

APPLICATION N° 34615/97

Fernanda QUINTANA ZAPATA v/SPAIN

DECISION of 4 March 1998 on the admissibility of the application

Article 8, paragraph 1 of the Convention *This provision applies to an illegitimate family as well as to a legitimate one*

In relation to the present case, living together for 65 years and having five children is proof of "family life"

Article 14 of the Convention *Conditions of application and notion of discrimination (recap of jurisprudence)*

Article 14 of the Convention in conjunction with Article 8 of the Convention *Refusal to pay a widow's pension to the applicant who had lived with the deceased for 65 years. A State which in its legislation on widows and widowers pensions, grants a benefit to a surviving spouse but not to the surviving partner of an unmarried couple, does not practise discrimination. This difference in treatment has a legitimate aim (protection of the traditional family) is proportionate to that aim and falls within the State's margin of appreciation.*

Article 26 of the Convention *Domestic remedies have been exhausted if, before the highest domestic authority the applicant has submitted, in substance the complaint he puts before the Commission.*

Competence *ratione materiae* *The Convention does not guarantee as such any right to a pension.*

THE FACTS

The applicant is a Spanish citizen. She was born in 1904 in Aznaga (Badajoz province) and lives in Sant boi de Llobregat (Barcelona province). She was represented before the Commission by Mr Francesc Casares Potau and Mr Joan Agusti Maragall, who are lawyers practising in Barcelona.

The fact, as submitted by the parties, may be summarised as follows.

a *The particular circumstances of the case*

The applicant, who was born in 1904, lived with E.M.B., who was born in 1905, as his wife from 1928 to 22 March 1993, the date of his death. Five children were born of their relationship and registered as the children of the applicant and E.M.B.

After E.M.B.'s death, the applicant applied to the social security services for a widow's pension (*pensión de viudedad*). The application was rejected in a decision of 20 November 1993 on the ground that the applicant had not proved that she had been married to the deceased and that there had been no legal impediment to such a marriage.

The applicant appealed against this decision to Barcelona Social and Employment Court, claiming to have married E.M.B. on 23 December 1928 in a civil ceremony in a village in Córdoba province but to have been unable to obtain the marriage certificate from the relevant office of the Registry of Births, Marriages and Deaths. Moreover, she emphasised that, marriage certificate or no, the undeniable reality was that she had lived with E.M.B. for over 65 years and had five children by him, all of whose births had been registered with the names of their father and mother. She argued that cohabitation for so long a period should be assimilated to marriage for the purposes of the entitlement to widows' pensions. She submitted that to decide otherwise would be to breach Articles 14 and 39(1) of the Spanish Constitution (respectively setting out the principle of non-discrimination and the principle of the social, economic and legal protection due to the family).

In a judgment of 27 January 1995, Barcelona Social and Employment Court No. 12 dismissed the appeal on the grounds that, contrary to the applicant's assertions, she had never been married to E.M.B., even if it had been proved that she had lived with him as his wife from 1928 to 22 March 1993, the date of his death. The court followed the Supreme Court (judgments of 29 June 1992 and 10 November 1993), which, in a similar case (involving 30 years' cohabitation between the deceased person and his partner), had rejected an application for a widow's pension on the ground that the woman in question had had sufficient time in which to marry the deceased.

The applicant appealed to the Catalonia High Court (*Tribunal Superior de Justicia de Cataluña/Tribunal Superior de Justicia de Catalunya*). In a judgment of 30 December 1995, the court dismissed the appeal on the ground that, under the current social security legislation, the only persons entitled to widows' pensions were surviving spouses. It held that legislation would be required to reflect a change in society in relation to marriage, since the relevant law did not authorise the court to interpret it equitably save where expressly provided. The court concluded that there was no breach of the principle of non-discrimination enshrined in Article 14 of the Constitution, since people could choose either to contract into the system of protection created by the law, or to stay outside it, the only exception being where they could prove that it had been impossible for them to so contract in. No such impossibility had been established, or even alleged, in the case in point.

