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

Item reference: Action Report (23/10/2024)

Communication from Spain concerning the case of M.D. and Others v. Spain (Application No. 36584/17) - *The appendices in Spanish are available upon request to the Secretariat.*

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

Référence du point : Bilan d'action (23/10/2024)

Communication de l'Espagne concernant l'affaire M.D. et autres c. Espagne (requête n° 36584/17) (**anglais uniquement**) - *Les annexes en espagnol sont disponibles sur demande au Secrétariat.*



MINISTERIO
DE LA PRESIDENCIA, JUSTICIA Y
RELACIONES CON LAS CORTES

ABOGACÍA GENERAL DEL ESTADO

SUBDIRECCIÓN GENERAL DE ASUNTOS
CONSTITUCIONALES Y DERECHOS HUMANOS

DGI

23 OCT. 2024

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

ACTION REPORT

M.D. and others v. SPAIN (Application No. 36584/17)

Judgment date: 28/06/2022

Final judgment date: 28/09/2022

I. Subject of the case

The case concerns the police's collection of files concerning a group of judges who had expressed their views on Catalonia's independence from Spain. The material collected in the files, including photographs, was subsequently leaked to the press.

II. Case description

1. Summary of relevant facts and dates

In February 2014, the applicants, twenty serving judges and magistrates who worked in Catalonia, signed a manifesto in which they set out their legal opinion in favour of the possibility of exercising the Catalan people's so-called "right to decide", within the framework of the Spanish Constitution and international law.

A national newspaper subsequently published an article under the headline "The conspiracy of thirty-three separatist judges", featuring photographs and personal details of all the applicants.

The applicants alleged a violation of Article 8 since the Spanish national police, without any justification, launched an investigation of the signatories of the manifesto using photographs taken from their database as well as personal information, which was subsequently leaked to the press. They held that such dissemination, by public officials, would constitute a criminal offence that was not properly investigated by the national courts.

Criminal proceedings had been initiated by the applicants and ultimately dismissed. During these proceedings the *Audiencia Provincial* had noted the existence of a police report directed to the Senior Chief of Police of Barcelona regarding the applicants' identities and personal and professional details, together with their photographs (taken from the police ID database). No statement was

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nevertheless taken from the Senior Chief of Police of Barcelona in these judicial proceedings, being responsible for the database.

2. Violation found

The European Court of Human Rights found a violation of Article 8 of the Convention. The Court states that there is no domestic legal provision that would justify the police drawing up a report on citizens when there is no indication that they have committed a crime or of their involvement in the preliminary stages necessary for its commission.

The Court considers that it is undisputed that those personal data were extracted from the police database and they were used for a purpose other than that for which they were collected. In respect of the leak to the press, the domestic authorities considered proved the State's responsibility for that leak, despite the fact that it had not been possible to prove its authorship.

It also states that, in order for an investigation to be considered effective, the responsible for the police database should have testified in court since, regardless of his criminal or disciplinary liability, his testimony would have helped to identify those responsible for the criminal acts in question. The *Audiencia Provincial* also considered relevant further investigative measures such as hearing the Senior Chief of Police of Barcelona, but this measure was not taken by the investigating judge when the case was reopened and the *Audiencia Provincial* eventually confirmed this procedure.

The Court concludes that the interference with the applicants' private life had not been in accordance with any domestic law, and the public authorities had used their personal data for a purpose other than that for which they were collected. Moreover, the Court considers that the courts concerned did not carry out an effective investigation capable of remedying the interference with the applicants' rights.

The Court awards each applicant EUR 4,200 in respect of non-pecuniary damage, and EUR 3,993 in respect of costs and expenses. The judgment became final on 28 September 2022.

Moreover, the allegation on Article 10 was declared inadmissible by the Court, as no type of sanction or chilling effect could be discerned from the mere fact that disciplinary proceedings took place, given their outcome and also the fact that they were not initiated *ex officio* by the General Council of the Judiciary, but rather as a consequence of a complaint lodged by a third party.

III. Individual measures

1. Just satisfaction

As stated, and following the declaration by the Court of the violation of Article 8 of the Convention, the applicants were awarded the following amounts:

- (i) EUR 4,200 to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (ii) EUR 3,993 jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses.



The judgment became final on 28 September 2022, since none of the parties requested that the case be referred to the Grand Chamber. Accordingly, the three-month deadline for payment of the amounts due to the applicants was 28 December 2022.

It must be noted that this has been a very complex case given the number of applicants involved. Once the documentation was submitted from the Human Rights Department to the Financial Department of the Ministry of Justice on 17 October 2022 the applicants' lawyer was required to provide the necessary additional documentation and ID cards of the applicants in order to pay them the just satisfaction awarded. This is a condition sine qua non requirement previous to register the interested parties in the Central Third Party File [*Fichero Central de Terceros*] and order the transfer through the Public Treasury.

On 10 November 2022, in view of the lack of response from the lawyer, a further request was made, given the need and urgency of the procedures. A file including the correspondence with the lawyer is attached to this Action Plan.

