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Spanish Judicial Decisions in Public International Law, 2007

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

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IV. SUBJECTS OF INTERNATIONAL LAW

1. The State

a) Universal jurisdiction for international crimes

STS 705/2007 of 18 July. Criminal jurisdiction. Appeal in Cassation 329/2007

Plea to the jurisdiction

Appeal in cassation for breach of the Law and breach of a constitutional precept, against a decree handed down by the Criminal Chamber of the National High Court (Section 3) dated 20 December 2006.

"I. Background

(…)

TWO. The Decree stated as follows: "IT IS THE DECISION OF THIS CHAMBER: To uphold the plea to the jurisdiction entered as a peremptory plea by the defence of the prisoner Eusebio in favour of the competent criminal court of the Republic of Argentina (*Juzgado Nacional en lo Criminal y Correccional Federal* number 12 of the Federal Capital), to which the examination of the acts and offences for which he has been arraigned here in Case 19/97 of Central Court of Instruction number 5 (Chamber Roll 139/97) is therefore ceded; let this decision serve as a formal accusation before the authorities of the Argentine Republic as provided in article 42 of the Treaty on Extradition

and Judicial Assistance in Criminal Matters between the Kingdom of Spain and the Argentine Republic of 4 March 1978 (RCL 1990, 1478), which shall be filed through diplomatic channels as provided in article 41 of the said Treaty but shall also be communicated by facsimile through the INTERPOL Service and through the Argentine Embassy in Spain.

Eusebio shall continue to be remanded in custody in connection with this case for the maximum period of forty days as from the date of such urgent communication". [sic]

(…)

II. Legal Grounds

ONE. The operative part of the Decision here at issue decrees that examination of the acts and offences giving rise to the prosecution of Eusebio in Case 19/97 of Central Court of Instruction no. 5 be ceded to the competent criminal court in the Argentine Republic, by way of the formal accusation procedure set out in articles 41 and 42 of the Treaty on Extradition and Judicial Assistance in Criminal Matters between the Kingdom of Spain and the Argentine Republic of 4 March 1978 (RCL 1990, 1478), as a result of the upholding of the plea to the jurisdiction entered by the prisoner's defence as a peremptory plea in the proceedings prior to the hearing.

Section Three of the Criminal Division of the National High Court founds its decision on the fact that there are various criminal investigations pending in the Argentine courts in connection with the same events in which Carlos Manuel was allegedly implicated as are at issue here and hence takes the view that such investigations take priority over the Spanish jurisdiction for purposes of trying these alleged offences.

After asserting that the Spanish courts undoubtedly have jurisdiction to examine these proceedings, in application of the principle of Universal Justice enshrined in article 23.4 of the Judiciary Act (RCL 1985, 1578, 2635), and in particular sections a), b) and h), and that the National High Court is competent according to article 65 of the same Act, all of which further coincides with the doctrine handed down in this respect by the Constitutional Court and by this same Chamber, subject to no limitation other than the possibility of *res judicata* in the event of a prior acquittal, a sentence duly completed or a pardon in another country (STC of 26 September 2005 [RJ 2005, 7405]), despite all the foregoing the Judges *a quibus* conclude that the peremptory plea made by the prisoner's defence ought to be upheld on the grounds that this is a case of "concurring jurisdictions" (sic), to the extent that there is in fact a genuine "conflict of jurisdiction" (sic) given the existence of *litis pendens* in that actions are simultaneously in progress in the Argentine Republic, listed in the Decree here at issue, and in our own country, all concerning the same events, in which Eusebio was allegedly a part.

In the opinion of the Court *a quo*, this conflict of jurisdiction must be settled in favour of the Argentine judicial authorities, since the forum of the *locus delicti* should have priority as a general criterion for the assignment of competence, and the Spanish jurisdiction must therefore stand down in obedience

to the axioms of Universal Justice or Prosecution enshrined in the above-cited precepts of Spanish internal law.

TWO. This line of argument is challenged by the public, private and popular prosecutions appearing in the case, who have brought respective appeals on differing grounds, but all coinciding in their principal aim, which is – other merely accessory considerations aside – that the defence's plea to the jurisdiction be denied and that the hearing proceed.

Having examined the reasons set out in these appeals, and most particularly those contained in the well-reasoned and telling submission from the Public Prosecution Service, we feel bound to uphold them in essence in view of the following infringements in the application of the Law (art. 849.1 LECrim [LEG 1882, 16]) which have indubitably been committed in the challenged decree:

1) Firstly, there is improper application of article 666 of the Criminal Procedure Act, which regulates the formulation and content of peremptory pleas, in this case as it relates to articles 19, 25, 26 and 45 of the same Act, and to articles 9, 21, 23.4, 38, 39, 42 and 65 of the Judiciary Act (RCL 1985, 1578, 2635).

That is, when article 666 of the Procedure Act considers the different circumstances that may legitimately be the object of peremptory pleas prior to the Ordinary Proceedings, and in particular when it includes *pleas to the jurisdiction* among these (section 1), it by no means refers to anything that could be described as an "international conflict of jurisdiction", but to possible collisions of internal law of the kind that can arise between the different jurisdictional orders or between the courts and the Administration, for the settlement of which the law also provides special Chambers in case the upholding of a plea to the jurisdiction should cause a negative conflict at a later date.

Here, there is strictly speaking no question of "declining" jurisdiction, since a conflict of competence with courts in another State could never arise out of a decision by a Spanish court, as this Chamber stated in its Judgment of 25 February 2003 (RJ 2003, 2147), nor is there any body whose mission is to settle the issue should one arise, and nor again is it conceivable that the National High Court, or this Court in appeal, should unilaterally decide to hand over to another country the jurisdiction necessary to examine a case regarding which, in accordance with the legal rules that have been infringed here, it has already been determined that jurisdiction lies with our national courts since there is no rule that authorises a Spanish court to hand over the right of jurisdiction to a foreign State.

In short, the manner in which the court *a quo* has applied article 666 of the Criminal Procedure Act and concordant legislation cannot be accepted in that it oversteps the bounds of the rules governing these issues, which under no circumstances may refer to an alleged international "conflict of jurisdiction".

2) Secondly, the Passive Extradition Act (Law 4/1985 of 21 March [RCL 1985, 697, 867]) has also been improperly applied, especially as regards articles 2, 3, 4, 6, 7 et seq. and 18, and likewise the Treaty on Extradition and Judicial Assistance in Criminal Matters between the Kingdom of Spain and the Argentine Republic signed on 3 March 1987 and ratified by Instrument of 26

February 1990, with regard essentially to articles 9, 11, 15, 16, 17, 18, 41 and 42 thereof.

