



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

AFFAIRE TEJEDOR GARCÍA c. ESPAGNE

CASE OF TEJEDOR GARCÍA v. SPAIN

(142/1996/761/962)

ARRÊT/JUDGMENT

STRASBOURG

16 décembre/December 1997

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SUMMARY¹

Judgment delivered by a Chamber

Spain – criminal conviction secured despite fact that public prosecutor's application – for an order setting aside a decision that no further action be taken – had been filed late (Articles 211 and 789 of Code of Criminal Procedure)

I. SCOPE OF THE CASE

Court had no jurisdiction to consider complaint declared inadmissible by Commission.

II. ARTICLE 6 § 1 OF THE CONVENTION

A. Applicability

Recapitulation of case-law on concept of “charge” – Article 6 § 1 applicable.

B. Compliance

Recapitulation of case-law: in first place for national authorities to interpret domestic law.

Public prosecutor had had three days to appeal against investigating judge's decision that no further action be taken – as case file had not contained any indication as to date public prosecutor had received case file, investigating judge had considered that public prosecutor's application had been made in time – interpretation of Article 789 § 5 of Code of Criminal Procedure in circumstances where date of receipt could not be established as a matter of certainty was a matter for domestic courts – interpretation of national courts could not be described as arbitrary or unreasonable, or of such a nature as to taint fairness of proceedings – no issue arose concerning equality of arms.

Conclusion: no violation (eight votes to one).

COURT'S CASE-LAW REFERRED TO

27.2.1980, Deweer v. Belgium; 15.7.1982, Eckle v. Germany; 21.2.1990, Van der Leer v. the Netherlands; 24.11.1993, Imbrioscia v. Switzerland; 23.3.1994, Ravensborg v. Sweden; 22.2.1996, Bulut v. Austria; 26.3.1996, Leutscher v. the Netherlands; 20.10.1997, Serves v. France

1. This summary by the registry does not bind the Court.

In the case of Tejedor García v. Spain¹,

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

Mr THÓR VILHJÁLMSSON, *President*,

Mr N. VALTICOS,

Mr I. FOIGHEL,

Mr J.M. MORENILLA,

Sir John FREELAND,

Mr A.B. BAKA,

Mr G. MIFSUD BONNICI,

Mr J. MAKARCZYK,

Mr T. PANTIRU,

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

Having deliberated in private on 26 September and 25 November 1997,

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 28 October 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 25420/94) against the Kingdom of Spain lodged with the Commission under Article 25 by a Spanish national, Mr Manuel Tejedor García, on 4 August 1994.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby Spain recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 of the Convention.

Notes by the Registrar

1. The case is numbered 142/1996/761/962. 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 of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant designated the lawyers who would represent him (Rule 30). The lawyers were given leave by the President to use the Spanish language in the written procedure (Rule 27 § 3). On 4 March 1997 the President granted the applicant legal aid (Rule 4 of the Addendum to Rules of Court A).

3. The Chamber to be constituted included *ex officio* Mr J.M. Morenilla, the elected judge of Spanish nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 29 October 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr N. Valticos, Sir John Freeland, Mr A.B. Baka, Mr G. Mifsud Bonnici, Mr J. Makarczyk and Mr T. Pantiru (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 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 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant’s and the Government’s memorials on 7 and 30 May 1997 respectively.

5. In accordance with the decision of the President, who had also given the Government’s representative leave to address the Court in Spanish (Rule 27 § 2), the hearing took place in public in the Human Rights Building, Strasbourg, on 25 September 1997. 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 European
Court of Human Rights, Ministry of Justice, *Agent;*

(b) *for the Commission*

Mr F. MARTÍNEZ, *Delegate;*

(c) *for the applicant*

Mrs N. FERNÁNDEZ SOLA, professor at the University
of Saragossa,
Mr M. MARCO BRIZ, of the Saragossa Bar, *Counsel.*

The Court heard addresses by Mr Martínez, Mrs Fernández Sola and Mr Borrego Borrego. Mrs Fernández Sola submitted additional documents.

Subsequently, Mr Thór Vilhjálmsson replaced, as President of the Chamber, Mr Ryssdal who was unable to take part in the further

consideration of the case, and Mr I. Foighel, substitute judge, became a member of the Chamber (Rules 10, 22 § 1 and 24 § 1).

