Information Note on the Court's case-law No. 167

October 2013

Del Río Prada v. Spain [GC] - 42750/09

Judgment 21.10.2013 [GC]

Article 7

Article 7-1

Heavier penalty

Nulla poena sine lege

Retroactivity

Postponement of date of applicant's release following change in case-law after she was sentenced: *violation*

Article 5

Article 5-1

Lawful arrest or detention

Postponement of date of applicant's release following change in case-law after she was sentenced: *violation*

Facts – Between 1988 and 2000, in eight sets of criminal proceedings, the applicant received a series of prison sentences amounting to more than 3,000 years in total for various offences linked to terrorist attacks. In November 2000, in view of the close legal and chronological connection between the offences, the *Audiencia Nacional* combined the applicant's sentences and fixed the total term to be served at thirty years, in accordance with the limit provided for in the 1973 Criminal Code, as in force at the relevant time. In April 2008 the authorities at the prison where the applicant was being held scheduled the date of her release for July 2008, after deducting remissions of sentence for the work she had done in prison since the start of her detention in 1987. Subsequently, in May 2008 the *Audiencia Nacional* asked the prison authorities to revise the applicant's planned release date and recalculate it on the basis of a new approach (known as the "Parot doctrine") adopted by the Supreme Court in a judgment of February 2006, according to which the relevant sentence adjustments and remissions were to be applied to each of the sentences individually and not to the maximum term of thirty years' imprisonment. As a result, the final date for the applicant's release was set at 27 June 2017. Her subsequent appeals were unsuccessful.

In a judgment delivered on 10 July 2012 (see Information Note 154) a Chamber of the Court held, unanimously, that there had been a violation of Articles 5 and 7 of the Convention, finding that the application of the new method for calculating remissions of sentence had not been foreseeable at the time of the applicant's conviction and had amounted to retroactive application, to her detriment, of a change that had taken place after the offences had been committed.

Law – Article 7: The parties' submissions mainly concerned the calculation of the total term to be served by the applicant in accordance both with the rules on combining sentences and setting a maximum term, and with the system of remissions of sentence for work done in detention as provided for in the 1973 Criminal Code.

(a) *Scope of the penalty imposed* – Under the 1973 Criminal Code, as applicable at the time when the offences had been committed, the maximum term of thirty years' imprisonment corresponded to the maximum term that could be served (*condena*) in the event of multiple related offences, as distinct from the concept of the "sentences" (*penas*) pronounced or imposed in the various judgments convicting the offender. Furthermore, for the purpose of discharging the "sentence imposed", prisoners were entitled to one day's remission for every two days' work done. However, there had been no specific rules on how to apply remissions of sentence when multiple sentences were combined and a maximum total term of imprisonment was set, as in the applicant's case, where sentences totalling three thousand years' imprisonment had been reduced to thirty years. It was not until the new 1995 Criminal Code had been drafted that the law had expressly stated, with regard to the application of sentence adjustments, that in exceptional cases the total duration of the sentences imposed could be taken into account, rather than the maximum term that could be served by law.

Having regard to the case-law and practice concerning the interpretation of the relevant provisions of the 1973 Criminal Code, prior to the Supreme Court's 2006 judgment, when a prisoner's sentences had been combined and a maximum total term set, the prison authorities and the courts had applied any remissions of sentence for work done in detention to the maximum term to be served. They had thus taken into account the maximum legal term of thirty years' imprisonment when applying remissions of sentence for work done in detention. In a judgment of March 1994 the Supreme Court had referred to the maximum legal term of thirty years' imprisonment as a "new, independent sentence" to which any adjustments provided for by law should be applied. Accordingly, despite the ambiguity of the relevant provisions of the 1973 Criminal Code and the fact that the Supreme Court had not set about clarifying them until 1994, it had clearly been the practice of the prison and judicial authorities to treat the term to be served (*condena*), as resulting from the thirty-year upper limit, as a new, independent sentence to which certain adjustments, such as remissions of sentence for work done in detention, were to be applied. In the light of that practice, while serving her prison sentence the applicant had been entitled to believe that the penalty imposed was the one resulting from the thirty-year maximum term, from which any remissions of sentence for work done in detention would be deducted. Moreover, remissions of sentence for work done in detention had been expressly provided for by statutory law, which required the term of imprisonment to be automatically reduced as a recompense for any work done in detention, except in two cases: when the prisoner escaped or attempted to escape, and when the prisoner misbehaved. Even in these two cases, remissions of sentence already allowed by a judge could not be taken away retroactively, as the days corresponding to the remissions of sentence already granted were deemed to have been served and formed part of the prisoner's legally acquired rights.

Although the 1995 Criminal Code had done away with remissions of sentence for work done in detention for people convicted in the future, its transitional provisions allowed prisoners convicted under the old 1973 Criminal Code – like the applicant – to continue to enjoy the benefits of such arrangements if this was to their advantage. However, the law had introduced harsher conditions for granting release on licence, even for prisoners convicted before its entry into

force. The Court inferred from this that in opting, as a transitional measure, to maintain the effects of the rules concerning remissions of sentence for work done in detention and for the purposes of determining the more lenient criminal law, the legislature had considered those rules to be part of substantive criminal law, that is to say of the provisions affecting the actual fixing of the sentence, and not just its execution.