It is obvious that in its decision the court *a quo* improperly applied the generic regulation contained in the cited Treaty with Argentina, which deals in the course of the Treaty with mutual judicial assistance, and whose provisions – in which the institution of extradition is naturally central – leave no possible room for the Decree here at issue, and likewise the particular provision contained in article 42, which is expressly cited in the High Court's Decree, including the operative part, which alludes to the "…accusation brought by a contracting party for the purpose of initiating an action in the Courts of the other party…", which is obviously not the case seeing that the High Court itself seeks to justify its decision by alluding to already-existing actions in which Carlos Manuel could be implicated.

Furthermore, it is silent on compliance with the legal rules governing extradition, which is the procedure envisaged both in the Treaty and in our Laws for transferring a person to another country for trial at the place of destination, for the simple reason that when the Decree here at issue was handed down, the Argentine authorities had not yet made any request to Spain for extradition (although they apparently have done so now).

The decree thus displays a deficient understanding both of our internal laws and of conventional law between States; it seeks to obviate the established channels for extradition, thus constituting a serious breach of rules in that respect, and particularly regarding the competences that these vouchsafe to the Government of our country in these matters (see arts. 6 para. 2 and 18.1 Law 4/1985 of 21 March), and likewise ignores the requirement that the court examine and verify whether the requisite conditions are met and that none of the obstacles established for authorisation of the transfer of the accused arise (arts. 1 and 3 et seq. of the cited Law).

3) And finally, a further legal infringement is committed in failing to properly apply article 18 of the Treaty on Extradition and Mutual Assistance in criminal matters between the Kingdom of Spain and the United States of Mexico of 21 November 1978 (RCL 1980, 1346), whereunder the express consent of the Mexican authorities is mandatory before a person who has been extradited from that country to this can be re-extradited to a third country.

There is no doubt that in practice the decision of the High Court is actually equivalent in its effects to an extradition, and in that respect the Mexican authorities, who originally granted the transfer of Carlos Manuel from that country, where he was, to this country which requested his extradition to put him on trial, would be defrauded of their right, as expressly defined in the cited bilateral Treaty (art. 18), to authorise the re-extradition of the extradited person to a third country, since they were neither consulted beforehand nor gave their consent.

The article cited provides that "…re-extradition in favour of a third State shall not be granted without the consent of the Party that granted the extradition". Therefore, the Decree here at issue would breach both the letter and the

spirit of the article, which is fully in force in our internal law ("ex" art. 96.1 CE [RCL 1978, 2836]).

In short, we conclude that the Decree here at issue, in following an inappropriate procedure, namely in upholding a plea to the jurisdiction incorrectly formulated as a peremptory plea under article 666 of the Criminal Procedure Act (LEG 1882, 16), is in fact tantamount to ordering the extradition of a prisoner who had already been arraigned for trial in which the Spanish courts were competent, absent any prior request for extradition or any attempt to determine whether the legal requirements therefore had been met, pre-empts the right of the Executive to decide on this matter and further breaches the provisions of the Treaties concluded by our country with the Argentine Republic and with the United States of Mexico, and therefore it must be set aside following the admission of the appeals brought against it."

b) Extraterritorial penal jurisdiction of the State

STS of 27 December 2007. Criminal jurisdiction. Appeal in Cassation 1164/2007

Extraterritorial criminal jurisdiction

Appeal in cassation for infringement of the law and a Constitutional provision and breach of form, brought by the Public Prosecution Service against a judgment handed down by the Provincial High Court of Granada, Section Two.

"II. Legal Grounds

ONE. Section Two of the Provincial High Court of Granada pronounced judgment (JUR 2007, 282737) in these proceedings, the operative part of which declared that the court lacked jurisdiction to judge events concerning which two persons had been accused of an offence under art. 318 bis, having allegedly been in charge of a boat with sixty-five immigrants on board who were attempting to reach Spain from the African coast and were intercepted 42.5 miles from the town of Adra in the province of Almería. The Public Prosecution Service lodged an appeal against the Provincial High Court's decision in the opposite sense, citing previous decisions on similar matters, according to which the appeal against the decree here at issue should be upheld and the challenged decree set aside.

The Court of Instance founded its decision on the view that the rule laid down in art. 23.4 of the LOPJ (RCL 1985, 1578, 2635), which establishes the principle of universal jurisdiction for certain crimes in our law, is not applicable to the case, and nor are the principles of territoriality and personality.

In STS 198/2007 of 8 October we said, and here we repeat:

"The Public Prosecution Service states that 'illegal immigration is one of the most serious problems facing our country at this time' and that 'it does not seem right that Spain should have no jurisdiction in relation to the pilots in charge of boats sailing to our country'; and in this connection it goes on to say that in its opinion the court at instance failed to give due heed to the Protocol against illegal trafficking of migrants by land, sea or air (RCL 2003,

2864) and art. 110 of the 1982 United Nations Convention on the Law of the Sea (RCL 1997, 345), which provides for a right to visit, inter alia, in the case of vessels possessing no nationality (as is normally the case with *pateras* or *cayucos*), given that failure to act in such cases would allow such conduct to continue with impunity.

The offence against the rights of foreigners regulated in article 318 bis, sections 1 and 3 of the Penal Code (RCL 1995, 3170 and RCL 1996, 777) art.318.bi.1 art.318.bi.3, of which the Public Prosecution Service accuses the defendants in this cause and for which it proposes seven years' imprisonment, is merely an offence of action consisting in the commission of acts tending to promote, encourage or facilitate illegal trafficking or clandestine immigration of persons "from, in transit through or to Spain". Such conduct is thus defined progressively: promotion, being equivalent to provoking, inciting or procuring its commission; encouraging, meaning any act of assistance or support for illegal trafficking; and facilitating, consisting in the removal of obstacles or the furnishing of means to enable trafficking, which is in the final analysis simply a kind of encouragement. We might say that any act committed at the outset or during the cycle of emigration or immigration which helps to achieve the purpose illegally is included in the definition of such conduct.

But in any case, given the range of activities that the penal category embraces, promoting, encouraging or facilitating clandestine immigration by any means is sufficient for the offence to have been committed; and hence it is sufficient for the offender to take part in any of the numerous tasks involved in such operations to meet the definition of the law, which can therefore include such acts as financing of the operation, acting as go-between, carrier or navigator, or facilitating such acts. This means that it is immaterial whether the immigrants reach the Peninsula or the islands or the operation is frustrated by the action of the judicial police or by shipwreck, inasmuch as the offence is consummated by acts tending to promote, encourage or facilitate it, and the immigrants do not necessarily have to reach Spanish territory clandestinely (see SSTS of 5 February 1998 [RJ 1998, 424] and 16 July 2002 [RJ 2002, 7668]).

