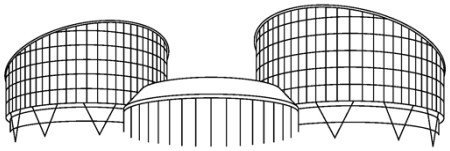

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF OLIVARES ZÚÑIGA v. SPAIN

(Application no. 11/18)

JUDGMENT

STRASBOURG

15 December 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Olivares Zúñiga v. Spain,

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

Georges Ravarani*, President*,
Carlo Ranzoni,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
María Elósegui,
Mattias Guyomar,
Mykola Gnatovskyy*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 11/18) 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 Mexican national, Ms Mónica Ileana Olivares Zúñiga ("the applicant"), on 13 December 2017;

the decision to give notice to the Spanish Government ("the Government") of the complaints concerning Article 6 § 1 and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 22 November 2022,

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

INTRODUCTION

1. The present case concerns the applicant's right to a fair trial in employment proceedings where, despite the applicant having lodged a *suplicación* appeal with the Madrid High Court of Justice and an appeal on points of law with the Supreme Court, the Constitutional Court declared her *amparo* appeal inadmissible for not having lodged an action for the annulment of proceedings.

THE FACTS

2. The applicant was born in 1978 and lives in Parla. The applicant was represented by Ms J. Garcia de Blanck, a lawyer practising in Madrid.

3. The Government were represented by their Agent, Ms H.E. Nicolás Martínez, co-Agent of Spain before the European Court of Human Rights.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 19 March 2013 the applicant was dismissed from her post as a lawyer in a company for disciplinary reasons. The applicant contested the dismissal before the Madrid Labour Court no. 41, requesting that it be declared null and void (*nulo*) or, in the alternative, unfair (*improcedente*).

6. On 20 January 2014 a first conciliation hearing took place before the court clerk, at which the company conceded that the dismissal had been unfair. The applicant, however, sought to have the dismissal declared null and void. The hearing on the merits took place on the same day.

7. By a judgment of 24 February 2014, the labour court allowed the applicant's claim in part, declaring the dismissal unfair, but dismissed her request to have it declared null and void. It considered that the facts as alleged by the applicant had not been established and that the proven facts could not lead to the legal consequence of nullity sought by her. The labour court ordered the company to either pay the applicant compensation in the amount of 14,377.42 euros (EUR) or reinstate her in her position. The company decided to pay the compensation.

8. The applicant lodged a *suplicación* appeal with the Madrid High Court of Justice, alleging that the labour court had not properly included all the relevant facts in the judgment and that the dismissal should be declared null and void because she was protected by an "indemnity guarantee" (*garantía de indemnidad*) not to be dismissed on the grounds of a work conflict in relation to which she tried to exercise her employment rights.

9. By a judgment of 5 February 2015, the Madrid High Court of Justice dismissed her appeal. It considered that the proven facts had been correctly established and that, according to the relevant case-law of the Supreme Court and the Constitutional Court, no different outcome could be reached as regards the nullity of the dismissal, because the "indemnity guarantee" (*garantía de indemnidad*) would only protect her in the event that she had initiated judicial proceedings or had been taking preparatory steps in order to initiate such proceedings, which had not been established at the hearing.

10. She lodged an appeal on points of law with the Supreme Court, on the basis of alleged contradictions between the judgment in her case and those in other cases before the High Court of Justice of the Balearic Islands and the Constitutional Court.

11. By a decision of 18 October 2016, the Supreme Court declared the applicant's appeal inadmissible, owing to the lack of similarities between the factual background in her case and those in the other judgments examined, as a result of which no contradiction emerged.

12. The applicant lodged an *amparo* appeal with the Constitutional Court. In it she relied on, *inter alia*, Article 24 of the Spanish Constitution, concerning the right to a fair trial. She complained, firstly, that the proven facts of the case, as established by the courts, had not properly included the evidence adduced at the hearing; secondly, she complained that the dismissal should have been declared null and void because, in relation to a work conflict, she was protected by an "indemnity guarantee" (*garantía de indemnidad*).

13. On 29 May 2017 the Constitutional Court declared the *amparo* appeal inadmissible, considering that the applicant had failed to properly exhaust

prior remedies. In particular, it stated that she was required to lodge an action for the annulment of proceedings (*incidente de nulidad*) against the judgment ruled by the High Court.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

14. The relevant provision of the Institutional Law on the Judiciary (as amended under Institutional Law no. 6/2007 of 24 May 2007) reads as follows:

Section 241(1)

"As a general rule, actions for the annulment of proceedings (*incidente de nulidad*) must be declared inadmissible. In exceptional cases, however, legitimate or potentially legitimate parties may request in writing that judicial decisions be declared null and void on the grounds of a violation of a fundamental right secured under Article 53 § 2 of the Constitution, provided that such a violation could not have been complained of before the delivery of the judgment or decision terminating the proceedings, and that, in either case, no ordinary or extraordinary remedy lies against the judgment or decision. ..."