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. Mr Tejedor García, who was born in 1948, now lives in Saragossa. At the material time, he was an officer in the national police force and lived at Mataró (Barcelona).

7. The facts underlying the procedure in issue were described in the judgment of the Saragossa *Audiencia Provincial* of 6 November 1991 (see paragraph 13 below), as follows:

“The accused, Mr Manuel Tejedor García, who was born on 11 October 1948 and has no criminal record, was at the material time a police officer stationed in the Mataró (Barcelona) police station, in the region of Maresme, where a large number of coloured people live and work. On 21 May 1989, while off duty, he was in Gallur (Saragossa) where he joined members of his family and friends to celebrate his niece’s first communion. At about 8.30 p.m., after a banquet which followed the ceremony and at which he drank, in addition to the wine that accompanied the meal, three glasses of champagne, a cognac and two half-measures of cognac, – so that his alcohol level was high – he went with friends to the ‘Diodon’ café ..., where he noted the presence of Mr Karamo Jarra, a Gambian national, and Mr Leonel Pajucides Falçao, a Portuguese national. They were both coloured and had temporary work in a nearby village ... They went to Gallur to enjoy their weekly day off and were in the vicinity of the games room in the café. [The accused] asked them for their identity papers, which they agreed to produce. [They] showed him respectively a work permit ... and an identity card issued by the Portuguese Republic ... The accused, Mr Manuel Tejedor García, who was dressed in plain clothing, did not consider the documents satisfactory and, showing his police identification, drew his revolver ... and fired a shot into the ceiling of the café; approximately twenty people were present and left the premises in a frightened state. He then kicked Mr Leonel Pajucides in the testicles after throwing the latter’s identity card to the floor saying that it was ‘shit’. Pointing his revolver at the two Africans, he forced them to leave the café with their hands above their heads and took them, using the psychological pressure of the gun, to the *guardia civil* barracks, where, finally, he handed them over to the officers on duty. Before that, on the way from the café, near to the stairs leading up to the barracks, the accused ... hit Mr Karamo Jarra – who had slightly lowered his arms because of fatigue and in order to negotiate the rough ground – hard in the mouth with his revolver, cutting his upper and lower lips and causing him to lose two teeth, one of which was picked up by a passer-by at the scene of the assault, which was stained by the victim’s blood. These events provoked the indignation and disapproval of the people present who gathered round the police officer and his prisoners after following them from the café. [They] ultimately formed a group in front of the entrance to the *guardia civil* barracks, protesting against the events they had just witnessed and noting that the accused came out of the building in an aggressive manner on several occasions.

Seeing that the situation was somewhat unusual, the officer in charge of the Gallur barracks informed his lieutenant, who immediately came over from Pedrola to take charge of the case. He checked whether the foreign nationals were lawfully resident in Spain and the identity papers they had produced; he then searched them. As no illegal substances or objects were found in their possession, they were released after making a statement and receiving medical attention.

While the lieutenant was conducting his inquiry, the accused started a number of indeterminate incidents against the *guardias civiles*, who were obliged to disarm and handcuff him. At about 11.30 p.m. he was cautioned and, the following morning, at about 3 a.m. he was taken to Saragossa and brought before the duty investigating judge, who, after questioning him in the presence of the police lawyer, Mr Luis Saldaña Estevan, ordered his release.”

8. A preliminary inquiry was opened in respect of the applicant for wrongful arrest, assault and disobeying orders. On 29 May 1989 the investigating judge sent the case file to the Saragossa *Audiencia Provincial*, competent for criminal proceedings regarding members of the security forces.

On 18 September 1989 the *ANPU* (*Asociación Nacional de la Policía Uniformada*), a professional association of police officers to which Mr Tejedor García belonged, and which was represented by Mr Gallego and defended by Mr Marco, brought a private prosecution (*acusación particular*) against the *guardia civil* officers of Gallur. It requested the court to declare that the applicant was innocent, and to investigate the responsibility of the two officers who had arrested him (see paragraph 7 above).

On 28 November 1989 the *Audiencia Provincial* appointed one of its judges to pursue the investigation of the case. On 18 December 1989 Mr Tejedor García appeared before that judge, accompanied by Mr Marco, who said that he represented both the *ANPU* and the applicant.