It is also important to note that the legal good protected by article 318 bis of the Penal Code (RCL 1995, 3170 and RCL 1996, 777) is composed of two kinds of interest: the general interest in controlling migratory flows and preventing their being exploited by Mafia-style criminal organisations, and the mediate interest in protecting the freedom, security, dignity and rights of emigrants.

At this point we must turn to the problem regarding what jurisdiction is competent to deal with actions of this kind when they are discovered and interrupted in international waters. And in this respect it must be said that we do not believe that the court of instance had adequate grounds for concluding that the Spanish jurisdiction could not legitimately do so.

That is, if the exercise of criminal jurisdiction is a manifestation of the State's sovereignty in accordance with the principle of territoriality, then each State is in principle entitled to examine any criminal act committed in its territory, regardless of the nationality of the perpetrator of the offence or of the

protected legal good (see art. 23.1 LOPJ [RCL 1985, 1578, 2635] and arts 14 and 15 LECrim [LEG 1882, 16].).

Nevertheless, the principle of territoriality coexists with other principles which serve to define the scope and boundaries of Spanish jurisdiction: a) the registration principle, or the flag principle, which supplements the former to cover ships and aircraft; and b) the real or protection of interests principle, whose purpose is to protect legal goods proper to the State regardless of where they are attacked.

These principles are based on the national interest of the legal good harmed by the offence, whether this is perpetrated in its territory or beyond its borders. In obedience to this principle, art. 23.3 LOPJ provides that Spanish courts shall deal with acts committed by Spaniards or foreigners outside Spanish territory where these are susceptible of being classified as one of the offences listed in the cited article (which do not include offences against the rights of foreign citizens).

Along with the territoriality principle and the real principle or principle of protection of Spanish interests, the scope of the jurisdiction of the Spanish courts is also determined by the principle of personality or nationality, which determines that any citizen is always subject to the jurisdiction of his own country. For instance, Spain's criminal jurisdiction is competent in respect of acts classified as offences in Spanish criminal law even if they have been committed outside the national territory, as long as those criminally responsible are Spaniards or foreigners who have acquired Spanish nationality since the commission of the offence, and provided that the following conditions are met: 1) that the offence be punishable in the place where it was committed, unless such a condition is unnecessary thanks to an international treaty or a rule of an international organisation of which Spain is part; 2) that the victim or the Public Prosecution Service present an accusation or bring an action in the Spanish courts; and 3) that the offender not have been acquitted, pardoned or sentenced in a foreign country, or in this last case that he not have served the sentence. If he should only have served part of the sentence, this will be taken into account and whatever sentence is pronounced will be reduced accordingly (see art. 23.2 LOPJ [RCL 1985, 1578, 2635] as amended by LO 11/1999 of 30/4 [RCL 1999, 1115]).

The principle of universality or world-wide justice also extends the scope of Spanish jurisdiction inasmuch as it serves to protect goods that are essential to humanity, as recognised by all civilised nations, regardless of the nationality of the offenders and the place of commission, essentially as regards the judging of truly international crimes. This principle is addressed by art. 23.4 LOPJ (RCL 1985, 1578, 2635) inasmuch as it declares the Spanish courts competent to deal with acts committed by Spaniards or foreigners outside the national territory where these may be classified under Spanish law as any of the following offences: a) Genocide; b) Terrorism; c) Piracy and illegal seizure of aircraft; d) Forging of foreign currency; e) Offences in connection with prostitution and corruption of minors or incompetent persons (as amended by LO 11/1999 of

30/4, which introduced the offences of corruption of minors or incompetent persons); f) Illegal trafficking in psychotropic, toxic or narcotic drugs; g) Offences of female mutilation (according to LO 3/2005 [RCL 2005, 1470], in force since 10 July 2005); and h) Any other offence that can be prosecuted in Spain under international treaties or conventions.

The scope of Spanish jurisdiction cannot be fully defined without reference to the so-called principle of supplementary justice, also known as the principle of penal law through representation, which comes into play when there is no request for or grant of extradition, allowing the State where the offender is to try him under its criminal law. This principle is underpinned by the progressive harmonisation of the different national legislations as a consequence of the similarity in structure of international treaties, inasmuch as they define categories of offences and normally oblige the States to place them on their statute books. The incorporation of such categories of offences into the internal Law thus makes it possible to apply the *aut dedere auto iudicare* rule if necessary in the event that extradition is not granted.

Therefore, while it is true that the principle of territoriality is the chief criterion – as is natural given its correlation with sovereignty – it is not an absolute principle, and there is a consensus in accepting the 'real' criterion or criterion of protecting State and national interests; whereas the principle of universality is only justified insofar as it has its base in a pre-existing international legality, either conventional or customary. And finally, the residual criterion of the principle of supplementary justice, one of those defining the limits of the State's jurisdiction, is intended to prevent an act that is considered criminal from going unpunished, considering – as we have said – that the community tends to view the same kinds of acts as criminal in the context of certain fields of general interest.

Turning now to the case at issue here, we must bear in mind that: 1/ Illegal immigration nowadays is one of the most pressing problems facing the International Community, and one that is generally closely tied to what is known as Transnational Organised Crime, and as such it has been the subject of international agreements and conventions such as the Convention of 15 November 2000 (RCL 2000, 2326) (ratified by Spain via Instrument of 21 February 2002, BOE 10/12/2003 [RCL 2003, 2864]), along with the "Protocol against the Smuggling of Migrants by Land, Sea and Air" supplementing that Convention, whose purpose is to promote cooperation to prevent and combat transnational organized crime more effectively" (see art. 1 of the Convention).

TWO. The above-cited Protocol (RCL 2003, 2864) provides that "States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea" (see art. 7) and determines that "A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law" (see art. 8.7).

THREE. The United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982 (BOE, 14 February 1997, no. 39/1997 [RCL 1997, 345]), provides that "The high seas are open to all States, whether coastal or land-locked" and "Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law" (see art. 87.1), and further provides that "Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship" (see art. 91.1).

FOUR. The Geneva Convention of 29 April 1958 (BOE, 27 December 1971 [RCL 1971, 2306], no. 309/1971) states that "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State" (see art. 1) and declares that "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty" (see art. 2). "Every State, whether coastal or not, has the right to sail ships under its flag on the high seas" (see art. 4). And it further provides that "Every coastal State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea" (see art. 12.2).

