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

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By refusing to take account of time served in France by members of the terrorist organisation ETA, the Spanish authorities did not breach the Convention in calculating prison terms

In today's **Chamber** judgment[1] in the case of **Arrozpide Sarasola and Other v. Spain** (application no. 65101/16) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights,

no violation of Article 7 (no punishment without law)

and

no violation of Article 5 § 1 (right to liberty and security)

The case concerned the calculation of the maximum length of prison terms to be served in Spain by members of the terrorist organisation ETA and the question whether time already served in France should be taken into account.

The Court observed that the Constitutional Court's decisions to declare inadmissible *amparo* appeals lodged by the applicants against judgments of the Supreme Court were based on the non-exhaustion of ordinary judicial remedies. However, the fact that the *amparo* appeals had been declared inadmissible on that ground, whereas the Supreme Court had previously declared actions to set aside as inadmissible for lack of relevance, and had moreover given notice of its decisions after the thirty-day time-limit allowed for the appeal, had to be regarded as entailing a lack of legal certainty.

The Court observed, however, that the decisions of the Supreme Court had not changed the maximum length of the total term of imprisonment, which had always been set at thirty years. The discrepancies between the various courts concerned as to the possibility of combining sentences had lasted for only about ten months, until the adoption by the Supreme Court of its leading judgment, which had settled the matter in the negative.

The solutions adopted in the applicants' cases had merely followed the judgment of the plenary formation of the Supreme Court. There had thus been no violation of Article 7. Lastly, given that the impugned decisions had not led to any alteration in the sentences, the disputed prison terms could not be regarded as unforeseeable or unlawful within the meaning of Article 5 § 1 of the Convention.

Principal facts

The applicants, Mr Santiago Arrozpide Sarasola, Mr Alberto Plazaola Anduaga and Mr Francisco Múgica Garmendia, are three Spanish nationals who were born in 1948, 1956 and 1953 respectively.

Mr Arrozpide Sarasola was arrested and placed in detention in France for membership of the ETA terrorist organisation. He was sentenced to ten years' imprisonment for offences committed in France in 1987. On 21 December 2000 he was surrendered to the Spanish judicial authorities pursuant to an extradition request. In Spain he was sentenced to over three thousand years'

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

imprisonment after eleven different sets of criminal proceedings for several terrorist attacks and murders committed in Spain between 1980 and 1987, including a booby-trapped car attack on a shopping centre.

The *Audiencia Nacional* set at thirty years the maximum length of the prison sentences to be served by Mr Arrozpide Sarasola in respect of all the custodial sentences imposed on him in Spain. Following the Court's judgment in the case of *Del Rio Prada*, the applicant requested and obtained the recalculation of the time to be served. The sentence reductions to which the applicant was entitled were deducted from the thirty-year maximum prison term.

Subsequently, the applicant requested that the prison sentence passed by the French courts, which he had already served in France, be combined with the thirty-year maximum term set in Spain. He relied on the Supreme Court's judgment no. 186/2014 of 13 March 2014, which had acknowledged the possibility of taking into consideration a sentence served in France, on the basis of Framework Decision no. 2008/675/JHA of the Council of the European Union of 27 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

On 2 December 2014 the *Audiencia Nacional* acceded to that request. The State Prosecutor lodged an appeal on points of law against that decision with the Supreme Court, for the protection of legality. On 10 March 2015 the Supreme Court allowed the appeal on points of law, considering that there was no need to include the prison sentence served in France in the calculation, with reference to the reasoning set out in its leading judgment (plenary Criminal Chamber) of 27 January 2015.

The applicant brought an action to set aside the Supreme Court's judgment and asked for the proceedings to be dealt with under an urgent procedure so he could lodge an *amparo* appeal with the Constitutional Court within the thirty-day time-limit. He then withdrew his action on the grounds that the Supreme Court had already had an opportunity to respond to his allegations of a violation of his fundamental rights. On 26 May 2015 the applicant lodged an *amparo* appeal with the Constitutional Court, which declared it inadmissible for failure to exhaust available legal remedies.

The second and third applicants had also been arrested and convicted in France for terrorist offences linked to ETA. They had served their sentences in France and then been extradited to Spain, where they were convicted of a terrorist attack carried out in Spain in 1987 (the second applicant) and several terrorist attacks and murders committed in Spain between 1987 and 1993 (the third applicant). They requested the inclusion of the prison sentence passed and served in France in calculating the thirty-year maximum prison terms set by law. The *Audiencia Nacional* first of all allowed their request, and then the State Prosecutor lodged an appeal on points of law with the Supreme Court, which upheld that appeal, using the same reasoning as in the judgment delivered in Mr Arrozpide Sarasola's case. The second applicant brought an action to set aside the judgment before the Supreme Court, and then withdrew it on the grounds that the Supreme Court had already responded to his allegations of a violation of his fundamental rights. On the same grounds as for the first applicant, the Constitutional Court declared the two applicants' *amparo* appeals inadmissible.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to a court), the applicants complained that the decisions given by the Constitutional Court declaring their *amparo* appeals inadmissible had deprived them of their right of access to a court. Relying on Article 7 (no punishment without law), they complained of what they saw as the retrospective application of new Supreme Court case-law and of a new law which had come into force after their conviction, which they submitted had extended the actual length of their sentences. Relying on Article 5 § 1 (right to liberty and security) they complained that their imprisonment had been extended by twelve, seven and ten years respectively owing to the retrospective application of the law to their detriment.

