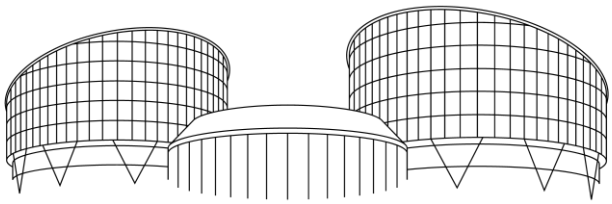

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GARCÍA MATEOS v. SPAIN

(Application no. 38285/09)

Judgment
[Extracts]

STRASBOURG

19 February 2013

FINAL

19/05/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Garcia Mateos v. Spain,

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Corneliu Bîrsan,
Ján Šikuta,
Luis López Guerra,
Johannes Silvis,
Valeriu Griţco, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 29 January 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38285/09) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Ms Raquel García Mateos ("the applicant"), on 24 June 2009.

2. The applicant was represented by Mr B. García Rodríguez, a lawyer practising in Madrid. The Spanish Government ("the Government") were represented by their Agent, Mr F. de A. Sanz Gandasegui, State Counsel and head of the Human Rights Legal Department, Ministry of Justice.

3. The applicant complained of a violation of her right to a fair hearing, and in particular her right to have judgments enforced and her right to an effective remedy, and also of discrimination on grounds of sex, in proceedings concerning the reconciliation of work and family life. She relied on Articles 6 § 1, 13 and 14 of the Convention.

4. Notice of the application was given to the Government on 20 February 2012. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1965 and lives in Perales Del Río (Madrid).

6. At the material time she worked full-time in a hypermarket, mornings or afternoons, from Monday to Saturday

7. On 26 February 2003, relying on Article 37 § 5 of the Labour Regulations, the applicant asked her employer to reduce her working hours (with a corresponding reduction of her salary) because she had custody of her son, who was under six years old. She applied to work half-time, from 4 p.m. to 9.15 p.m. from Monday to Wednesday.

8. In a letter of 21 March 2003 her employer notified her that she would not be allowed to work the hours requested. Instead, he proposed that she work half days, from Monday to Saturday, in the morning or afternoon.

9. An attempt by the applicant to reach an agreement with her employer with the help of the Madrid Mediation, Conciliation and Arbitration Board failed.

10. On 20 May 2003 the applicant brought special proceedings before the Employment Tribunal to adjust her working hours to enable her to look after a child under six years of age. In a judgment of 25 September 2003 Madrid Employment Tribunal no. 1 dismissed the applicant's case, considering that reductions in working hours should be made in the ordinary working day, whereas the applicant wanted to take several working days off (from Thursday to Saturday) and not to work mornings at all, which was not a reduction but a modification of the working day.

11. On 6 November 2003 the applicant lodged an *amparo* appeal with the Constitutional Court, based on the right to a fair hearing and the principle prohibiting discrimination on grounds of sex. In a judgment of 15 January 2007 the Constitutional Court allowed the appeal, considering that the principle that there should be no discrimination based on gender had been violated in the applicant's case. The court referred to the established case-law of the Court of Justice of the European Communities to the effect that "Community law precluded the application of a domestic measure which, although formulated in a neutral manner, affected a much higher percentage of women than men", unless this was the result of objective factors unrelated to any discrimination on grounds of sex. It noted that "in the event of indirect discrimination it is not necessary to prove the existence of more favourable treatment reserved exclusively for men; it is sufficient that there exists a legal provision the interpretation or application of which adversely affects a group composed mainly of female employees". The Constitutional Court found that there had been a breach of the principle prohibiting discrimination on grounds of sex, stating: "the court's refusal to acknowledge [the applicant's right to] a reduction of her working hours, without examining to what degree the reduction concerned was necessary in order to respect the constitutional purposes for which [the possibility of working reduced hours] had been introduced or what organisational difficulties the employer might have if [the applicant's] right to work the hours concerned were to be acknowledged, constitutes an unjustified

obstacle to [the applicant] in her work and in reconciling that work with her family life, and therefore discrimination on grounds of sex". The Constitutional Court accordingly allowed the *amparo* appeal, set aside the Madrid Employment Tribunal's judgment of 25 September 2003 and ordered that court to deliver a new judgment in keeping with the fundamental right in issue.

12. In a new judgment of 6 September 2007 the Employment Tribunal again dismissed the applicant's case. It considered that the reduction in working hours the applicant was seeking fell outside the scope of Article 37 of the Labour Regulations because she wanted to take Thursdays, Fridays and Saturdays off, especially as two of those days – Friday and Saturday – were the busiest days of the week. The court also held that, for the purposes of the constitutional protection she had been afforded, the applicant had not sufficiently justified the need for a reduction in her working hours that went beyond the bounds of a simple rearrangement of the ordinary working day.