From the foregoing it follows that: a) it is acknowledged that States have the right to sail the high seas freely and that this is to be done in conditions laid down by international conventions and other rules of international law; b) one of these conditions or requirements is that vessels must possess the nationality of the flag that they are authorised to fly, and are subject in principle to the exclusive jurisdiction of that State ("A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality" (see art. 92.2 of the United Nations Convention on the Law of the Se, done at Montego Bay on 10 December 1982 [RCL 1997, 345]).

The present case concerns a vessel without nationality (as is normally the case with the *pateras* and *cayucos* used for illegal activities of this kind). Sailing in vessels of this kind is really dangerous for the persons using them. In this case the Public Prosecution Service accused the persons presumably in charge of the unsuccessful operation of an offence under art. 318 bis sections 1 and 3 of the Penal Code (RCL 1995, 3170 and RCL 1996, 777) art. 318. bi.1 art. 318.bi.3, on the grounds that the lives of the occupants of the *cayuco* were seriously at risk given that they lacked either means of communicating with the outside world or life jackets (the media not infrequently carry reports of people losing their lives in operations of this kind), so that a vessel of the Spanish Marine Rescue Service had to rescue the immigrants and take them to the Spanish coast. As a result, the persons presumably in charge of this illegal immigration operation were landed on Spanish territory, which is undoubtedly where the arrested *cayuco* was headed.

It is patently obvious that this was a case of organised illegal immigration for the purpose of clandestinely entering Spanish territory. Such conduct is a serious offence carrying a penalty of six to eight years' imprisonment (see art. 318 bis 1º and 3º CP; art. 318.bi.1 art. 318.bi.3 and art 2.b) of the United Nations Convention against Transnational Organised Crime of 15 November 2000 (RCL 2000, 2326)). The vessel used had no nationality. There is no record of any State claiming knowledge of this fact. The persons presumably in charge – or at least some of them (those travelling in the *cayuco*) – were in national territory. In any case there is a clear nexus between the event that this case concerns and our national interests. In the present case, then, there is a set of circumstances which according to the rules and principles of international law cited above – particularly art. 23.4 h) LOPJ (RCL 1985, 1578, 2635), art. 23.4 art. 23.h as they relate to art. 8.7 of the Protocol against the Smuggling of Migrants by Land, Sea and Air transcribed above (RCL 2003, 2864) – cover this jurisdictional attribution, allow for the adoption of measures under the internal law, including the drafting of a report by the Security Forces, and more than justify the competence of the Spanish courts to try the present case.

It is therefore our duty to uphold the ground for cassation submitted by the Public Prosecution Service, and consequently also to set aside the challenged judgment (JUR 2007, 282737) and remit the proceedings to the Court from whence they came for it to pronounce the appropriate judgment on the criminal actions brought in this case by the Public Prosecution Service.

III. Finding

WE FIND IN FAVOUR OF THE APPEAL IN CASSATION for infringement of the Law and a provision of the Constitution and breach of form brought by the Public Prosecution Service against the judgment delivered on 16 February two thousand and seven (JUR 2007, 282737) by the Provincial High Court of Granada in proceedings against Ivan and Cesar for an offence against the rights of foreign citizens, which we hereby quash and set aside. The court awards costs *ex officio*.

We therefore declare that the events related in the accusation fall within Spanish jurisdiction; let the proceedings be remitted to the Court from whence they came so that the same Court that delivered the appealed judgment, which we hereby set aside, can pronounce a new judgment on the pleas submitted by the Public Prosecution Service in its final conclusions. Let this decision be conveyed to the cited Court for the appropriate legal purposes and the proceedings be remitted to it.

This our judgment, which shall be published in the Legislative Collection, we hereby pronounce, order and sign. Andrés Martínez Arrieta. José Ramón Soriano Soriano. Juan Ramón Berdugo Gómez de la Torre".

2. International Organisation

a) Regime for workers in the service of an international organisation

Judgment of the Court of Justice of the Region of Madrid of 7 November. N. 741/2007. Social jurisdiction. Appeal for Reversal 2992/2007

"Pleas of Fact

ONE: The record shows that the plaintiff brought a complaint against the defendant, the examination and judgment of which fell by rota to the cited Social Court, which delivered the above-cited judgment after conducting the appropriate procedural formalities and hearings, in which the respective positions of the parties were clearly set out.

TWO: In that decision, against which an appeal for reversal has been filed, the following facts were expressly declared to have been proven:

1. The plaintiff, Lourdes, worked as a cleaning lady (the category appearing on the pay slips, docs 4 et seq. complaint) for the defendant organisation, CONSEJO OLEICOLA INTERNACIONAL (COI), earning a basic salary of 731.68 euros (according to the cited pay slips) from 1/3/1993 until 31/12/2005, when she was discharged with a severance payment, including one month's salary in full settlement and compensation, of 14,084.84 euros, seemingly on the basis of 45 days per year of service (doc. 1 complaint).

(…)

4. The plaintiff duly applied for unemployment benefit on 10/1/2006, and the defendant Public Service advised her on 30/1/2006 that as she was not registered or in a situation assimilable thereto, nor did she qualify as a special case for receipt of such benefit, that benefit was refused (administrative decision attached to the complaint and accepted as reproduced). And indeed, as the record confirms, the plaintiff was not affiliated to or registered with any social security scheme and did not pay contributions thereto during her time of service.

5. The plaintiff filed a preliminary claim, which was rejected by decision of 23/3/2006 (docs 11 and 12, annexed to the complaint).

6. The plaintiff brought an action with the Social Courts in defence of her right to Social Security affiliation. The Court declared itself incompetent and declined jurisdiction in favour of the Contentious Administrative Courts (Order of 28/4/2006 by Social Court 36 of Madrid, annexed to the record), and for that reason a deferment of the proceedings was requested until such time as the Contentious Administrative Court should decide on this situation. The Court denied this request, and the record of proceedings does not show that any contentious administrative order has been forthcoming to date.

(…)

THREE: The judgment whose reversal is sought dismissed the complaint brought by the plaintiff.

FOUR: The plaintiff announced an appeal for reversal against that judgment, and the appeal was opposed by the defendant.

(…)

Legal Grounds

SOLE GROUND. The ground on which the plaintiff bases her appeal is covered by art. 191.c) of the LPL and concerns the infringement of Royal Decrees 2.805/1.979 of 7 December, 1.658/1.998 of 24 July and 317/1.985 of 6 February, and likewise the Headquarters Agreement between Spain and the defendant organisation, the Vienna Conventions of 1961 and 1963 "and other Decisions of the Directorate-General for Social Action, of the Directorate-General of Social Insurance and ILO Convention No 67".

