applies to:

"(...)

those entrusted, in any capacity whatsoever, with funds ... belonging to provincial or municipal authorities or to educational establishments or charitable organisations, and to administrators or depositories of funds ... deposited by a public authority, even if they belong to individuals".

According to the case-law, the offender must not only be a civil servant or a person entrusted with sums belonging to a public institution, he or she must also have taken advantage of that position.

2. The offence of simple embezzlement (apropiación indebida)

17. By virtue of Article 535:

"Anyone who, to the detriment of others, appropriates or embezzles money, assets or any other personal property, entrusted to his care as depository, agent or administrator, or in any other capacity carrying the obligation to deliver or return the property, or denies having received such property shall be liable to the penalties laid down in Article 528

(...)"

18. Article 528, in so far as relevant, provides as follows:

"(...)

A person convicted of this offence shall be liable to a term of imprisonment ranging from one month and one day to six months (arresto mayor) if the sum involved exceeds 30,000 pesetas. If there are found to be two or more of the aggravating circumstances provided for in Article 529 below or one especially aggravating circumstance, the person convicted shall be sentenced to a term of imprisonment ranging from six months and one day to six years (prisión menor) ... Where only one of the aggravating circumstances referred to in Article 529 is found to be established, the term of imprisonment shall be in the range of the maximum sentence available (grado máximo) [from four months and one day to six months]."

19. By Article 529:

"The following circumstances shall be deemed to be aggravating circumstances for the purposes of the preceding Article:

(...)

7. Where the offence is particularly serious in terms of the sum embezzled."

3. Aggravating circumstances

20. In order to determine the sentence, where a particular offence is punished with a term of imprisonment, this can be divided in three identical periods (grados): minimum, medium and maximum. If a court finds that no mitigating circumstances and only one aggravating circumstance can be established, it shall impose a medium or maximum sentence. Where more than one aggravating circumstances are established, the maximum sentence shall be imposed (Article 61).

21. Aggravating circumstances can be specific to a particular offence (see, for example, paragraph 19 above) or of a general nature. Article 10 of the Criminal Code describes the aggravating circumstances which can be applied to any offence:

"The following are aggravating circumstances:

(...)

10. the fact that the offender has taken advantage of the public nature of his or her position."

C. The Supreme Court's powers

22. Where the Supreme Court finds that an appealed decision is in breach of the law, it will quash it and set it aside and render a new decision on the merits. In doing so, the only restriction on the court is not to pass a heavier sentence than the one which would correspond to the prosecutor's request (Article 902 of the Code of Criminal Procedure).

23. As with any court, the Supreme Court has the power to depart from the legal classification given by the prosecution provided that: (a) the criminal intent in the offence found applicable is essentially identical to that in the offence as charged ("delitos homogéneos" - for instance homicide and parricide); (b) no different facts are taken into consideration; (c) the new classification leads to the imposition of a sentence that is less severe than that requested by the prosecution. These powers have been considered constitutional by the Constitutional Court in, among others, its judgments of 23 November 1983 (105/83), 17 July 1986 (104/86) and 29 October 1986 (134/86). The new legal classification may involve the finding of aggravating circumstances that are implicit in the original characterisation (Supreme Court, Criminal Chamber, judgment of 13 June 1984, Repertorio de Jurisprudencia Aranzadi no. 3553, p. 2708).

PROCEEDINGS BEFORE THE COMMISSION

24. Mr de Salvador Torres applied to the Commission on 11 January 1993. He relied on Article 6 of the Convention (art. 6), complaining that he had not been afforded a fair hearing in so far as he was never formally charged with the aggravating circumstance found to be established in his final sentence.

25. The Commission declared the application (no. 21525/93) admissible on 27 June 1994. In its report of 21 February 1995 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 6 paras. 1 and 3 (a), taken together, (art. 6-1+6-3-a) of the Convention. The full text of the Commission's opinion is reproduced as an annex to this judgment³

FINAL SUBMISSIONS TO THE COURT

26. At the hearing the Government requested the Court to find that no violation of the Convention had taken place. The applicant, for his part,

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-V), but a copy of the Commission's report is obtainable from the registry.

sought a finding of a breach of the Convention and a pecuniary compensation for the damage allegedly suffered and the legal costs incurred.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 PARA. 3 (a) OF THE CONVENTION (art. 6-3-a)

