AS TO THE ADMISSIBILITY OF

Application No. 25787/94
by Pablo ARRABAL
against Spain

The European Commission of Human Rights sitting in private on 15 January 1996, the following members being present:

MM. S. TRECHSEL, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 5 October 1994 by Pablo ARRABAL against Spain and registered on 25 November 1994 under file No. 25787/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 24 August and 10 October 1995 and the observations in reply submitted by the applicant on 20 September and 27 October 1995;

Having deliberated;

Decides as follows:

THE FACTS

a. Particular circumstances of the case

The applicant is a Spanish citizen born in 1964 and resident in Valladolid. He is a barrister and has been a member of the Bar of Madrid since 1989. The facts, as submitted by the parties, may be summarised as follows:

Since 1990 the applicant has lived in Valladolid, where he works in the export trade. In November 1993, the applicant decided to establish himself as a barrister (abogado) in Valladolid. On 26 November 1993, he addressed a letter to the Valladolid Bar informing them that he was a member of the Bar of Madrid and that he intended to join the Valladolid Bar in January 1994. On 3 January 1994, the applicant filed a membership application with the Valladolid Bar and, on 11 January 1994, he paid the Valladolid Bar a membership fee amounting to 100.000 pesetas. The competent official at the Valladolid Bar told the applicant that he would formally become a member of the Valladolid Bar in just a few days.

While waiting for the Valladolid Bar to deal with the membership application, the applicant carried out several acts for the practice of his profession. To that end, he rented an office in Valladolid and put up a plate with his name and the word "lawyer" written on it. On 3 January 1994, the applicant sent several letters to some companies informing them about his new professional office and telephone number. He signed his letters with his name, followed by "lawyer, enrolled in Madrid/Valladolid". On 22 January 1994, the applicant requested the Valladolid Bar to speed up the membership application.

On 25 January 1994, the applicant received a letter from the Valladolid Bar informing him that his membership application had been rejected, and accusing him of practising as a barrister without being registered with the local Bar. In February 1994, the Valladolid Bar, invoking Article 572 of the Spanish Criminal Code, introduced a criminal complaint accusing him of practising law without being registered with the local Bar.

On 22 April 1994, the applicant was acquitted by the "Juzgado de Instrucción" n° 2 of Valladolid. The judgment indicated that the applicant had only carried out "preparatory acts" in order to practise his profession in the future and had not shown at any time any intention of practising law in Valladolid without being properly registered with the local Bar. The court stated that the applicant lacked any "animus delicti".

The Valladolid Bar lodged an appeal with the "Audiencia Provincial". On 30 May 1994, the applicant was convicted and ordered to pay a fine of 10.000 pesetas, with one day of imprisonment in default. The court stated that even if no direct evidence proved that the applicant had been providing legal advice, this activity could be inferred from circumstantial evidence. In this respect, the court noted that he had previously moved the location of his professional office (despacho profesional) in Valladolid. It was also proved that in his new professional office in Valladolid he put up a plate with the word "lawyer" on it and had sent several letters to local companies informing them of the address and telephone number of his new professional office. The applicant appealed to the Constitutional Court, alleging the infringement of Articles 24.2 (presumption of innocence) and 25 (principle of legality) of the Spanish Constitution. By decision of 15 September 1994, the "amparo" appeal was rejected on the ground that the question at issue fell within the jurisdiction of the ordinary courts.

By letter of 29 June 1994, the applicant withdrew his enrolment in the Valladolid Bar and asked for the reimbursement of the 100.000 pesetas paid by way of fee. On 26 July 1995, the Valladolid Bar reimbursed the 100.000 pesetas.

b. Relevant domestic law

According to Article 572.2 of the Spanish Criminal Code:

"A fine of 1.500 to 15.000 pesetas will be imposed on:

...

A qualified or authorised person who carries on his profession without being registered with the respective official professional council, corporation or association, as far as this requirement is prescribed by law."

COMPLAINTS

Before the Commission, the applicant alleges a violation of Article 7 of the Convention. He points out that, according to the case-law of the Spanish Supreme Court, "preparatory acts" for the future practice of a profession do not constitute an offence under criminal law. Furthermore, Article 1 of the Spanish Criminal Code states that no one shall be convicted of an offence if he did not act with criminal intent. At the trial it was proved beyond all doubt that he had carried out the "preparatory acts" without any criminal intent.