On 15 November 2022, the representative sent a copy of the applicants' ID cards, reporting that one of the applicants was missing, with great difficulty in locating her. It was not until 1 December 2022 that the lawyer submitted the remaining ID card. However, with regards to two applicants the required data were provided only in February 2023 and they were paid shortly after.

The Financial Department responsible for the processing of the Court's payments has confirmed that all the applicants have been paid the amounts due. The date of payment to each applicant is listed below.

The authorities consider that no default interest is due with regard to the seven applicants who were paid shortly after the expiration of the three month time limit, since such delay was caused by the above-mentioned belated communication, by the applicants' lawyer, of the required information in respect of these applicants.

| APPLICANT | DATE OF PAYMENT |
|---|------------------------|
| Miriam De Rosa Palacio | 20/12/2022 |
| Joan Frances Uria Martínez | 20/12/2022 |
| Marta Planes Batalla | 20/12/2022 |
| Silvia Ventura Mas | 20/12/2022 |
| Ramón Llena Miralles | 20/12/2022 |
| Montserrat Raga Marimon | 20/12/2022 |
| Daniel Martínez Fons | 20/12/2022 |
| María del Carmen Sánchez-Albornoz Bernabé | 20/12/2022 |



| | |
|--|------------|
| | |
| Josep Antoni Rodriguez Saez | 22/12/2022 |
| Roser Aixandrí Tarré | 22/12/2022 |
| Matilde Aragó Gassiot | 22/12/2022 |
| Francesc Xavier González de Rivera Serra | 23/12/2022 |
| Maria del Mar Mirón Hernández | 29/12/2022 |
| Joan Agustí Maragall | 02/01/2023 |
| Faustino Rodriguez García | 02/01/2023 |
| Esteve Hosta Soldevila | 04/01/2023 |
| Lidia Castell Valldoresa | 10/01/2023 |
| Josep Niubó Claveria | 13/01/2023 |
| Araceli Aiguaviva Baulies | 16/02/2023 |
| Jordi Agustí Julià | 7/03/2023 |

2. Review proceedings

The revision appeal set out in the Spanish Procedural Criminal Law¹ enables an applicant who has obtained a favourable judgment from the Court to seek for a reopening of the investigation phase, through the possibility envisaged in art 954.3 of the procedural criminal law, as long as the time lapse to investigate crime has not ended. P

The applicants did not request the revision of their case before the Supreme Court in the one year time, which expired on 28 September 2023.

3. Further investigations

3.1.Criminal proceedings

¹ Art.954. 3.

An application for review of a final judicial decision may be made where the European Court of Human Rights has found that the decision was rendered in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, provided that the violation, by its nature and gravity, has effects which persist and cannot be terminated otherwise than by such a review.



Regarding the possibility for the investigation court to reopen or continue is criminal investigation, the Criminal prosecutor office has issued a specific report (see ANNEX 1) concluding that the prescription time for the prosecution and conviction of the investigated crime has already elapsed, not been legally possible to reopen a criminal investigation of an offence for which the statute of limitations has already expired.

3.2. Contentious-administrative proceedings

On the other hand, after the Court's judgment, the Spanish Supreme Court revised, in the course of a cassation appeal lodged by the applicants, the investigation made by the Spanish Data Protection Agency (A.E.P.D.) on the alleged violation of the personal data of the applicants, taking specifically into account the findings of the European Court in its judgment.

By Judgment 1.756/2023 of 21/12/2023 (see ANNEX 2), the Supreme Court quashed the Audiencia Nacional's prior decision to dismiss the complaint filed by applicants prior to their request to open criminal proceedings and, taking into account the findings of the Court, concluded that the AEPD's decision to shelve the case and the failure to initiate disciplinary proceedings was not justified, as effective and useful measures had not been taken to clarify all of the facts that are the object of the complaint for infringement of the Data protection..

We reproduce here below few relevant passages of this decision (copy of which is annexed to this communication):

In our opinion, the assumption made by the Court of First Instance in the aforementioned grounds of law and the conclusion reached on the sufficient investigation by the AEPD is not admissible, nor is it in accordance with what the ECHR stated in its Judgment of 28 June 2022.

Indeed, the Audiencia Nacional considers that after the investigation carried out by the AEPD into the security measures and rules concerning access to the DNI databases, all investigative measures had been exhausted and the AN ruling had been complied with. But at no point does the contested decision refer to the 'Internal Note' report containing the personal data of each of the signatories of the published manifesto. The mere reading of the resolution that agreed to close the file makes it clear that the proceedings focused essentially on the security measures for access to the DNI database, existing protocols and instructions in relation to the information system, improper access to the file and queries, the list of users investigated, with searches based on the document number - as described in the lower court ruling - but nothing is said or explained about the preparation of the aforementioned report - an internal note containing the personal data of the appellants, Judges and Magistrates in office, which included their date of birth, address, judicial destination, membership of a judicial association and, in certain cases, reference is made to their participation in certain activities or social movements and even their political opinions.

