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

THIRD SECTION

DECISION

Application no. 4184/15
Arnaldo OTEGI MONDRAGON against Spain
and 4 other applications
(see list appended)

The European Court of Human Rights (Third Section), sitting on 3 November 2015 as a Chamber composed of:

George Nicolaou, *President,*
Luis López Guerra,
Helen Keller,
Helena Jäderblom,
Johannes Silvis,
Dmitry Dedov,
Branko Lubarda, *judges,*

and Marialena Tsirli, *Deputy Section Registrar,*

Having regard to the above applications lodged on 14 January 2015,

Having deliberated, decides as follows:

THE FACTS

A list of the applicants is set out in the appendix.

A. The circumstances of the case

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

1. Proceedings before the Audiencia Nacional concerning the first applicant

2. On 2 March 2010 the first applicant was sentenced by the Fourth Section of the Audiencia Nacional to two years' imprisonment for

encouragement of terrorism (enaltecimiento del terrorismo). The first applicant brought a cassation appeal before the Supreme Court, challenging, inter alia, the impartiality of the President of the Fourth Section of the Audiencia Nacional (hereinafter "the presiding judge"), as she had displayed hostility towards the first applicant during the criminal proceedings. In particular, the first applicant argued that during the trial, and once the applicant had finished his statement, the presiding judge asked him whether he condemned ETA's (an armed Basque nationalist and separatist organisation) violence. The first applicant refused to give an answer and the presiding judge replied that she "already knew that he was not going to give an answer to that question".

3. On 2 February 2011 the Supreme Court ruled in favour of the first applicant, finding that the presiding judge's declarations during the trial had cast doubts on the absence of prejudice or bias. The Supreme Court found that it was not unreasonable to consider that the President's question and her subsequent reaction were signs of bias against the first applicant and of a preconceived idea as to the first applicant's guilt. Consequently, the Supreme Court declared the Audiencia Nacional's judgment void and ordered a re-trial with a different panel of judges. The first applicant was finally acquitted on 22 July 2011.

2. Proceedings before the Audiencia Nacional concerning all the applicants

4. In 2009, criminal proceedings were brought against all the applicants before the *Audiencia Nacional*. They were accused of being members of the terrorist organisation ETA. These proceedings were allocated to the Fourth Section of the *Audiencia Nacional*. The first applicant initiated proceedings to challenge (*recusar*) the whole Section, arguing that the Section's composition did not offer sufficient guarantees to exclude any legitimate doubt in respect of its impartiality, for the presiding judge had already showed signs of partiality and bias in previous criminal proceedings against the first applicant. On 26 April 2011 a special chamber of the *Audiencia Nacional* (a chamber that, according to Article 69 of the Judicature Act is *ex professo* formed to deal with challenge proceedings) ruled against the first applicant.

5. On 16 September 2011 the *Audiencia Nacional* delivered its judgment and sentenced the first and third applicants to ten years' imprisonment for being a member and a leader of a terrorist organisation. The second, fourth and fifth applicants were sentenced to eight years' imprisonment for belonging to a terrorist organisation. All the applicants brought an appeal before the Supreme Court. The first and fifth applicants contested in particular the impartiality of the Fourth Section of the *Audiencia Nacional* reiterating the same arguments that were brought during the challenging proceedings before the *Audiencia Nacional*.

6. On 7 May 2012 the Supreme Court, in a 3 to 2 decision, partially upheld the applicants' appeals and reduced their sentence to six years and six months' imprisonment in respect of the first and third applicants and six years in respect of the second, fourth and fifth applicants. However, the Supreme Court rejected the applicants' arguments concerning the alleged violation of the their right to an impartial tribunal by declaring that the bias displayed by the presiding judge against one of the applicants during previous and different proceedings did not reach the necessary threshold to believe that the judges (and, specifically, the presiding judge) had become again biased or prejudiced, not only against the first applicant but against all of them. According to the Supreme Court, there was no evidence apart from what happened in previous proceedings that supported the alleged partiality of the judges.

7. Two of the Supreme Court's judges issued separate dissenting opinions. According to the first dissenting opinion (which was endorsed, in substance, by the second dissenting judge), the applicants' right to an impartial tribunal had indeed been violated, because the preconceived idea showed by the presiding judge in previous criminal proceedings against the first applicant also affected her judgment during subsequent proceedings. This lack of impartiality also affected the other two judges of the panel. Consequently, a new trial before a different panel of judges should have been ordered. According to the second dissenting opinion, however, there was not enough evidence to support the applicants' conviction. Consequently, the fact that the Fourth Section of the *Audiencia Nacional* lacked impartiality, although true, was irrelevant, for the applicants should have been acquitted by the Supreme Court.