After the end of the investigation, the file was transmitted on 2 February 1990 to both the public prosecutor and the *ANPU* for their comments concerning the opening of oral hearings and committal for trial under Article 790 § 1 of the Code of Criminal Procedure (“CCP” – see paragraph 16 below). Following a judgment of the Constitutional Court declaring unconstitutional the provision by which criminal offences by security forces should be tried by the *Audiencia Provincial* the latter sent the case back to the Saragossa investigating judge.

9. On 10 September 1990 the investigating judge, having regard to the contradictory evidence as to the assault and the offer of drugs to the applicant, considered that no offence had been made out and decided, in accordance with Article 789 of the CCP (see paragraph 16 below), that no further action be taken (*auto de archivo de las actuaciones*). He directed that the case file was to be transmitted to the public prosecutor at the *Audiencia Provincial* of the town so that Article 789 § 5, no. 4, of the CCP could be complied with. Beneath the judge’s signature at the foot of the

document, the registrar added: “Done shortly afterwards, to which fact I attest.”

On the following day, the decision was served on Mr Gallego. However, no annotation appears on the file attesting service on the public prosecutor.

10. In an annotation of 7 November 1990 the registrar attested that the public prosecutor had returned the case file and lodged an application for the decision to be set aside (*recurso de reforma*) or, in the alternative, an appeal (see paragraph 16 below), dated 13 September 1990.

In an order (*providencia*) of 8 November 1990 the investigating judge held that the application for an order setting aside the decision that no further action be taken had been made in the correct form. On the following day, that order was served on Mr Gallego.

On 12 November 1990 Mr Gallego, on behalf of the *ANPU*, sought a declaration that the public prosecutor’s application be declared inadmissible because it had been lodged out of time (see paragraph 16 below) and confirmation of the decision of 10 September. That application, which the judge treated as having been made on behalf of Mr Tejedor García, was dismissed on the ground that it was not possible to make an application to set aside the impugned order, as it was merely a procedural formality. The judge did say, however, that Mr Gallego’s observations would be brought to the public prosecutor’s attention and be considered at the “appropriate time”. That decision was also served on Mr Gallego.

In a decision (*auto*) of 4 December 1990 the investigating judge rejected Mr Gallego’s observations and held that the public prosecutor’s application had been made in time, on the ground that in the absence of any indication as to when the public prosecutor had received the decision of 10 September 1990 and the case file, the application had to be deemed to have been made within the statutory three-day time-limit (see paragraph 16 below). As to the merits he stated that it would be better to test the evidence at an adversarial public hearing.

11. On 12 February 1991 the investigating judge made a final discontinuance order (Articles 637 no. 2 and 790 no. 6 of the CCP) in respect of the two *guardia civil* officers accused by the *ANPU*. In the applicant’s case, he ordered an oral hearing and committed the applicant for trial in the *Audiencia Provincial*. On 20 February Mr Tejedor García appointed Mr Marco as his barrister (*abogado*) and Mr Gallego as his solicitor (*procurador*).

On 14 March 1991 Mr Gallego filed a memorial on behalf of the *ANPU*, treated by the investigating judge as being the applicant’s defence.

12. After receiving the case file, the trial court noted that both the *ANPU* and the applicant were represented by Mr Gallego and requested him to clarify the situation.

In a letter of 15 May 1991, Mr Gallego informed the *Audiencia Provincial* that, as the applicant alone had been committed for trial, he would be acting only for him. This was recorded in an order (*providencia*) of the *Audiencia Provincial* dated 22 May 1991.

13. On 6 November 1991 the *Audiencia Provincial* dismissed the preliminary objection that the public prosecutor's application had been made out of time and found the applicant guilty of the alleged offences. It sentenced him to six months and fifteen days' imprisonment, and a fine of 200,000 pesetas, and ordered him to pay compensation to the victims. He was also suspended from duty for six months.

14. On 12 November 1991 Mr Tejedor García appealed on points of law on the ground, *inter alia*, that the public prosecutor's application against the decision of 10 September 1990 had been made out of time.