Despite the evident vagueness of the cited norms – the applicable provisions of which are not cited – art. 33.3 of the Vienna Convention on Diplomatic Relations of 18 April 1967, ratified by Spain on 21 November of the same year, clearly provides that a Diplomatic Agent who employs persons to whom the preceding section – dealing with "private servants" of the actual Agent – does not apply "shall observe the obligations which the social security provisions of the receiving State impose upon employers".

Also, art. 41 of the same Convention – which connects with arts 1.g and 38.2 in respect of members of the service staff – provides that "without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State", as alluded to in the written reply of 22/09/2006 given by the Under-secretary for Foreign Affairs and Cooperation at the Foreign Ministry to a question put by the plaintiff's counsel (document 16, on folio 16 of the record containing all the evidence offered by the plaintiff) and referred to in Fact three of the unchallenged account of events in the appealed judgment; and be it said that the verbal note of 22/11/06 also referred to in the seventeenth and last Fact of the said account cannot be construed as contradicting the previous written reply, firstly because there is no indication of any rectification of that previous response to the opposing party, despite this being a reply to a question from the plaintiff prompted by the said written reply. And besides this, the precise terms of that question, whose purpose was obviously to try and counteract the effects of the cited response, are not known; also, the terms of the said note are unclear in that even if the international organisation has concluded a special agreement, that does not mean that it is exempted from the State's general legislation on the subject; and on top of everything else, the document bears no legible signature nor indication of the department of the Ministry or the issuing officer, which minimum assurances of proper procedure are nevertheless present in the written reply previously received by the plaintiff.

In any case, whatever decision is arrived at by the courts is not affected by the opinion of the Administration or by the way in which the latter interprets the applicable regulations.

The Vienna Convention is not contradicted by the Headquarters Agreement concluded between Spain and the defendant international organisation, which makes no provision regarding the issue in this case – which be it said is only to be expected – and therefore the said Convention may be accepted as eminently applicable to the case as provided in art. 4.1 of the Civil Code even although

it does not involve an agreement with an actual State, given that it is in fact a matter of international relations with an independent supranational entity possessing its own legal personality which may by extension be properly treated in the same way as a State in all matters not otherwise specifically regulated, as one may fairly infer from the treatment afforded to the organisation's Executive Director in art. 10.1 of the Agreement.

Having established the foregoing, we must then start with the declaration contained in article 41 of the Spanish Constitution, to the effect that the public Social Security system established in Spain is "for all citizens" and is created to guarantee them social care and benefits in situations of need, "especially in the event of unemployment", which according to the ordinary implementing regulations introduced primordially by the Social Security Act (LGSS) means registration with the Social Security of any Spanish worker serving in Spain and contribution for all the contingencies covered by the system, as provided in arts 7, 12 and 15 of the said Act.

This then is the basis upon which to properly interpret the regulations applicable to the case, namely RD 317/1985 of 6 February, the Royal Decree dealing specifically with the international organisation defending in this action, which has headquarters in Spain. This regulation – unlike RD 2.805/1979 of 7 November, which is cited in its preamble – is applicable solely to Spanish civil servants residing and serving in the national territory, without mentioning (and hence excluding) workers; the latter, who in all likelihood constitute only a minimal or very small group, or may even consist of one or two persons engaged in jobs like the plaintiff's, obviously come under the general legislation since they also do not fall into the category of "private servants solely at the service of the Diplomatic Agent" referred to in art. 33 section 2 of the cited Vienna Convention as mentioned above, in respect of whom the said article excuses the Agent from complying with the social security provisions in force in the receiving State. Hence, this does not apply to the appellant. In short, her situation as a worker in the occupational category identified in point one of the uncontested account of the facts in the appealed decision is governed by the general Spanish legislation on the subject, as cited above, and hence she is entitled to the benefit here at issue.

According to art. 126 of the LGSS, liability for failure to affiliate or register the worker with the public insurance system lies entirely with the employer, albeit with respect to unemployment – unlike other social security benefits and as a special case – art. 220 of the Law invokes the principle that the managing entity is automatically responsible even in the event of failure to perform that obligation, "without prejudice to such action as may be taken against the infringing enterprise or to the latter's liability for any benefits paid". This is implemented in similar terms in art. 31 of RD 625/1985 of 2 April.

The appeal is therefore upheld and the original judgment consequently revoked.

We Find

In favour of the appeal for reversal brought by Lourdes against the judgment delivered by Social Court 30 of Madrid, dated the twenty-eighth of March two thousand and seven, in the proceedings conducted before it at the instance of the appellant against the SERVICIO PÚBLICO DE EMPLEO ESTATAL and CONSEJO OLEÍCOLA INTERNACIONAL (COI), in a claim for unemployment benefit. We therefore revoke the said decision and order the COI to pay the costs of the action in the terms provided by law, and we order the SPEE to advance payment of that benefit as properly explained herein."

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human rights and fundamental freedoms

a) Right to inviolability of the home

Judgment of the High Court of Justice of the Canary Islands of 22 June. Contentious-Administrative Jurisdiction. Appeal.

Appeal heard by Section Two of the Chamber for Contentious Administrative Proceedings of the Canary Islands, sitting at Las Palmas de Gran Canaria, conducted according to the special procedure for protection of the fundamental rights of the person before Contentious Administrative Court No. 1 of Las Palmas de Gran Canaria.

"II. Legal Grounds

ONE. The object of the Contentious-Administrative appeal now before this Court, which was conducted by the Contentious-Administrative court under the special procedure for the protection of fundamental rights, or judicial protection as it is called in the new jurisdictional Act, was a plea for recognition of unlawful action by the Town Council of Galdar infringing the appellant's fundamental rights to physical and moral integrity and to the inviolability of the home, in that on 10 de October 2005 a diesel engine was installed on a plot open to the air to supply electricity to the municipal offices situate at Calle Capitán Quesada no. 29 in Galdar, without the requisite classified activity permit for installation and operation as provided in article 2.1 of the Public Entertainment and Classified Activities (Legal Regime) Act, Law 1/1998 of 8 January (LCAN 1998, 10 and 45), and without prior administrative authorisation for electricity generation as required by article 21.1 of the Electricity Sector Act, Law 54/1997 of 27 November (RCL 1997, 2821), and that it produced noise, vibrations, smells and fumes in the adjoining dwelling which is the home of the plaintiff (here the appellant).