3. Proceedings before the Constitutional Court

(a) Main proceedings

8. On 21 June 2012 the third applicant lodged a separate *amparo* appeal against the judgments of 16 September 2011 and of 7 May 2012, arguing, *inter alia*, that there was not sufficient evidence to substantiate the applicant's conviction. On 27 June 2012 the first, second, fourth and fifth applicants lodged an *amparo* appeal with the Constitutional Court against these judgments, arguing, *inter alia*, that the panel composition of the Fourth Section of the *Audiencia Nacional* fell short of the requirements of an impartial tribunal.

9. On 22 July 2014 the Constitutional Court, in a 7 to 5 decision, ruled against the first, second, fourth and fifth applicants. On the one hand, the majority of the Constitutional Court found that the doubts as to the presiding judge's impartiality were neither subjectively nor objectively justified. On the other hand, the five dissenting judges were of the opinion that the applicants' right to an impartial tribunal had been violated.

In particular, the dissenting judges considered that the presiding judge's conduct in previous proceedings was a clear sign of a preconceived idea regarding the first applicant's guilt, which made her level of impartiality during the proceedings against all applicants questionable.

10. On 22 September 2014 the Constitutional Court ruled against the third applicant.

(b) Proceedings challenging two members of the Constitutional Court's composition

11. In the framework of the *amparo* appeals lodged by all the applicants, some of them initiated proceedings to challenge two of the judges of the Constitutional Court, because of their alleged lack of impartiality.

12. On 3 and 4 September 2013 the first, second, third and fifth applicants requested the presiding judge (P.C.) to abstain from participation in the decision, given that he was affiliated with a political party (People's Party – *Partido Popular*), which, according to the applicants, had publicly expressed opinions, through various spokesmen, about these criminal proceedings suggesting the criminal responsibility of the applicants.

13. On 21 October 2013 the Constitutional Court, in a 9 to 1 decision, ruled against these applicants. The Constitutional Court noted firstly that P.C. was no longer affiliated with a political party, because his membership lasted only until 2011. Furthermore, the Constitutional Court also stressed that neither the Constitution nor laws governing the Constitutional Court established any kind of incompatibility for belonging to, or having belonged to, a political party. According to Article 19.1.6 of the Organic Law on the Constitutional Court, the law only prohibited a Constitutional Court judge from holding a management position within a political group, but not from being a simple member. The dissenting judge referred to his previous dissenting opinion formulated in the decision no. ATC 180/2013, of 17 September 2013, where he claimed that the affiliation to a political (and, at that time, governing) party could eventually amount to a violation of the right to an impartial tribunal.

14. On 15 July 2014 the first and fifth applicants asked another judge (N.R.) to abstain from participation in the decision, for he had previously worked as a Supreme Court Public Prosecutor, where he had initiated enforcement proceedings to declare unlawful the constitution of a political party (called "SORTU") the applicants were members of. In these proceedings, the judge, acting as a prosecutor, had asked the Supreme Court for the non-inscription in the Registry of Political Parties of the political party SORTU, alleging that this party was a continuation of the political Party "HERRI BATASUNA", which had been declared illegal by the Supreme Court in a previous judgment as being an instrument of the terrorist organisation ETA to have a presence in the public representative institutions.

15. On 22 July 2014 the Constitutional Court ruled against these applicants. The Court stated that the proceedings before the Supreme Court referred to the inscription in the Registry of Political Parties of a collective or organization, but not to the criminal responsibility of any individual person. However, the question to be solved by the Constitutional Court dealt with a sentence against concrete individuals, accused of the crime of belonging to a terrorist organization. The Constitutional Court stressed that the facts discussed during the judicial proceedings where this judge had acted as a Public Prosecutor were completely different from the facts discussed in the instant case and, consequently, there were no objectively justified doubts about its impartiality.

B. Relevant domestic law and jurisprudence

1. The Constitution

Article 24

"1. Every person has the right to obtain the effective protection of the judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended.

2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to declare themselves guilty; and to be presumed innocent.

The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences."

2. The Judicature Act

Section 217

"Judges and magistrates must withdraw and may, where appropriate, be challenged on the grounds prescribed by law."

Section 219

"Grounds for withdrawal or, where appropriate, a challenge, include:

...

9. Friendship or self-evident enmity between the judge and any of the parties.

10. Have direct or indirect interest in the outcome of the proceeding.

...