On 28 May 1993 the Supreme Court dismissed the appeal. It found that there was nothing in the case file to show when it had been sent to the public prosecutor or when the public prosecutor had been served with the decision. In dismissing the appeal, the Supreme Court drew a distinction between a mere procedural error, which, as in the case before it, had not affected the rights of the defence, and a serious violation of a fundamental right. In its view, no violation of Article 24 § 1 of the Spanish Constitution existed in this case since:

(a) the right of access to legal remedies required that the formal conditions for the exercise of those remedies be interpreted by judges employing criteria favourable to that right of access;

(b) justice should prevail in order to avoid a denial of justice. Where applications to have a decision set aside or appeals were concerned, any interpretation that would unjustifiably prevent the case being judged on the merits should be rejected; and

(c) in the case before it, the accused had had at his disposal every necessary means freely to defend himself against the accusations that had been made against him, at first instance and before the Supreme Court.

15. On 6 July 1993 the applicant filed a constitutional appeal (*recurso de amparo*), which the Constitutional Court dismissed on 21 February 1994. The Constitutional Court found that the appeal had no constitutional basis, because the applicant was seeking, by way of *amparo*, to appeal against the courts' interpretation that the public prosecutor's application had been lodged in time. That was an issue of pure law which was not susceptible of constitutional relief. It nevertheless considered the courts' interpretation to have been justified and consistent with its case-law. Since the exact date of receipt of the case file in the public prosecutor's office could not be determined, the Supreme Court, and before it the investigating judge,

adopted the interpretation which was more favourable to the admissibility of the application on the basis of a broad interpretation of the provisions of the CCP.

II. RELEVANT DOMESTIC LAW

A. The Code of Criminal Procedure

16. The relevant provisions of the Code of Criminal Procedure read as follows:

1. Time-limits for applications, appeals or procedural acts

Article 202

“Except where statute expressly provides otherwise, no extension of time may be granted for taking procedural steps.

The relevant period may however be extended or interrupted ... if a justified reason is shown to exist.

...”

Article 211

“Applications to have an order set aside ... shall be lodged within three days of the last notice served on the parties to the proceedings.”

Article 215

“At the end of a period determined by statute, the judge or the court, as the case may be, the proceedings will be automatically resumed from the stage they had reached.

If the case file is in a third-party’s possession the registrar shall be responsible for its recovery and shall impose a fine of between 25 and 250 pesetas on the person concerned if he does not return the case file immediately or if, being a person required to express an opinion or to formulate a claim, he returns the case file without having examined it. In the latter case, the judge or the court shall allow a reasonable extension of time for that purpose; if, at the end of that extended period, the case file has not been examined and returned, the person concerned will be prosecuted for disobedience.

A person who, notwithstanding the imposition of a fine, fails to return the case file will also be liable to prosecution for that offence.”

Article 216

“The following applications and appeals may be made against orders of an investigating judge:

an application to have an order set aside or [and] an ordinary appeal ...”

2. *Discontinuance orders***Article 634**

“A discontinuance order may be final or provisional, complete or partial.

...”

Article 637

“A final discontinuance order shall be made where:

...

2. no offence is made out.

...”

Article 641

“A provisional discontinuance order shall be made where:

1° it has not been duly established that the offence leading to the opening of the investigation has been committed;

2° it appears from the investigation that an offence has been committed, but there are no grounds for accusing a specific individual of that offence ...”

3. *Summary proceedings***Article 789**

“...

5. ... the judge shall make one of the following decisions:

[1°] if he finds that no criminal offence has been made out, he shall order that no further action be taken ...

...

[4º] ... in the first three hypotheses, an appeal shall lie. If there is no representative of the public prosecutor's office in the vicinity ... or if the parties have not lodged an appeal, the case file shall be sent to the public prosecutor attached to the *Audiencia*, who, within three days of receipt, shall remit the same to the judge together with grounds of appeal or marked 'seen'. In the latter case, the order will be executed.

..."

Article 790

"1. If the investigating judge decides to follow the procedure provided for in this Article, he shall order in the same decision that the case file be communicated ... to the public prosecutor and the private prosecution, in order that they request within five days either that the accused be committed for trial on the basis of the prosecution's submissions, that he be discharged or, exceptionally, that supplementary evidence be obtained ...

...

3. If the public prosecutor or the private prosecution request a discontinuance order for one of the reasons mentioned in Articles 637 and 641 of the CCP, the judge shall agree ...