In the light of the foregoing, at the time when the applicant had committed the offences for which she had been prosecuted and when the decision had been taken to combine the sentences and set a maximum prison term, the relevant law, taken as a whole, had been formulated with sufficient precision to enable the applicant to discern, to a degree that was reasonable in the circumstances, the scope of the penalty imposed on her, bearing in mind the maximum legal term of thirty years and the system of remissions of sentence for work done in detention as resulting from the 1973 Criminal Code. The penalty imposed on the applicant had thus amounted to a maximum of thirty years' imprisonment, it being understood that any remissions of sentence for work done in detention would be deducted from that term.

(b) *Whether the application of the "Parot doctrine" to the applicant had altered only the means of executing the penalty or its actual scope* – In May 2008 the *Audiencia Nacional* had rejected the proposal to set 2 July 2008 as the date for the applicant's final release, instead relying on the "Parot doctrine" established in the Supreme Court's judgment of February 2006 – well after the offences had been committed, the sentences combined and a maximum term of imprisonment fixed. It had taken the view that the new rule by which remissions of sentence for work done in detention were to be applied to each of the individual sentences – rather than to the thirty-year maximum term as previously – was more in conformity with the actual wording of the 1973 Criminal Code. The application of the "Parot doctrine" to the applicant's situation had rendered ineffective the remissions of sentence for work done in detention to which she had been entitled by law and in accordance with final decisions by judges responsible for the execution of sentences. As a result, the maximum term of thirty years' imprisonment had ceased to be an independent sentence to which remissions for work done in detention were to be applied, and instead had become a thirty-year prison sentence to which, in practice, no such remissions were applicable.

(c) *Whether the "Parot doctrine" had been reasonably foreseeable* – The change in the system for applying remissions of sentence had been the result of the Supreme Court's departure from previous case-law, as opposed to a change in legislation. In March 1994 the Supreme Court had taken the view that the maximum term of thirty years' imprisonment was a "new, independent sentence" to which all the remissions of sentence provided for by law were to be applied. In any event, it had been the practice of the prison and judicial authorities prior to the "Parot doctrine" to apply remissions of sentence for work done in detention to the maximum term of thirty years' imprisonment. The Supreme Court had not departed from its previous case-law until 2006, ten years after the law to which it referred had been repealed. It had thus produced a new interpretation of the provisions of a law that was no longer in force, namely the 1973 Criminal Code, which had been superseded by the 1995 Criminal Code. In addition, the transitional provisions of the 1995 Criminal Code had been intended to maintain the effects of the system of remissions of sentence for work done in detention set in place by the 1973 Criminal Code in respect of people convicted under that Code, precisely so as to comply with the rules prohibiting retroactive application of the more stringent criminal law. However, the Supreme Court's new interpretation, which had rendered ineffective any remissions of sentence already

granted, meant in practice that the applicant and other people in similar situations were deprived of the benefits of the remission system.

Lastly, while the Court accepted that the Supreme Court had not retroactively applied the law amending the 1995 Criminal Code, it was nevertheless clear from the reasons given by the Supreme Court that it had pursued the same aim as the law in question, namely to guarantee the full and effective execution of the maximum legal term of imprisonment by those serving several long sentences. In this connection, while States were free to change their own criminal policy, for example by increasing the penalties applicable to criminal offences, in doing so they nevertheless had to comply with the requirements of Article 7 of the Convention, which unconditionally prohibited the retrospective application of the criminal law where this was to an accused's disadvantage.

In the light of the foregoing, at the times when the applicant had received her sentences and when she had been notified of the decision to combine them and set a maximum term of imprisonment, there had been no indication of any perceptible line of case-law development in keeping with the Supreme Court's 2006 judgment. The applicant had therefore had no reason to expect that the Supreme Court would depart from its previous case-law or that the *Audiencia Nacional*, as a result, would apply the remissions of sentence she had been granted not in relation to the maximum thirty-year term, but successively to each of the sentences she had received. This departure from the case-law had had the effect of modifying the scope of the penalty imposed, to the applicant's detriment.

Conclusion: violation (fifteen votes to two).

Article 5 § 1: The applicant had been convicted by a competent court in accordance with a procedure prescribed by law, and had received prison sentences totalling over 3,000 years. In most of the judgments concerned, as well as in its decision of November 2000 to combine the sentences and set a maximum total term, the *Audiencia Nacional* had indicated that the applicant was to serve a maximum term of thirty years' imprisonment in accordance with the 1973 Criminal Code. The applicant's detention had not yet attained that maximum term. There was clearly a causal link between the applicant's convictions and her continuing detention after 2 July 2008, which had resulted respectively from the guilty verdicts and the maximum thirty-year term of imprisonment.

In the light of the considerations that had led it to find a violation of Article 7 of the Convention, the Court considered that at the times when the applicant had been convicted, when she had worked while in detention and when she had been notified of the decision to combine the sentences and set a maximum term of imprisonment, she could not reasonably have foreseen that the method used to apply remissions of sentence for work done in detention would change as a result of a departure from case-law by the Supreme Court in 2006, and that the new approach would be applied to her. This had delayed the date of her release by almost nine years. She had therefore served a longer term of imprisonment than she should have served under the domestic legal system as it had stood at the time of her conviction, taking into account the remissions of sentence she had already been granted in conformity with the law. Accordingly, since 3 July 2008 the applicant's detention had not been "lawful".

Conclusion: violation (unanimously).

Article 46: In view of the particular circumstances of the case and the urgent need to put an end to the violations of the Convention found in the present case, it was incumbent on the respondent State to ensure that the applicant was released at the earliest possible date.

Article 41: EUR 30,000 in respect of non-pecuniary damage.