13. Having held public office or post where he or she previously participated directly or indirectly in anything related to the case

..."

Section 221

"A judge or magistrate who believes that he falls within the scope of one of the grounds set out in the preceding sections shall withdraw from the case without waiting to be challenged.

..."

3. Organic Law on the Constitutional Court

Section 19

"The post of a Constitutional Court judge is incompatible with (...) sixth: functions of management within political parties, trade unions, associations, foundations, professional associations ..."

4. Constitutional Court's jurisprudence

16. The Constitutional Court has addressed the issue of whether membership of a political party is compatible with the post of judge at the Constitutional Court. In its decision no. ATC 180/2013, of 17 September, the Court stressed the following:

"Consequently, this Tribunal has already stated that the Organic Law on the Constitutional Court does not prevent the Constitutional Court's magistrates from belonging to a political party, for it only prevents them from exercising management functions, since an ideological affinity does not undermine the impartiality to rule on all those matters prescribed by the Organic Law on the Constitutional Court (ATC 226/1988, of 16 February, FJ 3). This Court has already declared in various decisions that ideological affinity is not *per se* a reason for disqualification (ATC 195/1983, of 4 May; and STC 162/1999, of 27 September)".

COMPLAINTS

17. The applicants complain under Article 6 § 1 of the Convention that the Fourth Section of the *Audiencia Nacional* lacked impartiality, as this Section had previously been declared biased against the first applicant in the framework of criminal proceedings that were finally declared void by the Supreme Court.

18. The applicants also complain under Article 6 § 1 about the Constitutional Court's lack of impartiality, as one of the Constitutional Court judges (the presiding judge) was affiliated with a political party and another one had previously taken part as a Public Prosecutor in enforcement proceedings that had a connection with the criminal proceedings that were subject to the *amparo* appeal before the Constitutional Court.

THE LAW

A. Joinder of the applications

19. Given their common factual and legal background, the Court decides to join the applications pursuant to Rule 42 § 1 of the Rules of Court.

B. Complaint under of Article 6 § 1 of the Convention in relation to the judicial proceedings before the *Audiencia Nacional*

20. The Court considers that it cannot, on the basis of the case file, determine the admissibility of the complaint in so far as it concerns alleged lack of impartiality of the Fourth Section of the *Audiencia Nacional* and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

C. Complaint under of Article 6 § 1 of the Convention in relation to the judicial proceedings before the Constitutional Court

1. Alleged lack of impartiality of Judge P.C.

21. The applicants further complained that they had not received a fair trial by an impartial tribunal, due to the presence of a judge who was affiliated to the political party *Partido Popular*. They asserted that Judge P.C. (who was also the Constitutional Court's presiding judge) might have had an interest in the outcome of the proceedings, contrary to Article 219.10º of the Judicature Act. In respect of their complaints, the applicants invoked Article 6 § 1 of the Convention, which in so far as relevant reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ...by an independent and impartial tribunal ..."

22. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. An alleged lack of impartiality must be assessed both by means of a subjective test, which consists of seeking to determine the personal conviction of a particular judge in a given case, and by means of an objective test, which consists of ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, *Thomann v. Switzerland*, 10 June 1996, § 30, *Reports of Judgments and Decisions* 1996-III, and *Morice v. France* [GC], no. 29369/10, § 73-78, 23 April 2015).

23. As regards the subjective aspect of impartiality, the Court notes that nothing pointed to any prejudice or bias on the part of Judge P.C. There is no indication that P.C. was actually, or subjectively, biased against the applicants. Additionally, the Court observes that the applicants did not procure any evidence with which to rebut the presumption of the judge's impartiality and limited themselves to argue that P.C. was, at the time he was affiliated with the *Partido Popular*, under the obligation "to comply with the instructions of the party", which in previous occasions had publicly asked for the conviction of the applicants (see paragraph 12 above).

24. There thus remains the objective test. Here, what must be determined is whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII). This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the applicant is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports* 1996-III, and *Wettstein v. Switzerland*, no. 33958/96, § 44, ECHR 2000-XII).

25. The Court notes that judge P.C. had been a member of the *Partido Popular* until 2011. The *amparo* appeal was introduced by the applicants before the Constitutional Court on 21 and 27 June 2012, respectively. The controversy rests, consequently, on whether the fact of having previously belonged to a political party is enough to cast doubt on the impartiality of a judge.