4. When the public prosecutor requests the discontinuance in conformity with Articles 637 and 641 of the CCP, ..., before ordering it the judge may decide to transmit the case file to the hierarchical superior to the public prosecutor of the *Audiencia Provincial*, so that he decides whether to maintain or not the accusation ..."

B. Institutional Law no. 6/1985 of 1 July 1985 on the Judiciary

17. The relevant provisions of the Institutional Law on the Judiciary read as follows:

Section 241

"Jurisdictional acts made out of time shall only be quashed if the nature of the time-limit so requires."

Section 243

"Acts by parties that do not satisfy statutory requirements may only be rectified in the circumstances, on the conditions and within the period set out in the procedural law."

PROCEEDINGS BEFORE THE COMMISSION

18. Mr Tejedor García lodged his application (no. 25420/94) with the Commission on 4 August 1994. He complained:

(1) with respect to his detention, that his application for habeas corpus had not been considered by the investigating judge (Article 5 §§ 3 and 4 of the Convention); and

(2) with respect to the criminal proceedings, of an infringement of his right to a fair hearing, to be presumed innocent and to have adequate facilities for the preparation of his defence (Article 6 §§ 1, 2 and 3 (b) and (d)) and of his right to an effective remedy against the investigating judge's decision to declare admissible the application by the public prosecutor to have the decision that no further action be taken set aside (Article 13).

19. In its decisions of 15 May 1995 and 26 February 1996 the Commission declared the complaint relating to the lateness of the public prosecutor's application admissible and the remainder of the application inadmissible. In its report of 3 September 1996 (Article 31), it expressed the opinion that there had been a violation of Article 6 § 1 of the Convention (by eighteen votes to eleven). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

20. In their memorial the Government requested the Court to hold that the criminal proceedings in issue had not given rise to a violation of the rights guaranteed by Article 6 of the Convention.

21. The applicant's representative asked the Court at the hearing to hold that there had been a violation of Article 6 § 1 and to award just satisfaction to the applicant under Article 50.

AS TO THE LAW

22. The applicant alleged a violation of Article 6 § 1 of the Convention in that the investigating judge had granted an application filed out of time by the public prosecutor for an order setting aside the decision of

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is obtainable from the registry.

10 September 1990 that no further action be taken which, he claimed, had had the effect of discontinuing the criminal proceedings against him (see paragraphs 9 and 10 above). As far as it is relevant, Article 6 § 1 of the Convention provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...”

The Commission expressed the opinion that Article 6 § 1 had been breached, whereas the Government contested this conclusion.

I. SCOPE OF THE CASE

23. In his memorial to the Court, the applicant reiterated that the facts in issue in the present case also constituted a violation of the principle of the presumption of innocence guaranteed by Article 6 § 2 of the Convention. However, his representative did not explain that argument at the hearing. Since this complaint was declared inadmissible by the Commission in its decision of 15 May 1995 for failure to exhaust domestic remedies, the Court has no jurisdiction to consider it (see, among many other authorities, the *Leutscher v. the Netherlands* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 434, § 22).

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

A. Arguments of those appearing before the Court

24. The applicant stressed that the crux of the matter to be examined by the Court concerned the procedural decisions taken by the competent investigating judge. The facts that had led to the opening of the criminal investigation were without importance in this respect.

Furthermore, the applicant had to be considered a person “charged with a criminal offence” within the meaning of Article 6 from the moment when the investigating magistrate decided to initiate criminal proceedings against him.

With regard to the facts of the case, the applicant said that the date of notification to the public prosecutor of the decision ordering that no further action be taken could be inferred from the note signed on 10 September 1990 by the registrar at the foot of the decision (see paragraph 9 above), and that the communication of the decision to the public prosecutor’s office had been carried out the same day. Furthermore, the application bore the date of 13 September 1990, which meant that the public prosecutor had been aware

of the decision at that time. However, the return of the case file with the application was not registered until almost two months later, on 7 November 1990. By Article 280 of the Code of Criminal Procedure (“CCP”), the registrar was responsible for certifying the performance of procedural formalities. Indeed the Spanish Supreme Court had recognised that there had been a procedural error in the case.