13. On 28 November 2007, the applicant lodged a new *amparo* appeal with the Constitutional Court, which that court examined as proceedings in execution of its judgment of 15 January 2007. On 29 October 2008 she informed the Constitutional Court that her son had since turned six years old, so that as a result of the length of the judicial proceedings she no longer had the right to the reduced working hours she had applied for in order to look after her son. As the Constitutional Court's judgment could therefore no longer be enforced as such, the applicant claimed alternative compensation, under Article 18 § 2 of the Judicature Act (*Ley Orgánica del Poder Judicial*, "the LOPJ"), in the amount of 40,986 euros (EUR).

14. In a reasoned decision of 12 January 2009 the Constitutional Court held that its judgment of 15 January 2007 had not been correctly executed, and set aside the Employment Tribunal's judgment of 6 September 2007. However, it found that there was no need to remit the case to the lower court in so far as a new judgment of that court would serve no purpose now that the child was over six, and that an award of compensation was not permitted under Article 92 of the Institutional Law on the Constitutional Court.

15. A dissenting opinion was appended to the judgment. The dissenting judge deemed, *inter alia*, that the Constitutional Court should have awarded the applicant compensation, particularly in a case such as hers where compensation was the only way to protect the fundamental right in issue and restore the applicant's right in full.

II. RELEVANT DOMESTIC LAW AND PRACTICE

...

18. The relevant provisions of the Institutional Law on the Constitutional Court read as follows:

...

Article 55

"1. A judgment granting constitutional protection (*amparo*) shall contain one or more of the following pronouncements:

(a) a declaration of nullity of the decision, act or resolution that prevented the full exercise of protected rights and freedoms, specifying, where applicable, the scope of its consequences;

(b) recognition of the public right or freedom [concerned] in the light of the constitutional provision relating to its substance;

(c) full restoration of the appellant's right or freedom and adoption, where appropriate, of measures conducive to its preservation;

..."

THE LAW

...

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 COMBINED WITH ARTICLE 14 OF THE CONVENTION

36. The applicant complained of a violation of her right to a fair hearing within a reasonable time and also that she had been a victim of discrimination on grounds of sex. She further alleged that she had been unable to obtain redress for the violation of her fundamental right as acknowledged by the Constitutional Court. She relied on Articles 6 § 1 and 14 of the Convention, which read as follows:

Article 6

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing within a reasonable time ... by [a] ... tribunal ..."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

37. The Government disagreed.

38. Since the Court is master of the characterisation to be given in law to the facts of the case, when giving notice of the present case to the parties it considered it appropriate to examine the applicant's complaint from the point of view of the right of access to a court, of which the execution of a

judgment given by any court must be regarded as an integral part (see, among other authorities, *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II).

A. The parties' submissions

39. The Government pointed out that in its judgment of 15 January 2007 the Constitutional Court had found in favour of the applicant and allowed her *amparo* appeal in respect of her complaint concerning the principle of non-discrimination when in fact, as her child had reached the prescribed age limit by the time the execution proceedings were pending before the Constitutional Court, the applicant was no longer entitled to the reduced working hours she had applied for. In the Government's submission, the fact that it was materially impossible to execute the Constitutional Court's judgment did not constitute a violation of the right to a fair hearing in this case, unlike the facts examined in the *Hornsby* judgment (cited above), which concerned the administrative authorities' delay in complying with court judgments.

40. As to the alleged infringement of the principle of non-discrimination, the Government submitted that the infringement had been acknowledged and remedied by the Constitutional Court. According to the Government, the principle of subsidiarity precluded the examination by the Court of the alleged violation of a right that had already been found by the domestic courts to have been violated.

41. The applicant, on the other hand, considered that as the Constitutional Court had set aside the judgment of the Madrid Employment Tribunal, no court had examined the merits of her claim. She referred to the *Hornsby* case cited above, and submitted that the fact that the Constitutional Court had set aside the judgments of the lower court did not suffice to make the proceedings compatible with Article 6 of the Convention.

B. The Court's assessment

42. The right of access to a court cannot oblige a State to have every single civil judgment executed, no matter what the judgment or the circumstances (see *Sanglier v. France*, no. 50342/99, § 39, 27 May 2003). In the present case the judgment in issue is the Constitutional Court's judgment of 15 January 2007 which, after finding a violation of the principle of non-discrimination on grounds of sex, set aside the Madrid Employment Tribunal's judgment of 25 September 2003 and ordered the that court to deliver a new judgment in keeping with the fundamental right in issue (see paragraph 11 above).

