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Contact: Ireneusz Kondak
Tel: 03.90.21.59.86

Date: 03/10/2024

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Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.

Meeting: 1514th meeting (December 2024) (DH)

Reply from the authorities (04/10/2024) following a communication from the applicant concerning the case of Otegi Mondragon and Others v. Spain (Application No. 4184/15).

Information made available under Rule 9.5 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1514^e réunion (décembre 2024) (DH)

Réponse des autorités (04/10/2024) suite à une communication du requérant relative à l'affaire Otegi Mondragon et autres c. Espagne (requête n° 4184/15) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.5 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



MINISTERIO
DE LA PRESIDENCIA, JUSTICIA
Y RELACIONES CON LAS CORTES

DGI
04 OCT. 2024
SERVICE DE L'EXECUTION
DES ARRÊTS DE LA CEDH

ABOGACÍA GENERAL DEL ESTADO
SUBDIRECCIÓN GENERAL
DE ASUNTOS CONSTITUCIONALES Y
DERECHOS HUMANOS

OTEGI MONDRAGON & JOINDER CASERS VS Spain.

4184/15; 4317/15; 5053/15; 5028/15; 4323/15

On 16 September 2024 the Directorate of Human Rights Department for the execution of judgments of the European Court of Human Rights communicated to the Government of Spain, through its procedural representation before the Court, a Rule 9.1 communication, submitted on behalf of the applicant's representative on 13 September 2024, raising certain issues as regards individual measures.

With regard to the said communication, the Government of Spain respectfully brings to the Department for the execution of judgments the following considerations:

1.- The Court identified in its judgment Section 954 § 3 of the Spanish Criminal Procedure Code (as modified by Law 41/2015, of 5 October 2015), as the instrument to provide the possibility of revision of a final decision where it has been found a violation of the Convention or one of its Protocols.

That is exactly what happened in this case, as the Supreme Court upheld in its judgment 426/2020, of 27 July, the revision appeal lodged by the applicants, quashing the Audiencia Nacional judgment 22/2011, of 16 September, which was the judgment in which the Court had appreciated a lack of impartiality in the composition of the Chamber that had tried the applicants.

2.- In their appeal before the Constitutional Court (recurso de amparo) the applicants requested the annulment of the order of retroaction for the repetition of the oral trial contained in a second Supreme Court's judgment (692/2020 of December 15) ulterior to the one issued in the revisión appeal (426/2020), because they considered it violated their right to effective judicial protection without

CORREO ELECTRÓNICO:

aetedh@mjusticia.com

C/ SAN BERNARDO, 45
28015 MADRID
TEL.: 91 390.45.11
FAX: 91 390.21.48

defencelessness (Article 24 EC) in its aspect of prohibition of procedural *bis in idem*.

3.- In its judgment no. 9/2024, the Plenary of the Constitutional Court upheld the alleged violation raised by the applicants in their amparo appeal, considering the repetition of the trial to be a disproportionate burden for them, thus giving a full reparation to the applicants for the violation declared by the Court.

In consequence with that declaration, the Constitutional Court also declared the nullity of the second judgment of the Supreme Court (692/2020, of December 15) (legal grounds 6), reasoning that it would not be appropriate to annul only the order of retroaction and maintain the declaration of nullity of the sentence issued by the Audiencia Nacional, as that would entail a material acquittal decision in relation to the first prosecution, which was unrelated to the purely procedural violation denounced in the amparo appeal.

This decision of the Constitutional Court implied the maintenance of the *res judicata* effect of the sentence initially imposed to the applicants in the cassation appeal Supreme Court's judgment No. 351/2012, of May 7, which had reduced the sentence imposed by the Audiencia nacional and was fully complied with by the plaintiffs, as there were no doubts of the impartiality of the composition of the Supreme Court which issued that judgment.

4.-_Contrary to the submissions of the applicants' lawyers, the Government of Spain consider that_this decision of the Spanish Constitutional Court is fully in line with the findings of the Court.

The arguments raised by the applicant's lawyers are simply wrong: they interpretate the Court's judgment as a *carte blanche* for their clients not to be tried again, whereas the Court only appreciated the right to be judged by an independent court.

This was fully accomplished by

- a- the annulment of the Audiencia Nacional's conviction by the Supreme Court in the revisión appeal procedure (426/2020, of 27 July)
- b- the maintainance of the Supreme Court's judgment (351/2012) that had ruled on the cassation appeal lodged by the applicants against that conviction, revising the Audiencia Nacional's judgment and convicting the applicants with a reduction of the sentences initially imposed to 6 years and 6 months imprisonment for Mr. Arnaldo Otegi Mondragón and Mr. Rafael Usabiaga, who were also stripped of their 'leadership' status, and 6 years for the rest of the applicants.

The Constitutional Court's decision in the amparo appeal is not contradictory with the judgment of the Court at stake, as the lawyers try to present now, violating the applicant's procedural rights by transforming the application of the guarantee of the prohibition of double criminal prosecution of Article 4 of Protocol 7 of the Convention and Article 50 of the Charter of Fundamental Rights of the European Union, into a burden for them.

This is a clear misunderstanding both of the Court's and of the Constitutional Court judgments. The Constitutional has simply clarified that the Court's decision only entailed the right for the applicants not to be retried, but not the right to be acquitted and therefore exempted from their final convictions, issued by an independent Court.

6.- Eventually, the Government of Spain also consider that the alleged violation of the right to a fair trial of the applicants, in conjunction with Article 46 (1) of the ECHR, by the said judgment 9/2024 of the Constitutional Court, does not belong to this supervision procedure, as it refers to an alleged new violation of the rights of the applicants protected by the Convention, which per se should be the subject of a separate application before the Court.

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For the former reasons, the Government of Spain has respectfully requested and again requests the Committee of Ministers to declare the closure of the supervision of the execution of the

aformentioned judgment of the Court, condiering that the incumbent domestic authorities have already adopted all the individual and general measures stemming from it.

Madrid, 4 October 2024

The Agent of Spain

A handwritten signature in black ink, consisting of stylized initials 'AB' followed by a horizontal line and a flourish.

Alfonso Brezmes Martínez de Villarreal

DEPARTMENT FOR THE EXECUTION OF JUDGMENTS- COUNCIL OF EUROPE