The applications were lodged with the European Court of Human Rights on 4 November 2016, 23 November 2016 and 21 November 2016, respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Vincent A. **De Gaetano** (Malta), *President*,
Branko **Lubarda** (Serbia),
Helen **Keller** (Switzerland),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),
María **Elósegui** (Spain),

and also Stephen **Phillips**, *Section Registrar.*

Decision of the Court

Article 6 § 1

The Court observed that the Constitutional Court's decisions to declare inadmissible the applicants' *amparo* appeals against the judgments of the Supreme Court had been based on the non-exhaustion of ordinary judicial remedies: in particular, the Constitutional Court found that the applicants had not brought an action to set aside under section 241(1) of the Institutional Law on the Courts.

The Court noted that the first two applicants had actually brought actions to set aside in the Supreme Court, requesting that their cases be dealt with urgently, in order to be able to lodge an *amparo* appeal with the Constitutional Court. Even though the applicants had withdrawn their actions in the Supreme Court before appealing to the Constitutional Court, the former had notified them of decisions declaring their actions inadmissible on grounds of a lack of relevance. That notice had been sent to them after the statutory thirty-day time-limit for an *amparo* appeal and after they had actually lodged such an appeal. Therefore, if the two applicants had waited for the notification of those decisions before preparing and lodging their *amparo* appeals, it would have been open to the Constitutional Court to declare the appeals inadmissible as out of time.

Moreover, the Court found that the Constitutional Court's decisions to declare the *amparo* appeals inadmissible, as regards the first and second applicants, for failure to exhaust ordinary judicial remedies, were at odds with the decisions of the Supreme Court, which had previously declared the actions to set aside inadmissible for lack of relevance, taking the view that most of the complaints submitted by those two applicants had already been examined in the cassation judgments appealed against. In addition, the Court found that the Government had relied on a 2013 judgment of the Constitutional Court which indicated that an action to set aside was not required when the court which had delivered the decision appealed against, at last instance, had already ruled on the alleged violations of the fundamental rights of which protection would then be sought in the *amparo* appeal.

The fact that the *amparo* appeals had been declared inadmissible for non-exhaustion of domestic remedies, whereas the Supreme Court had previously declared the actions to set aside of the first and second applicants inadmissible for lack of relevance, and had moreover given notice of its decisions after the thirty-day time-limit allowed for the appeal, had to be regarded as entailing a lack of legal certainty to the detriment of the applicants. The decisions as to the inadmissibility of the *amparo* appeals, on grounds of non-exhaustion, had thus deprived the applicants of their right of access to a court.

Article 7

The Court began by observing that the Supreme Court impugned decisions had not changed the maximum length of the total term of imprisonment, which had always been thirty years.

The subject-matter of the dispute was the question whether it was necessary to take account of the time already spent in France on the basis of the sentences handed down in respect of offences committed in France. The decisions of the *Audiencia Nacional* in favour of taking this previous time into account had never become final, because they had been appealed against by the public prosecutor before the Supreme Court. The Court also noted that, at the time when the applicants had committed the criminal offences and when the decisions were taken to calculate the total length of their aggregate prison sentences, the relevant Spanish law, as a whole, did not provide, to a reasonable extent, for time already served in another State to be taken into account.

The Court attached weight to the fact that the applicants had sought the combining of their sentences with those already served in France only after the delivery of the Supreme Court judgment in which it had observed that it was in favour of taking account of time already served in another State on the basis of the EU Council Framework Decision no. 2008/675/JHA.

In accordance with that approach, some Sections of the Criminal Division of the *Audiencia Nacional* had combined sentences served in France with those handed down in Spain. But all those decisions, except for three isolated cases, had been annulled by the Supreme Court following appeals by the public prosecutor on points of law and the delivery of judgment no. 874/2014 of 27 January 2015 by the plenary formation of the Criminal Division of the Supreme Court. That judgment had dismissed the possibility of taking into account sentences handed down and served in another EU member State when calculating prison sentences to be served in Spain within the maximum term.

The Court observed that the discrepancies between the various courts concerned as to the possibility of combining the terms of prison sentences, had lasted for only about ten months, until the adoption by the Supreme Court of its leading judgment no. 874/2014, which had settled the matter in the negative. The solutions adopted in the applicants' cases had merely followed the judgment of the plenary of the Supreme Court. There had thus been no violation of Article 7.

Article 5 § 1

The Court considered that when the applicants' prison sentences had been handed down, and later on, when they had requested that the time spent in France be taken into account, Spanish law, as a whole, did not provide, to a reasonable extent, for time already served in another State to be taken into account for the purposes of the calculation within the maximum thirty-year term. Given that the impugned decisions had not led to any alteration in the sentences, the disputed prison terms could not be regarded as unforeseeable or as not being in accordance with a procedure prescribed by law, within the meaning of Article 5 § 1. Accordingly there had been no violation of Article 5 § 1.

Just satisfaction (Article 41)

The Court held that Spain was to pay the representative of the first applicant 2,000 euros (EUR) in respect of costs and expenses and the representatives of the second and third applicants EUR 1,000 each also in respect of costs and expenses.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.