26. While the applicants pointed to P.C.'s political affiliation as a sign of a lack of impartiality, the Court does not find any indication in the present case that P.C.'s membership of a particular political party had any connection or link with the substance of the case before the Constitutional Court (see, *Pabla Ky v. Finland*, no. 47221/99, § 33, ECHR 2004-V, and *mutatis mutandis*, *Holm v. Sweden*, 25 November 1993, §§ 32-33, Series A no. 279-A).

27. Additionally, the Court observes that, under domestic legislation, membership of a political party was not *per se* incompatible with the post of judge at the Constitutional Court. Indeed, according to Section 19 of the Organic Law on the Constitutional Court the post of a Constitutional Court's judge is only incompatible with, *inter alia*, "functions of management within political parties". The Court notes that, in the present case, Judge P.C. had been a mere member of a political party without any management functions. Furthermore, it does not result, from the allegations of the applicants, that he had taken part in any party activity concerning the accusations formulated against them, or the consequent proceedings. The Court does not accept that the mere fact that P.C. had been a member of

the *Partido Popular* is sufficient to raise doubts as to his impartiality. In these circumstances, the Court is of the opinion that the applicants' fear as to the lack of impartiality of Judge P.C. due to a previous affiliation to a political party cannot be regarded as being objectively justified.

28. Consequently, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

29. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. Alleged lack of impartiality of Judge N.R.

30. The applicants further complained that the Constitutional Court lacked impartiality due to the fact that Judge N.R. had taken part as a Public Prosecutor in enforcement proceedings that had a connection with the criminal proceedings that were subject to the *amparo* appeal before the Constitutional Court.

31. The Court reiterates that impartiality must be assessed both by means of a subjective test and by means of an objective test (see paragraph 22 above).

32. As regards the subjective aspect of impartiality, the Court notes that nothing in the present case pointed to any prejudice or bias on the part of Judge N.R.

33. Concerning the objective test, the Court notes that the applicants applied for the removal of the judge in question. They construed the situation as one requiring withdrawal within the meaning of section 219.13º of the Judicature Act, that is, that this judge had held public office involving his direct or indirect participation with a matter related to the case. The Court notes that the Constitutional Court observed that the facts discussed in the enforcement proceedings were completely different (*i.e.* the illegalisation of a political party –SORTU– because of its similarities with other parties which had been previously declared illegal) from the facts discussed in this *amparo* appeal (*i.e.* the alleged violation of the applicants' fundamental rights in the framework of criminal proceedings brought against them for belonging to a terrorist organisation). The Court would also add to that that, although the proceedings concerned the applicants and also involved issues relating, very broadly, to terrorism, there was no link between the facts alleged or the issues discussed in the previous case and the present one.

34. The Court observes that the mere fact that this judge had already participated in enforcement proceedings concerning a political party of which the applicants were members does not objectively justify any fears as to a lack of impartiality on the part of this judge (see *mutatis mutandis*, *Diennet v. France*, 26 September 1995, § 38, Series A no. 325-A; *Ringeisen*

v. Austria, 16 July 1971, § 97, Series A no. 13; *Thomann*, cited above, § 63, and *Faugel v. Austria* (dec.), nos. 58647/00 and 58649/00, 24 October 2002).

35. It follows that this complaint must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Decides to adjourn the examination of the applicants' complaint concerning the alleged violation of Article 6 § 1 of the Convention in relation to the judicial proceedings carried out before the *Audiencia Nacional*;

Declares the remainder of the applications inadmissible.

Done in English and notified in writing on 26 November 2015.

Marialena Tsirli
Deputy Registrar

George Nicolaou
President

APPENDIX

No	Application No	Lodged on	Applicant Date of birth Place of residence	Represented by
1.	4184/15	14/01/2015	**Arnaldo OTEGI MONDRAGON** 06/07/1958 Logroño	Jone GOIRIZELAIA ORDORIKA Olivier PETER
2.	4317/15	14/01/2015	**Sonia JACINTO GARCIA** 28/11/1977 Estremera	Jone GOIRIZELAIA ORDORIKA Olivier PETER
3.	4323/15	14/01/2015	**Rafael DIEZ USABIAGA** 21/08/1956 El Dueso	Olivier PETER Iñigo IRUIN SANZ
4.	5028/15	14/01/2015	**Miren ZABALETA TELLERIA** 26/10/1981 Valladolid	Jone GOIRIZELAIA ORDORIKA Olivier PETER
5.	5053/15	14/01/2015	**Arkaitz RODRIGUEZ TORRES** 01/02/1979 Logroño	Jone GOIRIZELAIA ORDORIKA Olivier PETER