The applicant lodged an application for the protection of fundamental rights (an "*amparo*" appeal) with the Constitutional Court, claiming a violation of Article 14 taken in conjunction with Article 39(1) of the Spanish Constitution. In a decision of 22 July 1996, served on 29 July 1996, the Constitutional Court dismissed the *amparo* appeal for the same reasons as those given by the courts below.

b *Relevant domestic law*

1 Spanish Constitution

Article 14

"All Spanish citizens are equal before the law. Any discrimination based on birth, race, sex, religion, opinion or any other condition or personal or social circumstance shall be prohibited."

Article 39(1)

"The State authorities shall ensure that the family is afforded social, economic and judicial protection."

2 The General Social Security Act (as amended)

Under section 174 of the General Social Security Act (as amended) non-marital relationships between men and women do not give rise to any entitlement to a widow or widower's pension, even where the parties have lived together. Accordingly, the grant of such a pension is dependent on the existence of a lawful marriage between the deceased and the claimant, a "lawful marriage" being one celebrated in accordance with one of the forms laid down in section 149 of the Civil Code.

The only exception is that the surviving partner of an unmarried couple who could not marry because there was no divorce in Spain until 1981 may claim a widow or widower's pension.

COMPLAINTS

The applicant states that she lived with EMB for 65 years and had five children by him. She submits that the refusal to grant her a widow's pension constitutes a violation of the principle of non-discrimination enshrined in Article 14 of the Convention, taken in conjunction with the right to respect for family life contained in Article 8 of the Convention and the right to found a family set out in Article 12 thereof.

THE LAW

The applicant complains that the Spanish courts rejected her claim for a widow's pension despite her having lived with the deceased for 65 years and having had five children by him. She invokes Article 14 of the Convention in conjunction with Articles 8 and 12 thereof.

The Commission considers that the applicant's complaint really concerns the principle of non-discrimination and the right to respect for family life. The Commission will concentrate on this aspect of the problem and will examine it under Article 14 taken in conjunction with Article 8.

Article 8 of the Convention provides

"1 Everyone has the right to respect for his private and family life, his home and his correspondence

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others "

Article 14 of the Convention provides

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status "

The respondent Government raise a preliminary objection to the effect that domestic remedies have not been exhausted. They submit that the applicant did not claim a violation of her right to respect for her private and family life before the Spanish courts. They emphasise that, in the domestic proceedings, the applicant focused on the alleged violation of the principle of non-discrimination laid down in Article 14 of the Spanish Constitution, taken in conjunction with Article 39(1) thereof, which proclaims the principle that the family should be protected, but does not enshrine a fundamental right.

The applicant disputes the Government's position, affirming that she referred to Articles 14 and 39(1) of the Constitution before all the Spanish courts which dealt with her case, and that the latter provision guarantees a right to protection for family life, within the meaning of Article 8 of the Convention.

The Commission recalls that, according to its established case-law, the requirement to exhaust domestic remedies is fulfilled if, before the highest domestic authority, the applicant has submitted, in substance, the complaint he puts before the Commission (see for example, No. 9186/80, Dec. 9.3.82, D.R. 28, p. 172). Such was the case in the present proceedings, since the complaints which the applicant puts before the Commission formed part of her *amparo* appeal to the Constitutional Court, and the Commission notes that that court dealt with the merits thereof. In these circumstances, the Commission considers that the preliminary objection of non-exhaustion of domestic remedies cannot be allowed.

As regards the merits, the Government claim that no public authority has interfered with the applicant's family life. First, the fact that, under national law, marriage is a precondition for the grant of a pension in the event of the death of one member of a couple cannot be considered as interference by the State in the applicant's right to respect for her family life. As regards the alleged violation of Article 14 of the Convention in conjunction with Article 8 thereof, the Government stress that, according to the Commission's case-law, there is no discrimination where the difference in treatment is based on two factually different situations. It is evident that a relationship of cohabitation as man and wife cannot, in law, be assimilated to marriage. Moreover, the applicant herself acknowledges that marriage and cohabitation outside marriage do not have the same legal status. The Government also wish to emphasise that two statements from Peñarroya Registry of Births, Marriages and Deaths (in Cordoba province) were produced before Barcelona Social and Employment Court, certifying that the register contained no entry recording a marriage involving the applicant between October 1922 and August 1943. With regard to the applicant's financial interest in the case, the Government point out that the applicant receives a non-contributory old-age pension of 36,510 pesetas (ESP) (approximately 1,500 French francs (FRF)) fourteen times a year, whereas the widow's pension which she claims amounts to approximately ESP 2,000 (approximately FRF 80) fourteen times a year.