The court of instance dismissed the plea, Ground Three of the judgment stating as regards the circumstances of the case:

"We would point out in the first place that the object of this appeal is not to determine whether there is a permit for the installation concerned or whether

such a permit is mandatory, as that belongs to the sphere of ordinary legality and hence must be examined in Contentious-Administrative appeal no. 621/2005 before Contentious-Administrative Court no. Three of the Province.

Therefore, in the present case what we have to determine is whether the engine concerned produces sufficient noise and fumes to infringe fundamental rights to physical integrity and inviolability of the home. And in that respect the record of the proceedings shows no evidence to support such an infringement. On the one hand the writ of complaint was accompanied by a notarised declaration to the effect that there was noise coming from an adjoining plot and a smell of fumes, but without any expert report establishing the level of noise. On the other hand, the record (folio 1) contains a municipal technical report concluding that the noise produced by the engine blends into the general background noise and that it cannot be said that the engine could cause a nuisance through airborne noise".

In short, the appeal was dismissed because the plaintiff did not furnish sufficient evidence of the reality of the noise and nuisance reported nor that these were of sufficient intensity to warrant an assumption of infringement of the fundamental rights whose protection was sought, albeit the First and Second Grounds do correctly explain the substance of the rights invoked and their scope, which is not limited to protection against material entrance in the actual home.

TWO. The fact is that few fundamental rights in our legal system have seen their scope so spectacularly expanded as the right to inviolability of the home, which in that sense has become a textbook example of what jurisprudence has come to call the "expansive force of fundamental rights".

This development is not unconnected with a ruling by the European Court of Human Rights on the interpretation and application of article 8 of the Rome Convention of 4 Nov. 1950 (RCL 1979, 2421) on "Protection of Human Rights and Fundamental Freedoms", relating to the right of all persons to respect for their private and family life, their home and their correspondence, section 2 reminding us that "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

That jurisprudence has made its way onto the Spanish statute book via article 10.2 of the Spanish Constitution (RCL 1978, 2836) and has been accepted by the Constitutional Court in its interpretation of the scope of the right to inviolability of the home.

The judgment of the European Court of Human Rights of 9 December 1994 (TEDH 1994, 3) (López Ostra versus Spain) marked the starting-point for the reconsideration and evolution of the Spanish Constitutional Court's jurisprudence regarding the scope of the right to inviolability of the home, followed by the Courts of Justice, which are bound by the Constitutional Court's interpretation of the norms enshrined in the Constitution.

And precisely because the Constitution recognises what we call fundamental rights and public freedoms, with enhanced legal protection (internally via the special judicial procedure for protection of fundamental freedoms in the Contentious-Administrative sphere, and where appropriate through the constitutional procedure of appeal for the protection of fundamental rights), a strong tendency has arisen for such intrusions to be considered seriously harmful when they affect a person in connection with his home, and to be viewed as unconstitutional violations of or offences against his right to privacy when this is disturbed by such inroads. Indeed, peaceful enjoyment of the right to privacy, and most particularly within the home and its environs, requires an environment that is immune to disturbances from the outside which one has no specific duty to tolerate, including excessive and persistent noises, even where these are produced by activities which are in principle legitimate but cease to be so when they overstep certain limits.

In this vein, the core of privacy/protection of the home has come to include the absence of nuisances in the form of fumes and smells on the grounds that these also constitute, or may constitute, an infringement of the fundamental rights protected by article 18 of our Constitution.

In the same vein, the judgment of the European Court of Human Rights of 2 Oct. 2001 (ECHR 2001, 567) (Hatton and others versus the United Kingdom) in connection with noise caused by air traffic concluded that this infringed article 8 of the European Convention on Human Rights in that a fair balance was not struck between the economic well-being of the country and effective enjoyment by the plaintiffs of respect for their homes and their private and family lives.

Our Constitutional Court has been one of the movers in this doctrinal trend, inevitably so in view of article 10.2 of the Spanish Constitution, for the purposes of which the Constitutional Court Judgment of 24 May 2001 warned that prolonged exposure to certain levels of noise that are objectively avoidable and unbearable merits the protection afforded to the fundamental right to personal and family privacy in the home insofar as these prevent or seriously hinder the free development of the personality, always provided that the injury or harm is caused by acts or omissions of public entities which can be blamed for the injury caused.

In short, at stake here is our right to lead our private lives without external disturbances or interferences which are avoidable and which we are under no obligation to bear. No-one has the right to prevent us from enjoying a minimum degree of peace and rest; and the public powers are actually duty-bound to assure our enjoyment of that right as far as the circumstances will permit".

THREE. In this case, then, in view of the jurisprudence of the Constitution and the Supreme Court, this Chamber considers that there has been a clear and flagrant infringement of a fundamental right, interpreted not only as the right to freedom from illegal entry but also as the right to repose, peace and quiet in the family home, irrespective of whether the nuisance is not excessively prolonged or the noise, smells and fumes may be judged bearable in terms of their intensity within a given space.

The argument of the Administration, which is recorded in the judgment, is that because of the nature of the special proceedings it was not possible to discuss the legality of the installation there and that besides, it was not demonstrated that the noise could be considered unbearable in the sense of affecting personal physical or moral integrity or the inviolability of the home, adding furthermore that the engine was not installed on a permanent basis but was a temporary, emergency measure and in any case did not exceed the legal limits on emission of noise, gases or vibrations.

However, this Chamber considers that the installation, without any authorisation, necessarily creates a nuisance which the persons affected are not obliged to tolerate. For peaceful enjoyment of the right to privacy, and most particularly within the home and its environs, requires an environment that is immune to disturbances from the outside which one has no specific duty to tolerate, and such disturbances indubitably include persistent noises, and also fumes and smells.

In this case the activity was not legitimate – the Council explained that the lack of authorisation was due to the urgency and the temporary nature of the installation – and furthermore it produced, noises, fumes and smells that neither the plaintiff nor the other neighbours were under any obligation to tolerate. And if only for the fact that it was operated without any kind of authorisation or control and for the real production of noise and other nuisances, we may fairly conclude that its infringed the neighbours' right to peace, quiet and repose in their own homes.

The argument that the issue of the legality of the installation cannot be addressed in the special procedure for the protection of fundamental rights is untenable in that the action was brought precisely under article 32 of the LJCA (RCL 1998, 1741) in order to preserve the rights and freedoms for whose protection the appeal was brought (art. 114.2 LJCA). Hence, the facts – that is the absence of any kind of legal authority for the installation and operation of the engine – provide the basis for the action brought, and it cannot be dismissed as an issue of ordinary legality. It might have been if this unlawful action – which has been proven and actually acknowledged – did not constitute a serious enough interference in the rights whose protection is sought, which is a basic or central issue in the chosen procedure.