15. The relevant provision of the Institutional Law on the Constitutional Court, as amended under Institutional Law no. 6/2007 of 24 May 2007, reads as follow:

Section 44(1)(a)

"Violations of rights and freedoms which are open to an *amparo* appeal and which derive immediately and directly from an act or omission on the part of a judicial body may give rise to such an appeal, subject to the following conditions:

(a) that all the legal remedies provided for by procedural rules have been exhausted in the particular case, through judicial channels. ..."

16. The relevant provision of Law no. 36/2011 of 10 October 2011, on Social Jurisdiction, reads as follows:

Section 218

"Appeals on points of law for the unification of case-law may be lodged against judgments handed down by the Social Chambers of the High Courts of Justice on a *suplicacion* appeal."

17. The Constitutional Court, in its judgment no. 39/2003 of 27 February 2003, stated:

"Certainly, Article 44.1 LOTC, which regulates appeals for amparo against decisions of judicial bodies, establishes, among others, the requirement to exhaust all remedies available through ordinary judicial channels as a consequence of the subsidiary nature of the appeal for amparo, since the general protection of rights and freedoms corresponds, in accordance with Article 53.2 EC, in the first place, to the bodies of the Judiciary. Consequently, when there is a remedy that can be used and is appropriate by

its nature and character to protect the freedom or right that is understood to have been violated, this remedy must be filed before lodging an amparo appeal before this Court

...

This requirement, far from being an empty formality, is an essential element in order to respect the subsidiarity of the amparo appeal and, ultimately, to guarantee the correct articulation between this Court and the bodies making up the Judiciary, to whom, we must reiterate, the reparation of possible injuries to rights invoked by citizens corresponds first and foremost, so that the constitutional jurisdiction can only intervene once said reparation has been attempted and has not taken place, leaving the judicial avenue exhausted.

In accordance with the aforementioned doctrine, we must conclude that, in this case, the applicant did not exhaust, before filing his application for amparo, the procedural channels provided by law so that the infringement of his right could be redressed beforehand through the courts

...

once the Judgment of the Social Division of the High Court of Justice became final as a result of the Order of the Social Division of the Supreme Court of 10 January 2001, the applicant should have sought before the aforementioned Chamber of the High Court of Justice of Madrid, within a period of twenty days, the annulment of the proceedings based on the existence of a flaw of inconsistency, and, by failing to do so, denied the judicial body the possibility of redressing the injury that he now claims through the present action for amparo".

18. The Constitutional Court, in its judgment no. 112/2019 of 3 October 2019, summarised both the previous judicial interpretation of the law and the current situation, as follows:

"(a) According to the case-law of this court, in such cases, in order to exhaust the judicial remedies, it is necessary to bring an action for annulment before the court that adopted the decision considered to be in violation of fundamental rights. This has been required by this court in cases including when the violation of fundamental rights is deemed to have occurred in the judgment that decided on a *suplicación* appeal and the remedy employed to seek judicial reparation for the alleged violation of the fundamental right – an appeal on points of law for case-law uniformity – was deemed inadmissible. In these cases, according to the case-law of the Constitutional Court, to be able to lodge an *amparo* appeal it is necessary to have previously brought an action for annulment before the court that decided on the *suplicación* appeal ... As stated in the Constitutional Court's judgment no. 39/2003, of 27 February 2003, in these cases the requirement to exhaust judicial remedies, 'far from constituting an empty formality, is an essential element to respect the subsidiary nature of the *amparo* appeal and, in the last instance, to ensure the correct configuration of the relationship between this court and the other organs of the judiciary', as the judicial organs 'are the ones which are primarily responsible for repairing possible violations of the rights invoked by the citizens'. For that reason, that judgment argues that 'when, on account of its nature and character, an appropriate and available remedy exists to protect the freedom or right which is allegedly violated, this remedy must be pursued before turning to this court'.

...

(c) The court, however, after due reflection, has decided to amend this approach and consider that in such cases it is not necessary to bring an action for annulment in order

to consider fulfilled the requirement of exhausting judicial remedies before lodging the *amparo* appeal ... for the following reasons.

(d) The requirement of exhausting judicial remedies before lodging the *amparo* appeal ... 'must be interpreted in a flexible, purpose-based manner' ... 'it does not require the use of every possible remedy, but only those normal ones that are clearly available, in such a way that their use is undoubtedly correct and possible' ... 'without the need to overcome any interpretative difficulties beyond what is reasonable' ...