The applicant also invokes Article 13 of the Convention insofar as the Constitutional Court declined to review the case and no other domestic remedy was available.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 5 October 1994 and registered on 25 November 1994.

On 15 May 1995, the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 24 August and 10 October 1995. The applicant replied on 20 September and 27 October 1995.

THE LAW

1. The applicant complains that he was convicted of having practised as a barrister without registration although he had carried out only "preparatory acts" which do not constitute an offence according to the case-law of the Spanish Supreme Court. He invokes Article 7 para. 1 (Art. 7-1) of the Convention, which reads as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Government observe that the Supreme Court case-law which the applicant quotes makes reference to cases of offence, not of petty offence, since the proceedings for petty offences are not heard by the Spanish Supreme Court, but by the first instance court and by the "Audiencia Provincial" on appeal. Contrary to the applicant's submissions, the commission of a petty offence does not require the payment of fees by clients. In the present case, the imposed penalty was not deprivation of liberty but a pecuniary fine of a minimum amount. The Government recall that, according to its case-law, the Commission is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible

violation of any of the rights and freedoms set out in the Convention. Furthermore, it is for the national courts to assess the evidence before them. In the Government's view, while one can have different views as to the severity or leniency in the determination of the facts constituting the offence of illegal professional practice under Article 572.2 of the Spanish Criminal Code, the judgment of the Audiencia Provincial cannot be considered at all as being contrary to the law.

The applicant submits that according to Article 5 (Art. 5) of the Spanish Criminal Code a suspect can be prosecuted only if a petty offence has been completed and according to the Spanish case-law there is completion of a petty offence only if the client has paid some fee. Thus preparatory acts for the future practice of a profession do not constitute an offence under Spanish law. That was the reason why he was acquitted in first instance. He insists that he never had any clients nor charged any fees. He only performed preparatory acts for the future practice of the profession of barrister but he did not practise the profession itself. He considers that he has been wrongly convicted, in violation of Article 7 para. 1 (Art. 7-1) of the Convention, for performing bona fide preparatory acts for his profession.

The Commission recalls that Article 7 para. 1 (Art. 7-1) of the Convention, which prohibits the retroactive application of the criminal law and the retroactive imposition of heavier penalties to the detriment of the accused, also enunciates in a more general way the principle of the statutory nature of offence and punishment (Eur. Court D.H., Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, opinion of the Commission, p. 45, para. 44). This requirement is satisfied where it is possible to determine from the relevant statutory provision what act or omission entails criminal liability, even if such determination derives from the courts' interpretation of the provision concerned (cf. No. 8710/79, Dec. 7.5.82, D.R. 28 p. 77).

The Commission also recalls that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (Eur. Court D.H., Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 25, para. 58). Furthermore, as a general rule it is for the national courts to assess the evidence before them.

The Commission notes that the applicant was acquitted of the charge of practising as a barrister without being registered with the local Bar under Article 572.2 of the Spanish Criminal Code by the "Juzgado de Instrucción" no. 2 of Valladolid. Upon appeal by the Valladolid Bar, the "Audiencia Provincial" of Valladolid convicted the applicant and ordered him to pay a fine of 10.000 pesetas. The appeal court found in particular that it could be inferred from the circumstantial evidence submitted to the court that the applicant had not carried out only "preparatory acts" as stated in the first instance, but had been providing legal advice. The "amparo appeal" was rejected by the Constitutional Court.

The Commission considers that the applicant was accused of and sentenced for an act classified as a petty offence under the Spanish Criminal Code at the time it was committed. The Commission is of the opinion that, when determining the facts in question, the "Audiencia Provincial" in no way exceeded the limits of a reasonable interpretation of the relevant provision of the Spanish law.

An examination of this complaint does not, therefore, disclose any appearance of a violation of the rights set out in the above provision of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also invokes Article 13 (Art. 13) of the Convention insofar as the Constitutional Court declined to review the case and no other domestic remedy was available.

Article 13 (Art. 13) of the Convention states :

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission recalls that this provision guarantees an effective remedy but not a successful outcome (cf. No. 10496/83, Dec. 14.5.84, D.R. 38 p. 189). In the present case, even if unsuccessful, the applicant had the opportunity to submit his complaint to the Constitutional Court.

It follows that this part of the application must also be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(S. TRECHSEL)