FOUR. Having arrived at the heart of the debate, we find that the technical report cited by the Administration as evidence that the noise was not intense enough to constitute an infringement of the right to privacy states that when the engine is stopped the noise level is 62.3 dB(A) and when it is running the level is 64.2 dB(A), from which it concludes that the noise of the engine merges into the background noise and hence it cannot be said to cause a nuisance through airborne noise.

However, that conclusion bears out the thesis that when the engine is running the noise to which the nearest neighbours are subjected is more intense, inasmuch as it rises from 62.3 dB(A) to 64.2 dB(A), and the noise is moreover continuous and prolonged, lasting from 8.00 to 15.00 hours from Monday to Friday and from 8.30 to 12.30 on Saturdays. And it should be remembered

that the right to privacy is infringed not only by the intensity but also by the prolongation or continuation of the noise, which can render it unbearable, producing a serious and reasonable likelihood that the right to personal repose, peace and quiet will be infringed.

As to the fumes, the technical report states that at the time of inspection these were little, with no sign of horizontal displacement; however, this is a partial and slanted conclusion in that it takes no account of so elementary a factor as the strength and direction of the wind, for which no technical qualification is required.

And lastly, the report makes no mention of the smells, which constitute another possible infringement of the fundamental right to peace and quite in one's own home.

For the rest, a private individual need not be required to demonstrate the intensity of a noise by means of a sound-level meter. Given evidence of unauthorised installation and the fact that it is being operated and produces noise, smells and fumes, it is up to the Administration, which installed the engine, to demonstrate that the nuisance does not exceed the limits of what is reasonable and normal – which limits will in principle be exceeded if the unauthorised engine is run only a few metres away from dwellings.

And finally as regards the notary's report, the Notary may not be a technical expert, but he certainly can record objective facts for which no professional qualification is required, including a) the smell of fumes and the noise perceptible before reaching number 16 in Calle El Moral; and b) noise and the smell of fumes inside the dwelling, in a bedroom, in the kitchen and on the roof.

This is a simple piece of testimony, but furnished by a public commissioner for oaths, whose personal perception may be relied upon as regards the fact and the extent of the nuisance caused by the installation when in operation.

In short, the important point is that there were noises, smells and other nuisances which the citizen is not obliged to tolerate, and it has been demonstrated that the engine was installed a scant few metres from the dwelling, that the engine was installed with no regard whatsoever for proper procedure, and that the installation was not dismantled or halted until ordered by a court as a provisional measure, from which it follows that for as long as it lasted the administrative action infringed the plaintiff's right to inviolability of her home and to personal and family privacy, and therefore we are obliged to uphold her plea for the cessation of the unlawful action in order to preserve the rights that have been infringed.

FIVE. As for the acknowledgement of an entitlement to compensation for pain and suffering as an individualised legal situation, admittedly the supporting evidence is not sufficient to accredit pain and suffering to the extent claimed. However, the very fact and existence of the noise and other nuisances is objective evidence of suffering that must be remedied, and this Chamber estimates the monetary value of such remedy at seven thousand euros, which it considers a reasonable sum, sufficient to palliate the pain and suffering, which was temporary.

The expansive force of fundamental rights should be accompanied by an expansive force in the compensation for pain and suffering; but the judgment cannot be accepted as the sole remedy for the injury, for otherwise the court's decision would be no more than a formal declaration lacking any material force to repair the injury to the infringed right.

At the same time, while the assessment of pain and suffering is always highly subjective, this Chamber takes the view that the nuisance proven in this case ought to carry compensation commensurate with the circumstances, particularly the duration of the noise, which only ceased when the court ordered provisional measures (and not on the initiative of the Town Council) – but it did cease, and hence the infringement of the right concerned was not excessively prolonged. It is therefore our opinion that the compensation is commensurate with the fact that the noise and other nuisances went on for many hours during the day, in which circumstances the qualitative intensity of the nuisance would necessarily increase, inevitably producing nervousness, disquiet, confusion and a sense of insecurity in the inhabitant of a nearby dwelling faced with a new and unexpected situation which led – not to say obliged – her to take legal action.

SIX. This Chamber therefore revokes the appealed judgment and upholds the Contentious-Administrative appeal and recognises, for the particular purposes of this individual case, the plaintiff's entitlement to compensation for pain and suffering in the amount stated in the foregoing Ground. There is no award of costs for successful appeals of this kind (art. 139.2 LJCA [RCL 1998, 1741], *a sensu contrario*), and there is no award of costs for the original proceedings absent rash or procedurally improper conduct in the defendant Administration (art. 131.1 LJCA).

In light of the articles cited above and other generally applicable considerations

III. We Find

In favour of the appeal brought by Procurator Ángel Colina Gómez in the name and on behalf of Eva against the judgment of Number One Contentious-Administrative Court of Las Palmas de Gran Canaria as mentioned in Plea the First, which we hereby revoke, and in its stead we declare admissible the Contentious-Administrative appeal brought and we acknowledge that in installing and operating an engine to supply electricity the local authority has acted in a way that infringes the plaintiff's fundamental rights to personal and family privacy and to inviolability of the home, and we recognise, for the particular purposes of this individual case, the plaintiff's entitlement to compensation of seven thousand euros for pain and suffering.

There is no award of costs for the original proceedings or the appeal.

This our judgment, certification of which shall be appended to the Chamber's roll, we pronounce, order and sign".

b) Right of asylum

STS of 25 October 2007. Contentious-Administrative Jurisdiction. Appeal in Cassation 1943/2004

On 01/10/2003 the Chamber for Contentious Administrative Proceedings of the National High Court – Section One – pronounced Judgment dismissing the appeal brought against a Decision by the Ministry of the Interior, dated 31/01/2002, refusing to admit the appellant's application for asylum for consideration. The Supreme Court declared that there was a case for the appeal in cassation brought by the appellant, set aside the challenged Judgment and upheld the contentious-administrative appeal.

"Legal Grounds

ONE. The judgment here appealed dismissed the Contentious-Administrative appeal brought by Armando, a Cuban national, against a denial by the Ministry of the Interior dated 31 January 2002 following re-examination of a prior refusal to admit his asylum application for consideration, dated 29 January 2002, citing the circumstance contemplated in article 5.6 (b) of Law 5/84 of 26 March (RCL 1984, 843) as amended by Law 9/94 (RCL 1994, 1420, 1556).