For her part, the applicant states that there is no doubt that living together is not exactly the same as being married. However, the principle of equal treatment should be respected where situations are essentially the same. Once one accepts - as do the Convention and the Spanish Constitution - that the protection of the family should apply to illegitimate as well as to legitimate families, there is no valid ground for arguing that there is enough difference between these two types of family to justify a difference in treatment.

The applicant does not deny the existence of two statements from Peñarroya Registry of Births, Marriages and Deaths to the effect that there is no record of her marriage on their register. On the contrary, she emphasises that she has always maintained that, although she was married in a civil ceremony, no record of this remained because of the serious social upheaval in that locality at the time of the Spanish Civil War. She agrees that it has not been possible to prove that she was married. She emphasises that she has brought the application for reasons of principle rather than financial ones, although the latter could also have applied, given her situation.

The Commission observes at the outset that the applicant lived with E M B as his wife from 1928 until his death in 1993, that is for 65 years. Five children were born of this relationship. Their births were registered with the names of E M B and the applicant as their parents.

As regards the widow's pension, the Commission recalls that the Convention does not guarantee any right to a pension as such (see No. 5763/72, Dec. 18.12.73, Collection 45, p. 76 and No. 7624/76, Dec. 6.7.77, D.R. 19, pp. 100-110).

However, the issue before the Commission is whether, in the circumstances of the case, the contested decision constitutes a violation of the applicant's right to respect for her family life.

With regard to the issue whether the decision in question relates to "family life" within the meaning of Article 8 of the Convention, the Commission recalls that, in the *Marckx* and *Johnston* cases, the European Court of Human Rights has held that Article 8 applies to the family life of an illegitimate family as well as to that of a legitimate one (see *Eur. Court HR, Marckx v. Belgium* judgment of 13 June 1979, Series A no. 31, pp. 14-15, paras. 30-31 and *Johnston and Others v. Ireland* judgment of 18 December 1986, Series A no. 112, p. 25, para. 55). The evidence on the case-file shows that the applicant lived with E M B as his wife for 65 years and that five children were born of this relationship. In the Commission's view, there is therefore no doubt that the applicant and her late husband had a "family life".

The question therefore arises whether, as the applicant alleges, there has also been a discriminatory interference with that life contrary to Articles 14 and 8 of the Convention taken in conjunction with each other.

The Commission recalls that a difference in treatment is discriminatory under Article 14 if it "has no objective and reasonable justification", that is to say if it does not pursue a "legitimate aim" or where there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see Eur. Court HR, the case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" of 23 July 1968, Series A no 6, p. 34, para. 10). The Commission considers that differences in treatment with regard to widows' pensions as between spouses and persons who lived together outside marriage pursue a legitimate aim and are based on an objective and reasonable justification, that is, the protection of the traditional family (see the above-mentioned *Marckx v. Belgium* judgment, p 18, para. 40). Moreover, the Commission considers that, on the facts of the case, the alleged discrimination does not appear disproportionate and, in any event, can be considered as falling within the State's margin of appreciation.

The Commission notes that the Spanish legislation on widows' and widowers' pensions has taken some account of the position of the surviving member of an unmarried couple in this regard, since, under that legislation, persons living together outside marriage, who were unable to marry each other because of the prohibition on divorce before 1981 may be entitled to a widow or widower's pension where their partner dies. However, the Commission notes that the applicant was not in this position.

The Commission observes that, according to the Spanish courts, the applicant had enough time to marry E.M.B. so as to be able, if necessary, to avail herself of all the benefits dependent on marriage.

In these circumstances, the Commission considers that the contested decisions do not constitute a discriminatory interference with the applicant's family life contrary to Article 14 of the Convention taken in conjunction with Article 8 thereof (see the above-mentioned *Johnston and Others v Ireland* judgment, paras. 66-68 and No. 21173/93, Dec. 30.8.93, unpublished)

Therefore, the application must be rejected as manifestly ill-founded, pursuant to Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.