27. Mr de Salvador Torres alleged that the fact that he had been convicted of an offence with an aggravating circumstance with which he had never been expressly charged constituted a violation of Article 6 para. 3 (a) of the Convention (art. 6-3-a) which, in so far as relevant, reads:

"Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, ... and in detail, of the nature and cause of the accusation against him;"

28. The Commission shared the applicant's view. Noting that that provision (art. 6-3-a) should be examined in the broader context of a fair trial under Article 6 para. 1 (art. 6-1), it considered that, for the purpose of preparing his or her defence, a person charged with a criminal offence is entitled to be informed not only of the material facts on which the accusation is based but also of the precise legal classification given to these facts. Since the finding of an aggravating circumstance led to a heavier sentence being imposed, the applicant should have been formally notified that such a finding was possible in his case.

29. The Government, for their part, contended that the applicant must always have known that his position as head administrator of a public hospital could give rise to the finding of the aggravating circumstance in Article 10 para. 10 of the Criminal Code (see paragraph 21 above). They observed that the provisions on which the charges of embezzlement of public funds against him were based (Articles 394 para. 4 and 399 of the Criminal Code - see paragraphs 15 and 16 above) required that the offender be a civil servant or an administrator of funds belonging to a public institution who had taken advantage of his or her position in committing the offence. As to the fact that the applicant's sentence of imprisonment was increased from eighteen months to five years as a result of the finding of the aggravating circumstance, the Government pointed out that, under Spanish law, the Supreme Court's sentencing powers are limited only by the maximum penalty requested by the prosecutor (see paragraph 22 above), which was fifteen years in the present case.

30. The Court notes that from the outset the investigating judge characterised the facts as established by him as falling within the definition of the offence of embezzlement of public funds (see paragraph 8 above). This legal classification was endorsed by the public prosecutor and the private prosecutor acting on behalf of the hospital, and they both maintained it throughout the proceedings (see paragraphs 8 and 10 above). In Spanish law, the offence of embezzlement of public funds requires that the offender be either a civil servant or an administrator of funds in a public institution, that he should have taken advantage of his position in committing the offence and that the sums embezzled be "public funds" (see paragraphs 15 and 16 above).

31. It further notes that the applicant never disputed the fact that, in his capacity as head administrator of a Barcelona public hospital, he fell within the category of those "entrusted ... with funds belonging to the provincial or municipal authorities or to educational establishments or charitable organisations", or that of administrators or depositories of funds deposited by a public authority (Article 399 of the Criminal Code - see paragraph 16 above). In fact, the file of the case shows that this was common ground between the parties (see paragraphs 9 and 11 above). In that capacity, the applicant was clearly occupying a position of a public nature. Neither the Audiencia Provincial nor the Supreme Court characterised the sums embezzled as "public funds". Both applied the more general offence of simple embezzlement. However, whereas the Audiencia Provincial found that no aggravating circumstance of a general character applied in this case (see paragraph 9 above), the Supreme Court considered that the fact - as established by the Audiencia Provincial and uncontested by the applicant - that Mr de Salvador Torres had taken advantage of his position as head administrator of a public institution aggravated the offence. In the exercise of its powers (see paragraphs 22 and 23 above), the Supreme Court imposed a sentence which, though heavier than that of the Audiencia Provincial, was well below that requested by the prosecutors at the outset and maintained throughout the proceedings (see paragraphs 8 and 10 above).

32. The Court observes that unlike Articles 394 and 399 of the Criminal Code, Article 10 para. 10 requires only that the offender should have taken advantage of the "public nature of his position" (*carácter público*). It is evident that the Supreme Court, in finding that there was an aggravating circumstance, was referring to this factor (see paragraph 12 above and, *mutatis mutandis*, the *Gea Catalán v. Spain* judgment of 10 February 1995, Series A no. 309, p. 11, para. 29).

33. In sum, as expressed by the Constitutional Court in its decision of 20 July 1992 (see paragraph 13 above), the public nature of the applicant's position was an element intrinsic to the original accusation of embezzlement of public funds and hence known to the applicant from the very outset of the proceedings. He must accordingly be considered to have been aware of the

possibility that the courts - that is, the Audiencia Provincial and the Supreme Court - would find that this underlying factual element could, in the less severe context of simple embezzlement, constitute an aggravating circumstance for the purpose of determining the sentence. Therefore, the Court finds no infringement of the applicant's right under Article 6 para. 3 (a) (art. 6-3-a) to be informed of the nature and cause of the accusation against him.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 6 para. 3 (a) of the Convention (art. 6-3-a).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 October 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar