CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 43544/98
by Alexis Avelino GONZALEZ
against Spain

The European Court of Human Rights (Fourth Section) sitting on 29 June 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr G. Ress,
Mr A. Pastor Ridruejo,
Mr L. Caflisch,
Mr J. Makarczyk,
Mr I. Cabral Barreto,
Mrs N. Vajić, *Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 8 June 1998 by Alexis Avelino GONZALEZ against Spain and registered on 22 September 1998 under file no. 43544/98;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a US citizen, born in 1962. At the time when he introduced his application, he was in custody in Madrid pending his extradition to the USA.

He is represented before the Court by Mrs Dulce Fernández Martín, a lawyer practising in Madrid.

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 15 January 1993 the applicant was charged with conspiracy to import cocaine and attempting to import cocaine by the Federal Court for the Southern District of Florida. The district attorney and the applicant signed an agreement to the effect that the applicant would plead guilty to the first charge, would be discharged on the second and would cooperate with the district attorney's office by acting as an undercover agent in groups of cocaine traffickers. He was then released on bail and ordered to appear before the court to be sentenced on 4 January 1994. However, he did not appear. On 2 February 1994 a warrant for the applicant's arrest was issued by the Federal judge.

Further proceedings had also been brought against the applicant before the Eleventh Judicial Circuit Court for Dade County, Florida, on 12 charges including armed robbery and kidnapping. On 1 March 1994 the judge of this court issued a warrant for the applicant's arrest.

The applicant was arrested in Madrid, Spain, on 5 February 1997 pursuant to the international arrest warrant issued by the Federal Court for the Southern District of Florida. The warrant requested the applicant's detention and extradition to the USA to be tried for drug trafficking.

Following the applicant's arrest in Madrid, the Central Investigating Court *(Juzgado Central de instrucción)* no. 2 of the *Audiencia Nacional*, by a decision of 6 February 1997, ordered the applicant's detention pursuant to the relevant provisions of the law of 21 March 1985 on extradition and the Extradition Treaty between Spain and the USA. The court added that his detention would become invalid if a formal extradition request was not submitted within 45 days from the day of the notification to the USA embassy, and that that period was to begin to run on the day of the arrest.

On the same day, 6 February 1997, the Central Investigating Court notified the Spanish Ministry of Foreign Affairs of the applicant's detention. On 14 February 1997 the Ministry of Foreign Affairs notified the USA Embassy.

On 14 March 1997 the Spanish Foreign Ministry received a note from the Governor of Florida , requesting that the applicant be detained and handed over to authorised agents so that he could be taken to America and punished according to the law.

The Embassy of the United States presented a Verbal Note dated 24 March 1997 requesting the applicant's extradition. The mandatory extradition documents were received on 1 April 1997, including decisions from the US District Court for the Southern District of Florida and from the Eleventh Judicial Circuit Court for Dade County, Florida.

On 26 March 1997 the Central Investigating Court of the *Audiencia Nacional* extended the applicant's detention for 40 days .

On 25 April 1997 the Spanish Council of Ministers authorised the continuation of the extradition proceedings.

Appealing against the decision of 26 March 1997, the applicant requested the *Audiencia Nacional* to order his release as the mandatory extradition documents had not been received within the time laid down by law. The *Audiencia Nacional,* by a decision of 9 April 1997, rejected this request. The applicant lodged an appeal (*recurso de reforma*) that was also dismissed by the same court on 10 April 1997. The applicant appealed (*recurso de queja*) to the *Audiencia Nacional*, which rejected his appeal by a judgment of 26 September 1997. Finally, on 24 October 1997, the applicant lodged an appeal *de amparo* with the Constitutional Court on the grounds of violation of Articles 17 (right to liberty) and 24 (fair trial) of the Spanish Constitution.

On 30 June 1997 the applicant, relying on Article 13 of the Law on extradiction from Spain, had requested the *Audiencia Nacional* to obtain from the American authorities additional information relating to the agreement concluded between the district attorney and himself. On 18 July 1997 the *Audiencia Nacional* had rejected this request as it considered the requested information to be irrelevant to the proceedings.

On 10 November 1997 the applicant requested the *Audiencia Nacional* to declare the extradition request inadmissible on the grounds that the information provided by the American authorities was biased and said nothing of the agreement signed between the applicant and the district attorney, that the formalities had not been complied with, that there was no evidence of the applicant's participation in one of the offences and that there was a risk to his life on account of threats received from drug traffickers' groups. The applicant also sought leave to submit certain evidence for the next hearing. On 1 December 1997, the *Audiencia Nacional* rejected this request for the same reasons as those given in its decision of 18 July 1997.

By a decision of 31 March 1998, the Central Investigating Court no. 2 of the *Audiencia Nacional* found, *inter alia*, that the conditions regarding documentation for the purposes of mandatory extradition under the Extradition Treaty between Spain and USA had been met. It indicated that both arrest warrants were good and that the Federal court had even convicted the applicant. The Court added :

> " ...there is no doubt about the existence of the agreement (between the applicant and the district attorney)... the applicant broke it since he did not appear before the court to receive sentence... therefore only if the agreement is still valid in accordance with the laws of the requesting State (USA) ....will its content apply.
>
> (...)
>
> The applicant's reasoning that he acted as an undercover agent ... and that he had to leave his country because his life was in danger, cannot be considered by the court, as they are facts irrelevant to the extradition proceedings.
>
> (...)

The applicant alleged a formal defect... as he was detained on 5 February 1997 and the extradition request was received on 24 March 1997, and therefore after the 45-day period prescribed by the treaty had expired ... the day to start counting the period was not, as alleged by the applicant, the day of arrest, but the day of notification of the arrest to the embassy ...

(...) "

The Court then decided:

" To declare the extradition (of Avelino Alexis Gonzalez) admissible in order to : A) Be sentenced for the offences of which he was found guilty by the Florida Federal Court... or, if the agreement between the district attorney and the person requested is not valid, to be tried for the facts of charge no.1 and for the facts corresponding to charge no. 2 (arrest warrant of 3.2.94); B) Be tried for the facts for which proceedings were brought against him before the Eleventh Circuit Court of the Dade County (arrest warrant of 1.3.94). Extradition is declared admissible provided that, if the extradited person is sentenced to life imprisonment, imprisonment could not be indefinite or for the whole life..."

On 8 April 1998 the applicant lodged an appeal (r*ecurso de suplica*) against the *Audiencia Nacional*'s decision of 31 March 1998. The Criminal Chamber of the *Audiencia Nacional* dismissed the appeal by a decision of 2 June 1998**,** stating, *inter alia* :

"The reasons alleged by the applicant to justify his leaving the country cannot be taken into account when deciding on the admissibility of the extradition request ... If the alleged risk is genuine, the applicant should seek protection from the authorities of the country concerned...

(...)

The 45-day period should start from the day of the notification of the arrest... to the embassy... regardless of the fact that the State had been informed of the detention through INTERPOL. Moreover, non-compliance with this 45-day period could be relevant with regard to the decision of imprisonment, but not for declaring the extradition request inadmissible."

Replying to the applicant's argument about the illegality of the international arrest warrant, the Court stated :

"(...)

Although in the notification of the detention, INTERPOL stated that the arrest warrant was dated 15 January 1993, in the communication from the American authorities it appears that this date corresponds to the day of the trial ... and the arrest warrant was issued on 2 February 1994. It is also reported that on 14 January 1993 proceedings were brought against the applicant and on 1 March 1994 the judge of the Eleventh Judicial Circuit Court for Dade County issued a warrant for his arrest."

On 25 June 1998 the applicant lodged an appeal *de amparo* with the Spanish Constitutional Court against the judgment of 2 June 1998, alleging violation of Articles 15 (right to life), 17 (right to liberty) and 24 (fair trial) of the Spanish Constitution.

On 23 June 1997 the applicant applied to the *Audiencia Nacional* arguing that the requesting State (the USA) should give formal, concrete and binding guarantees on the maximum duration of the sentence to be imposed on the applicant and that, if he was convicted, he should be imprisoned in a special prison for collaborators of the government. This application was rejected by the *Audiencia Nacional* on 14 July 1998 as it considered that the question raised had already been dealt with in its decision of 31 March 1998. On 20 July 1998 the applicant lodged a second appeal (*recurso de súplica*) with the same arguments. The applicant submitted that the judgment of 31 March 1998 was not sufficient as it only set generic conditions. Moreover, relying on Article 4 of the Law, on extradition from Spain, the applicant submitted that it was unlawful to declare extradition admissible as life imprisonment constituted inhuman and degrading treatment. The appeal was dismissed by a decision of 30 July 1998. The Criminal Chamber of the *Audiencia Nacional* concluded :

> " ...the decision declaring extradition admissible establishes as a condition that if the court of the requesting State (the USA) orders life imprisonment, it should not be for whole life. As the USA and Spain have signed an extradition treaty, signature is considered a sufficient guarantee that the USA will comply with the commitment contained in that decision..."

On 17 August 1998 the applicant lodged an appeal *de amparo* with the Constitutional Court, arguing that the refusal of the *Audiencia Nacional* to request the US authorities to give concrete and formal guarantees in the extradition proceedings constituted a violation of Articles 15 (right to life), 24 (fair trial) and 25 (imprisonment to be oriented towards re-education and social rehabilitation) of the Spanish Constitution.

On 16 July 1998 the applicant requested the *Audiencia Nacional* to stay enforcement of his extradition until the appeals lodged with the Constitutional Court had been decided. On 30 July 1998 the Criminal Chamber of the *Audiencia Nacional* dismissed the applicant's request.

The appeals *de amparo* were rejected as being manifestly ill-founded by three decisions delivered by the Constitutional Court on 28 and 30 September 1998. Concerning the applicant's complaint about the risks he would run if extradited, the Constitutional Court stated that the hypothetical threats deriving from his former relations with criminal organisations were irrelevant since he was to be delivered to the US Authorities who would be responsible for his safety.

On 22 September 1998 the applicant asked the European Commission of Human Rights to apply Rule 36 of its Rules of Procedure and ask the Spanish Government to stay the execution of the extradition order. By a decision of the same day the President of the Commission rejected the request.

On 13 January 1999 the applicant was extradited to the United States, where he is imprisoned in the Miami Federal Centre of Detention.

COMPLAINTS

The applicant complains that his extradition was unlawful as the international arrest warrant issued by the US authorities was invalid, since his arrest in Spain, on 5 February 1997, would have required a new international arrest warrant different from earlier one of 15 January 1993. He asserts that the latter did not take into account the agreement between himself and the district attorney. The applicant also complains that the extradition request was submitted after the 45 days laid down by law, a deadline which had begun to run on the date of his arrest (5 February 1997), and therefore ended on 21 March 1997, not on 24 March 1997. The applicant notes that, even if the notification to the embassy is considered to be the starting day for calculating the 45-day period, the latter would have expired on 31 March; yet it was not until 1 April 1997 that a Verbal Note, without the legal formalities, was received from the US Embassy. He invokes Article 5 of the Convention.

The applicant complains of the decision of the *Audiencia Nacional* rejecting his request for the submission of evidence. Moreover, he contends that the extradition documentation did not prove his participation in the criminal offences attributed to him and that the Spanish court should have decided whether there was at least *prima facie* evidence of his participation. He invokes Article 6 § 1 of the Convention.

The applicant further complains of the rejection by the *Audiencia Nacional* of his request to receive from the US authorities concrete and formal guarantees that he would not be sentenced to inhuman or degrading punishment. He considers that the generic condition to the effect that in the event of life imprisonment, the detention could not be indefinite or for a lifetime is not sufficient. He claims that life imprisonment is an inhuman and degrading punishment and invokes Article 3 of the Convention.

The applicant also complains that the Spanish Government have not requested the United States to give the necessary guarantees to protect his life. He alleges that he had to flee the United States, as drug traffickers had found out about his co-operation with the Federal Government and threatened to kill him and his family. He invokes Article 2 of the Convention.

The applicant finally complains that he did not have a fair and public hearing within a reasonable time before the Constitutional Court. He invokes Articles 6 and 13 of the Convention.

THE LAW

1. The applicant complains that the judicial decision authorising his extradition to the USA was unlawful and alleges the violation of Article 5 of the Convention, the relevant parts of which provide :

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (...)

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(...)"

The Court recalls that Article 5 § 1 (f) of the Convention requires the lawfulness of the detention of "a person against whom action is being taken with a view to" extradition. However, the review carried out by the Court is limited to examining whether there is a legal basis for the detention and whether the decision to place a person in detention may or may not be described as arbitrary in the light of the facts of the case (Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 25, § 59). Furthermore, where the Convention refers directly back to domestic law, as in Article 5, it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, *inter alia*, the Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, p. 20, § 46, and the Quinn v. France judgment of 22 March 1995, Series A no. 311, p. 18-19, § 47).

The Court notes that on 5 February 1997 the applicant was arrested pursuant to an international warrant for his arrest and extradition issued by the Federal District Court for the Southern District of Florida, and was taken into custody pending extradition. By a decision of 6 February 1997, the *Audiencia Nacional*, in application of the relevant provisions of the Law of 21 March 1985 on Extradition and the Extradition Treaty between Spain and the United States, ordered the applicant's detention. The Court considers that in ordering the detention of the applicant with a view to his extradition, the *Audiencia Nacional* was following a procedure which was in conformity with domestic legislation. In so far as the applicant complains that the US authorities did not make a formal extradition request within the 45-day period prescribed by law, the Court notes that by decisions of 31 March 1998 and 2 June 1998, the *Audiencia Nacional* stated that the date on which the 45-day period for the submission of the extradition request began to run was the day of the notification to the requesting State of the applicant's arrest, not the day of arrest. For the Court, this interpretation of the national law seems reasonable. The Court observes furthermore that in the other decisions taken in the framework of the proceedings against the applicant, the *Audiencia Nacional* gave exhaustive reasons justifying his continued detention. Consequently, it considers it to be beyond doubt that the requirements of Article 5 § 1 (f) were met. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. The applicant complains of the decision of the *Audiencia Nacional* to reject his request for the submission of evidence. Moreover, he alleges that the extradition documentation did not prove his participation in the criminal offences attributed to him and that the Spanish court should have decided whether there was at least *prima facie* evidence of his participation. In this connection, he invokes Article 6 § 1 of the Convention, the relevant part of which provides :

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

The Court does not consider it necessary in the instant case to examine whether the guarantees contained in Article 6 of the Convention apply to the impugned proceedings. It notes that the applicant was able to seek judicial review of the extradition request and that the proceedings before the *Audiencia Nacional* do not disclose any element of unfairness. It is to be observed that the applicant was legally represented in these proceedings and had the opportunity to submit any arguments he considered useful for the presentation of his case. Furthermore, the Court notes that the *Audiencia Nacional* duly reasoned its refusal of the request to solicit supplementary evidence. These considerations lead it to conclude that, even assuming that Article 6 § 1 is applicable to these proceedings, the applicant's complaint under this head is inadmissible as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

3. The applicant complains of the refusal by the *Audiencia Nacional* of his request to ask the US authorities for concrete and formal guarantees that he would not be sentenced to inhuman or degrading punishment. He considers the generic condition that in the event of a life sentence imprisonment could not be indefinite or for life not to be sufficient. He submits that life imprisonment constitutes inhuman and degrading punishment and invokes Article 3 of the Convention.

Even assuming that the risk of being sentenced to life imprisonment in the event of extradition to a non-Contracting State is contrary to Article 3 of the Convention, the Court notes that by a decision of 31 March 1998 the *Audiencia Nacional* declared admissible the extradition request provided that, if the applicant was sentenced to life imprisonment, the imprisonment could not be indefinite or for life. In these circumstances, it considers that this complaint must be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

4. The applicant alleges that he had to flee the United States as drug traffickers had found out about his co-operation with the Federal Government and threatened to kill him and his family. He complains that the Spanish Government had not asked the United States to give the necessary guarantees to protect his life and invokes Article 2 of the Convention.

The Court recalls that the right not to be extradited is not as such included among the rights and freedoms guaranteed by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee (see, *mutatis mutandis*, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 33, § 85). The Court recalls also that, owing to the importance of the right to life, the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (see H.L.R. v. France judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 758, § 40).

In the present case the Court, like the Spanish Constitutional Court, considers that the applicant has not shown that, by extraditing him to the United States, the Spanish authorities did in fact expose him to the danger he alleges. The Court does not consider that his declaration that he had been threatened on several occasions by drug traffickers constitutes

satisfactory *prima facie* evidence (see the H.L.R. judgment cited above, p. 757, § 34). The examination of this complaint therefore discloses no appearance of a violation of the rights and freedoms guaranteed by the Convention in particular by Articles 2 and 3. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

5. The applicant complains that he was not given a fair and public hearing within a reasonable time before the Constitutional Court and invokes Articles 6 and 13 of the Convention.

Even assuming Article 6 of the Convention to apply to the proceedings concerned, the Court notes in the first place that the Constitutional Court dismissed his appeals *de amparo* before the execution of the extradition decision by the Spanish authorities. Furthermore, the decisions dismissing the appeals *de amparo* gave sufficient reasons and were delivered within a reasonable time. It follows that, even assuming that Article 6 § 1 is applicable to these proceedings, this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

Matti Pellonpää
President