43. However, the Madrid Employment Tribunal failed to act on the Constitutional Court's judgment of 15 January 2007 as required. In a second

judgment, of 6 September 2007, the Employment Tribunal considered that the applicant's request to work fewer hours went beyond the limits authorised by law and that she had not sufficiently justified the need for a reduction in her working hours (see paragraph 12 above). The applicant had thus been obliged to appeal once again to the Constitutional Court. In its decision of 12 January 2009 that court found that its judgment of 15 January 2007 had been incorrectly executed, and set aside the second judgment of the Madrid Employment Tribunal (see paragraph 14 above).

44. The Court reiterates that the State is required to provide litigants with a system whereby they are able to secure the proper execution of domestic court decisions. Its task is to consider whether the measures taken by the national authorities – a judicial authority in the instant case – to have the decisions concerned executed were adequate and sufficient (see *Ruianu v. Romania*, no. 34647/97, § 66, 17 June 2003), for when the competent authorities are required to take action to execute a judicial decision and fail to do so – or to do it properly – their inertia engages the responsibility of the State under Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Scollo v. Italy*, 28 September 1995, § 44, Series A no. 315-C).

45. The Court observes that in the present case, in its decision of 12 January 2009, the Constitutional Court found a violation of the applicant's right to the execution of its earlier judgment finding a violation of the principle of non-discrimination. The Court reiterates that a decision or measure in the applicant's favour is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII, and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 180, ECHR 2006-V). It notes that in spite of the two judgments of the Constitutional Court, the violation found by that domestic court has still not been repaired to this day.

46. The Court observes that the applicant's initial intention was not to seek compensation but to obtain recognition of her right to work reduced hours in order to be able to look after her son before he reached the age of six. Her claim for compensation only came later, when her son was no longer young enough for her to have the right to work shorter hours.

47. In its decision of 12 January 2009 the Constitutional Court refused to award the applicant compensation in this respect and gave no indication as to any possibility of applying to another administrative or judicial body at a later stage.

48. It is true that because of the child's age when the proceedings ended, it was no longer possible to afford the applicant reparation in kind for the infringement of her right found by the courts. It is not for the Court to tell the respondent State how it should provide for redress in the framework of the *amparo* appeal. It can only note that the protection afforded by the

Constitutional Court proved ineffective in the present case. On the one hand the applicant's request to work special hours was never answered on the merits, even though the two rulings against her by the Employment Tribunal were set aside. And on the other hand the applicant's *amparo* appeal before the Constitutional Court served no purpose as that court found that Article 55 § 1 of the institutional Law on the Constitutional Court made no provision for compensation to redress a violation of a fundamental right.

The failure to restore the applicant's rights in full made the protection afforded by the Constitutional Court's *amparo* appeal finding in her favour illusory in the present case.

49. The Court accordingly finds that there has been a violation of Article 6 § 1 in conjunction with Article 14 of the Convention.

...

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Article 41 of the Convention provides

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

55. The applicant claimed EUR 40,986 in respect of non-pecuniary damage. This is the same amount she claimed before the Spanish Constitutional Court.

56. The Government considered that the finding of a violation by the Constitutional Court in itself constituted sufficient just satisfaction in the present case. In any event they did not agree with the assessment criterion used by the applicant to fix the amount claimed.

57. The Court considers that the applicant should be awarded EUR 16,000 in respect of non-pecuniary damage.

B. Costs and expenses

58. The applicant claimed EUR 5,760 for the costs and expenses incurred in the proceedings before the Court, which is 12% of the amount she claimed in respect of non-pecuniary damage, but no bills have been produced.

59. The Government noted that this claim was unsubstantiated and considered it inappropriate to award a percentage of the amount awarded in respect of the applicant's main claim to cover her costs and expenses. They left it to the Court's judgment to fix the amount to be awarded.

60. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Furthermore, under Rule 60 § 2 of the Rules of Court itemised particulars of any claim made under Article 41 of the Convention must be submitted, together with the relevant supporting documents or vouchers, failing which the Chamber may reject the claim in whole or in part (see *Buscarini and Others v. Saint-Marin* [GC], no. 24645/94, § 48, ECHR 1999-I, and *Gómez de Liaño y Botella v. Spain*, no. 21369/04, § 86, 22 July 2008). In the present case the applicant has failed to submit any invoices to substantiate her claim. The Court accordingly considers that no award should be made under this head and dismisses the claim.

C. Default interest

61. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

...

2. *Holds* that there has been a violation of Article 6 § 1 in conjunction with Article 14 of the Convention;

...

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 19 February 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President