Therefore, it can be seen that the Agency does not complete the investigation into the totality of the facts that are the subject of the complaint, as all information relating to the internal information note is omitted, about which nothing is indicated, and there is no record of a possible investigation into its authorship.

As the ECtHR indicates, it is unquestionable that the photographs of the appellants published in the newspaper had their origin in the police database, to which only the authorities have access, and



'although the manner in which the leak occurred is not established, there is no other explanation than that the authorities allowed the leak' and in view of the circumstances of the case, in order for it to be considered that a sufficient investigation had been carried out, it was necessary for the investigators to have taken all the necessary steps to clarify the circumstances in which the appellants' photographs could be accessed. This argument can be transferred to the preparation of the internal memo containing the personal and professional data of the appellant Judges and Magistrates. This leads to the conclusion that the decision to close the case in the circumstances indicated was adopted without taking all the useful and effective measures, also in relation to the internal note or police report drawn up in respect of persons whose behaviour did not involve any type of criminal activity.

Therefore, the interpretation of the Chamber a quo, which understands that its previous ruling of 30 May 2018 was correctly complied with the investigation carried out by the AEPD, is based exclusively on what was stated by the Agency itself, which in turn refers to the Minutes and statements on the security measures regarding access to the DNI files. However, the investigation was not completed in the terms mentioned in the judgment of the European Court of Human Rights, nor in relation to the preparation of the aforementioned police report, which is full of personal data on each of the Judges and Magistrates who signed the manifesto, without any objective justification and in clear violation of the LPD.

For our part, and limiting the appeal to resolving the question that is of interest to the court, limited to whether in the circumstances described the decision to file and not initiate disciplinary proceedings is justified, we consider that it cannot be maintained, in the terms in which the Court of First Instance does, that the decision to dismiss is duly justified, in accordance with what was stated by the ECHR in its judgement of 28 June 2022.

FIFTH.- Doctrine to be established.

In accordance with what was stated by the ECtHR in its judgement of 28 June 2022, it cannot be maintained that the AEPD's decision to file the case and the failure to initiate disciplinary proceedings was duly justified, when effective and useful measures were not taken to clarify all of the facts that are the object of the complaint for infringement of the DPA.

In the operative part of the judgment, the Supreme Court

- 1.- quashes the former judgment of 28 February 2022 of the Audiencia Nacional
- 2.- declares the former decision of the Data Protection Agency to file the case null and void and
- 3.-orders the Data Protection Agency to reopen the proceedings so that may take further useful and effective steps to clarify the facts complained of, including the drawing up of the Police Report Note.

As a result of that pronouncement, the Data Protection Agency must reopen the investigation on the facts denounced by the applicants.

Depending on its findings, the Data protection Agency may initiate proceedings for the exercise of sanctioning powers, specifying the facts, the identification of the person or entity against whom the



proceedings are directed, the infringement that may have been committed and the possible penalty to be imposed.²

The Government of Spain consider that the aforementioned decision adopted by the Spanish Supreme Court allows the applicants to have an effective investigation by the Spanish Data Protection Agency capable of remedying the interference with their right declared by the Court.

IV. General measures

1.- Publication and dissemination of the judgment

The judgment delivered was widely disseminated among domestic authorities and those courts concerned, as well as to the general public through its publication on the website of the Ministry of Justice. It has also received wide press coverage.

The translation of the judgment has also been disseminated among domestic authorities and those courts concerned and published in the Ministry of Justice website. It was in turn submitted to the HUDOC database.

2.- Other General measures

The revision by the Court of the positive obligations of national authorities under Article 8 has an individual nature *per se*, which requires a detailed case-by-case analysis.

The violation found by the Court is a very specific and isolated case, so no similar violations are likely to occur in the future.

V. State of the execution of the judgment

The Government of Spain consider that all the obligations for the domestic authorities stemming from the judgment have already been adopted, and therefore asks the Department for the execution of judgments to forward this Action report to the Committee of Ministers in order to proceed with the closure of the supervision procedure on this case.

² Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights.

Article 68. decision to initiate proceedings for the exercise of sanctioning authority.

1. Once the proceedings to which the previous Article refers have been concluded, if appropriate, the Presidency of the Spanish Data Protection Agency shall be responsible, when appropriate, for issuing a decision to initiate proceedings for the exercise of the power to impose penalties, specifying the facts, the identification of the person or entity against whom the proceedings are directed, the infringement that may have been committed and the possible penalty.



Madrid to Strasbourg, 23 October 2024

The Agent of the Kingdom of Spain

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ANNEXES

ANNEX 1- Criminal Prosecutor's Office report

ANNEX 2 – Supreme Court's Judgment 1.756/2023

ANNEX 3 – Correspondence with the applicants' lawyer to obtain data required for payment of just satisfaction.

TO THE DEPARTMENT FOR THE EXECUTION OF JUDGMENTS- COUNCIL OF EUROPE