Finally, the decision of 10 September 1990 had to be assimilated to a final discontinuance order and had become *res judicata* once notified to the public prosecutor. Accordingly, it was not just – as the Supreme Court had stated – a “procedural error” (see paragraph 14 above). When a judicial decision had become final because the time-limits for appeal had expired without an appeal being entered, there was no longer any right of appeal. In the present case, the guarantee afforded by *res judicata* had been ignored to the detriment of the applicant’s fundamental rights. Furthermore, the equality of arms between the prosecution and the defence had not been respected, the public prosecutor having received not only different, but more favourable treatment than the accused, to the applicant’s prejudice.

25. The Government contended, firstly, that the decision complained of by the applicant had taken place at the stage of the preliminary investigation, during which there had been no “charge” and, consequently, nobody “charged with a criminal offence”. Therefore, the principle of equality of arms had not applied at that point. In any event, the applicant had not actively taken part in the preliminary investigation, during which he had, improperly, been represented by the *ANPU* police association, which was acting as a private prosecutor. He had not been notified of the contested decision and had not complained when the prosecution’s application for an order setting it aside was granted.

As to the facts, the Government noted that there was no indication on the case file of the date the decision was served on the public prosecutor and that, first the investigating judge, and subsequently the two higher Spanish courts, had considered that the public prosecutor’s application could not be considered time-barred in the particular circumstances of the case.

The Government further stated, with reference to decisions of domestic courts, that the decision in question was only provisional and could not produce the effects of *res judicata*. The preliminary inquiry could thus be reopened at any time by the investigating judge without any specific conditions. Final discontinuance orders could only be made by the investigating judge in the next stage of the proceedings concerned with the preparation for trial (see Article 790 taken in conjunction with Article 637 of the CCP – paragraph 16 above).

26. The Commission, while acknowledging that it was in the first place for the national authorities to interpret and apply domestic law, reiterated its case-law according to which the Convention organs are, nonetheless, entitled to review whether such interpretation is arbitrary. In its opinion, procedural rules concerning formalities and time-limits in court proceedings were intended to ensure the rule of law and legal certainty. In particular, time-limits governing the filing of appeals by the prosecution had to be scrupulously complied with in order to avoid any imbalance between it and the defence to the detriment of the latter.

In the present case, no convincing reasons had been advanced by the Government to explain why the public prosecutor's application, dated 13 September 1990, had only been filed on 7 November 1990, almost two months after the investigating judge's decision. If there had been a mistake or procedural defect attributable to the registrar or to the judicial authorities, it should not have had detrimental effects on the rights of the accused.

B. The Court's assessment

1. Applicability of Article 6 § 1

27. The Court must first examine whether the applicant has been the subject of a "charge" for the purposes of Article 6 § 1 of the Convention. It recalls that this concept is "autonomous" and that it has to be understood within the meaning of the Convention and not solely within its meaning under national law. It may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see, for example, the *Deweert v. Belgium* judgment of 27 February 1980, Series A no. 35, p. 22, § 42, and p. 24, § 46; the *Eckle v. Germany* judgment of 15 July 1982, Series A no. 51, p. 33, § 73; and the *Serves v. France* judgment of 20 October 1997, Reports 1997-VI, p. 2172, § 42). Moreover, as the Court stated in the *Imbrioscia v. Switzerland* judgment of 24 November 1993 (Series A no. 275, p. 13, § 36), the words "determination of [any] criminal charge" in Article 6 § 1 do not imply that that Article has no application to pre-trial proceedings.

28. In the present case, a preliminary inquiry had been opened against the applicant in respect of various criminal offences arising out of the incident of 21 May 1989, after which he had been cautioned by the police and brought before the Saragossa investigating judge (see paragraph 7

above, last sub-paragraph). The allegations made against him had been examined by the investigating judge who subsequently ordered that no further action be taken in the light of the contradictory nature of the evidence (see paragraphs 8 and 9 above). Therefore, the applicant had been the subject of a criminal charge within the meaning of Article 6 § 1. That provision is accordingly applicable.

2. *Compliance with Article 6 § 1*

29. The applicant complained that the proceedings against him had been unfair because the domestic courts had granted the public prosecutor's application for an order setting aside the decision that no further action be taken some two months after the expiry of the three-day time-limit contained in Article 789 § 5, no. 4, of the CCP.