TWO. The original judgment records the story told by the appellant when applying for asylum and when requesting re-examination, details the Administration's grounds for refusal to admit the application for consideration and explains why the court considers that the decision not to admit the asylum application for consideration was correct and lawful. Specifically, the said Judgment offers the following legal grounds:

"ONE. In order to settle this dispute, the following facts need to be considered:

1. The appellant, a Cuban national, founds his application on the following account: When his uncle applied for asylum, pressure was put on his family. When "Che's" remains were brought home, the house was searched. He has never been imprisoned, although he was detained for two or three hours.

2. The draft decision states that this case does not qualify for asylum. The UNHCR reported that the application ought not to be admitted, citing art. 5.6.b) (RCL 1984, 843).

3. The application was denied under art. 5.6.b).

4. Upon re-examination the appellant stated that some of the documents were with the US embassy in Cuba; that members of his family had travelled to the USA, leaving behind a very tense situation; and that his intention was to leave the country and rejoin his family. His departure was delayed indefinitely, and then began a series of threats, detentions, blackmail and summonses. In October 2002 he attempted to leave the country but was detained in immigration on the grounds of political problems and prevented from boarding the aeroplane. He belongs to the Asociación Maseístas por la Dignidad (a human rights association; he possesses a membership card, but it is in Cuba). He has also worked with a movement called Carlos Manuel de la Peña.

5. The UNHCR reported that it saw no reason to alter its opinion against admission of the application. The request was denied upon re-examination.

TWO. According to art. 5.6.b) of Law 5/1984 (RCL 1984, 843) as amended by Law 9/1994 (RCL 1994, 1420, 1556), at the proposal of the body in charge

of inquiries and after a hearing of the UNHCR, the Minister may, in a reasoned decision, resolve not to admit an asylum application for consideration where the applicant fails to cite any of the conditions required for recognition of refugee status. This only happens when the conditions stipulated in art. 3 of the Law arise.

According to the doctrine, for refugee status as defined in the Geneva Convention to be recognised, the following must be demonstrated: a) that the applicant is a foreign national or possesses no nationality; b) that he is genuinely at risk or has well-founded reasons to fear so; c) the possibility of coming to harm is due to the lack of State protection when there is persecution; d) that he has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and e) that none of the reasons stipulated in law for cessation or exclusion arise. In this case it will be helpful to clarify the meaning of the term "persecution"; it means systematic conduct tending to cause harm to life or rights inherent to personal dignity and directed at an individual or a group, for reasons or motives of race, nationality, belonging to a particular social group, or political opinions. For the rest, it is up to the foreign applicant to furnish details of the facts on which his application is founded.

And in fact the appellant's story does not support the assertion that he has been the object of persecution as defined above. All this is not to deny "the notorious severity of the political system in Cuba" – STS of 28 February 1989 (RJ 1989, 1164). But the fact that he left the country with a passport and without any difficulty clearly suggests the absence of persecution of the kind necessary to qualify for asylum – STS of 18 September 2001 (RJ 2001, 9172), 27 January 1997 (RJ 1997, 267), 1 April 1995 (RJ 1995, 3169), 23 June 1994, 8 November 1993 (RJ 1993, 8607), 4 October 1993 (RJ 1993, 7208) and 4 December 1987(RJ 1987, 9385). So substantial an alteration of the story at the time of re-examination is not credible".

THREE. The applicant brought an appeal in cassation against this judgment, setting out one sole reason for challenging it, under article 88.1.d) of the Jurisdiction Act (RCL 1998, 1741), claiming infringement of article 3 and 8 of the Asylum Act (RCL 1984, 843) in that, the appellant asserts, he did in fact suffer genuine persecution for political reasons in his country of origin.

FOUR. We mean to uphold the appeal in cassation.

Be it said in the first place that the citation of articles 3 and 8 of the Asylum Act (RCL 1984, 843) is valid in cassation even although what is challenged is refusal to consider an application, for as we have repeatedly said, refusal to admit an application for consideration by reason of the circumstances set out in art. 5.6.b) of the Asylum Act is also by extension an infringement of that provision, and anyone claiming infringement of the said article as it relates to the granting of asylum is implicitly also claiming infringement of the rule governing admission for consideration. And article 5.6.b) of Law 5/84 as amended by Law 9/94 (RCL 1994, 1420, 1556) has in fact been infringed.

The rule contained in article 5.6.b) allows for a decision not to admit an asylum application for consideration when the application fails to cite any of the circumstances required for recognition of refugee status; but that is not the case, for when he first applied for asylum, and more insistently at the re-examination stage, the applicant did claim persecution for political reasons, that is reasons that may serve for the recognition of refugee status (articles 1.A.2 of the 1951 Geneva Convention [RCL 1978, 2290, 2464], 1 of the 1967 New York Protocol and 3.1 of Law 5/1984).

The original judgment dismissed the story as related at the time of re-examination as lacking credibility in that it differed from the story as originally related upon applying for asylum; but when we come down to it the two versions are not so divergent given that in the first version the applicant related the problems that he had encountered because a relative had applied for asylum, describing a house search and detention. In any event the claim by the Chamber at instance that the story as related on re-examination lacked credibility is irrelevant to the reason for refusal adduced by the Administration, which has nothing to do with how plausible the story was.

For that reason, the lack of precision in the application and the doubts that arise as to whether or not there was actual persecution cannot be resolved by a refusal to consider the asylum application; to the contrary, they can only be settled by processing the application and then deciding whether or not a grant of asylum is warranted. This follows quite clearly from articles 17 and 18 of the Regulation implementing Law 5/1984, approved by Royal Decree 203/1995 (RCL 1995, 741), whereby the reasons for refusal to consider an application must be manifest (as per article 17 referring to applications not made at a frontier) or must be manifest and unchallengeable (as per article 18 referring to applications made at a frontier, as in the present case).

FIVE. In accordance with article 139 of the Jurisdiction Act (RCL 1998, 1741), there is no reason to make any special award of costs, either at the earlier instance or at this cassation stage.

And therefore, in the name of HM the King and in exercise of the power emanating from the people and vouchsafed us by the Constitution,

We Find

That appeal in cassation no. 1943/2004 brought by Armando against judgment no. 252/02 delivered on 1 October 2003 (JUR 2004, 53465) by Section 1 of the Chamber for Contentious Administrative Proceedings of the National High Court is warranted; and therefore:

1. We uphold the contentious-administrative appeal brought by Armando against the refusal by the Ministry of the Interior, dated of 31 January 2002, to reconsider the previous Decision of 29 January 2002 refusing to admit his asylum application for consideration, and we hereby set aside both decisions as unlawful.

2. We recognise the right of Armando to have his application for asylum admitted for consideration. And

3. We make no special award of costs, either at the earlier instance or in this appeal in cassation".