From the procedural rules governing an action for annulment, it cannot be inferred that its use is clearly mandatory in cases such as the present one ...

Moreover, the subsidiary nature of the *amparo* appeal does not require such an action to be brought in these cases ...

In the present case the subsidiary nature of the *amparo* appeal has been respected, since the remedy provided for in procedural legislation in respect of a decision alleged to have violated fundamental rights – namely, an appeal on points of law – was pursued and it complied with the timing and the formal requirements set down by the law.

...

(f) ... It follows, therefore, that the bringing of an action for annulment in cases such as the present one, since it is not clearly required under section 241(1) of the Institutional Law on the Judiciary, is not a necessary requirement for exhausting the judicial remedies before lodging an *amparo* appeal with this court ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

19. The applicant complained that the Constitutional Court had unduly refused to examine her amparo appeal, and that the findings of fact of the national courts had breached her rights as provided for in Article 6 § 1 of the Convention, which reads as follows:

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

A. Admissibility

20. The Government submitted that the applicant had not exhausted domestic remedies, as required by Article 35 § 1 of the Convention. In particular, she had failed to bring an action for annulment before the Madrid High Court of Justice, which had led to her *amparo* appeal being dismissed on account of her not having exhausted prior remedies. This fact had prevented the Constitutional Court from examining the case, and since it had been entirely the fault of the applicant, her application should be declared inadmissible.

21. The applicant did not submit any observations on this issue.

22. The Court observes that the essence of the applicant's claim before it is precisely that her *amparo* appeal had been unduly rejected as the

requirement to bring a prior action for annulment breached her rights under Article 6 of the Convention. Therefore, the need to bring an action for annulment and the compatibility of that requirement with Article 6 constitutes the subject matter of the case, to be determined on the merits.

23. The Court notes that the complaint that the Constitutional Court had unduly refused to examine her amparo appeal is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

24. Regarding the complaint about other aspects of the right to a fair trial, in the instant case, the Court notes that at the various stages of the proceedings, the applicant was able to submit the arguments she considered relevant to her case and the national courts gave factual and legal reasons for dismissing her arguments. Moreover, the Court notes that the labour court partly allowed her claim, declaring the dismissal unfair, while dismissing her request to have it declared null and void (see paragraph 7 above). It has not been shown that the national courts acted unlawfully or arbitrarily in the assessment of the evidence submitted by the parties and the interpretation they made of that evidence.

25. Therefore, this complaint must be declared inadmissible pursuant to Article 35 § 3 of the Convention, as manifestly ill-founded.

B. Merits

1. The parties' submissions

(a) The applicant

26. The applicant submitted that an action for annulment had not been necessary in her case, as she had invoked her constitutional rights at every level of jurisdiction. She also argued that the Government's position ran counter to the Constitutional Court's stated reason for declaring the *amparo* appeal inadmissible and that the Constitutional Court had failed to indicate with which specific court she should have brought the action for annulment.

(b) The Government

27. The Government contested the applicant's argument. Regarding the decision of the Constitutional Court to declare the *amparo* appeal inadmissible for not having brought an action for annulment, the Government submitted that that requirement was clear both in the law and in the case-law of the Constitutional Court, judgment 39/2003 of 27 February 2003 (see paragraph 17 above). The applicant, being a lawyer herself, should have known about the requirement but she had chosen to ignore it. Moreover, the applicant could not have considered the action for annulment superfluous, as before the Constitutional Court she had alleged new violations of rights that had not been part of her claim before the High Court of Justice, thus infringing

the subsidiary nature of the *amparo* appeal, and as such, the Constitutional Court had been unable to rule on them.

2. The Court's assessment

(a) General principles

28. The Court reiterates that the "right to a court", of which the right of access is one aspect, is not absolute (see, in particular, *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18); it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see *García Manibardo v. Spain*, no. 38695/97, § 36, ECHR 2000-II, and *De la Fuente Ariza v. Spain*, no. 3321/04, § 22, 8 November 2007). Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Moreover, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Zubac v. Croatia* [GC], no. 40160/12, § 78, 5 April 2018, and *Arribas Antón v. Spain*, no. 16563/11, § 41, 20 January 2015). The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court (see *Kart v. Turkey* [GC], no. 8917/05, § 79, ECHR 2009).