The Government stated that a decision of that kind was not final at that stage of the investigation.

30. The Court observes that the decision in question was taken at a preliminary stage of summary proceedings. Proceedings of this kind are designed to deal with straightforward criminal cases and involve three stages: the preliminary investigation, the preparation for trial and the trial itself. In accordance with Article 789 § 5, no. 4 *in fine*, the investigating judge may decide at the end of the first stage to suspend proceedings when, *inter alia*, no criminal offence has been made out (see paragraph 16 above). His decision, however, only becomes final when the case file is returned to the judge by the public prosecutor marked "seen". In the present case, however, the public prosecutor returned the case file together with an application for an order setting aside the decision that no further action be taken or, in the alternative, an appeal (see paragraph 10 above).

31. The Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that the Court will not substitute its own interpretation for theirs in the absence of arbitrariness (see, *mutatis mutandis*, the *Ravnsborg v. Sweden* judgment of 23 March 1994, Series A no. 283-B, p. 29, § 33, the *Bulut v. Austria* judgment of 22 February 1996, Reports 1996-II, pp. 355–56, § 29, and as regards arbitrariness in relation to Article 5, among others, the *Van der Leer v. the Netherlands* judgment of 21 February 1990, Series A no. 170-A, p. 12, § 22). This applies in particular to the interpretation by courts of rules of a procedural nature such as time-limits governing the filing of documents or the lodging of appeals. Although time-limits and procedural rules governing appeals by the prosecution must be adhered to as part of the concept of a fair procedure, in principle it is for the national courts to police the conduct of their own proceedings.

32. In the present case the relevant provision of national law (see paragraph 16 above) allowed the public prosecutor three days to appeal against the decision that no further action be taken; that period began to run from the date of receipt of the case file accompanying the decision. Both the file and the application or appeal must be returned to the judge (see paragraphs 16 and 30 above). It appears that the investigating judge's decision of 10 September 1990 was served on the applicant's legal representative the following day. However, the case file did not contain any annotation from the registrar attesting service of the decision on the public prosecutor, or the dates the latter received and returned the file to the investigating judge (see paragraph 9 above). In the absence of any indication as to the date of receipt, the investigating judge considered that the application had to be deemed to have been made in time (see paragraph 10 above). That interpretation was upheld by the Supreme Court which stressed the importance of avoiding a strict interpretation that would unjustifiably prevent the case from being examined on its merits (see paragraph 14 above). Both the investigating judge and the Supreme Court took into consideration the submissions made in support of the applicant's position (see paragraphs 10 and 14 above).

Although the date appearing on the public prosecutor's application to have the decision set aside was marked as 13 September 1990, the national courts did not consider that fact to be relevant to the issue concerning the date of receipt of the file and held that that date could not be determined for certain, there being nothing to show when the decision had been sent to the public prosecutor or when he had actually received it (see paragraphs 14 and 15 above).

As is clear from the above, the courts were thus called upon to interpret Article 789 § 5, no. 4, of the CCP in circumstances where the date of receipt could not be established as a matter of certainty.

33. In the Court's view, the interpretation to be given to Article 789 § 5, no. 4, in such circumstances is a matter for the domestic courts. Granting the public prosecutor's application almost two months after the decision not to prosecute meant that the matter had not become final under Spanish law. In these circumstances, the interpretation of the national courts cannot be described as either arbitrary or unreasonable, or of such a nature as to taint the fairness of the proceedings. Nor can it be said that any issue arises concerning the equality of arms in this case.

34. There has, accordingly, been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

Holds by eight votes to one that there has been no violation of Article 6 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 1997.

Signed: THÓR VILHJÁLMSSON
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the dissenting opinion of Mr Valticos is annexed to this judgment.

Initialled: T. V.
Initialled: H. P.

DISSENTING OPINION OF JUDGE VALTICOS

(Translation)

My vote, the sole dissenting vote, expresses, if the truth be told, a general impression derived from considering the case as a whole. I can well understand that others may react or reason differently. For my part, independently of the appalling nature of the offence that led to the impugned proceedings, the continuing doubt as to how the public prosecutor's file came to be lost in transit and as a consequence the confusion that marred the proceedings have finally led me to the same conclusion as that reached by the majority of the Commission, namely that the applicant did not have an entirely fair hearing.