29. The Court also reiterates that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation, still less, courts with jurisdiction to deal with *amparo* appeals. However, where such courts do exist, the State must ensure that they provide litigants with access to the fundamental guarantees of Article 6 (see *Zubac*, § 80, and *Arribas Antón*, § 42, both cited above). Moreover, the compatibility of limitations laid in domestic law with the right of access to a court as secured by Article 6 depends on the specific features of the proceedings in issue. The Court has several times found that the imposition by the national courts of a requirement to comply with particular formalities in order to lodge an appeal is liable to breach the right of access to a court. This is the case when an excessively formalistic interpretation of a legal provision *de facto* prevents the consideration of the merits of a remedy attempted by a litigant (see, for example, *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, §§ 48-55, ECHR 2002-IX; *De la Fuente Ariza*, cited above, §§ 24-28; and *Ferré Gisbert v. Spain*, no. 39590/05, §§ 28-33, 13 October 2009). Regard should be had to the domestic proceedings as a whole and to the role played in them by the Constitutional Court, although the conditions for the admissibility of an

amparo appeal may be stricter than in the case of an ordinary appeal (see *Arribas Antón*, cited above, § 42).

30. Lastly, the Court reiterates the fundamental principle that it is for the national authorities, particularly the courts, to interpret and apply domestic law (see *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII). The Court will not therefore question the judgment of the national courts as regards alleged errors of law, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015).

(b) Application to the case

31. Regarding the rejection of the applicant´s amparo appeal on the basis that an action for annulment was a prerequisite for an *amparo* appeal, the Court attaches particular importance to whether the procedure to be followed for such an action, as a remedy to be used before applying to the Constitutional Court, could be regarded as foreseeable, at the relevant time, from the litigant's point of view. It notes in that connection that the Government relied on a Constitutional Court judgment of 2003 establishing the criteria for determining when the bringing of an action for annulment was required before lodging an *amparo* appeal (see paragraph 27 above).

32. The Court observes, however, that section 241 of the Institutional Law on the Judiciary provides for this extraordinary procedural remedy (action for annulment) only if there exists no ordinary or extraordinary appeal against the decision that is considered to have violated a fundamental right (see paragraph 14 above). In this respect, it is worth noting that the possibility contemplated by the Spanish legal system of being able to lodge an appeal on points of law for the unification of case-law with the Supreme Court against judgments handed down by the Social Chambers of the High Courts of Justice in the labour sphere (see paragraph 16 above), can reasonably be considered, as the applicant indeed did, as meaning that in the circumstances of her case, it was not appropriate to lodge an action for annulment against those judgments. The applicant could reasonably consider that she would not have the possibility to lodge an action for annulment as a means to invoke fundamental rights breaches involving the lower courts' judgments, once the Supreme Court had decided on her appeal on points of law.

33. However, the Supreme Court declared the applicant's appeal on points of law inadmissible (see paragraph 11 above). The applicant's argument before this Court that in these particular circumstances, since she had invoked her constitutional rights at every level of jurisdiction, there was uncertainty as to the modalities of exhausting the annulment action requirement appears convincing.

34. The Court notes, moreover, that the Constitutional Court itself found that it had to change its approach regarding when to file an action of annulment (*incidente de nulidad*) in these cases. In its judgment of 2019 (see

paragraph 18 above), it held that the requirement of exhausting judicial remedies before lodging the *amparo* appeal does not require the use of every possible remedy but only those normal ones that are "clearly" available, "without the need to overcome any interpretative difficulties beyond what is reasonable" and that "[f]rom the procedural rules governing an action for annulment, it cannot be inferred that its use is clearly mandatory in cases such as the present one". It can therefore be concluded that the Constitutional Court changed its case-law because it acknowledged that the system previously in force had created uncertainty and that there was a lack of foreseeability of the available or, rather, necessary remedies to be exhausted before lodging an *amparo* appeal.

35. The foregoing considerations are sufficient to enable the Court to conclude that, in the circumstances of the present case, the need to bring an action for annulment was not foreseeable. The Court consequently holds that the decision to declare the *amparo* appeal inadmissible for non-exhaustion of prior remedies unduly restricted the applicant´s right of access to a court.

36. There has accordingly been a violation of Article 6 § 1 of the Convention on that account.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. The applicant claimed 113,100 euros (EUR) in respect of pecuniary damage. She considers that she should had recovered her job position and should had received an amount of money called "*salario de tramitacion*" under the Labour Code of Proceedings, being the total sum of all the monthly salaries that would have been paid since the dismissal date. She also claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

39. The Government did not recognise any sum as being due for this claim.

40. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 9,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

41. The applicant also claimed EUR 15,920 in respect of costs and expenses. This sum was divided as follows: EUR 1,720 for the barrister's fees incurred in the proceedings before the Madrid Labour Court no. 41; EUR 1,200 for her self-representation in the *suplicación* appeal before the Madrid High Court of Justice; EUR 2,500 for her self-representation in the appeal on points of law before the Supreme Court; EUR 3,500 for her self-representation in the *amparo* appeal before the Constitutional Court; and EUR 7,000 for the barrister's fees incurred in the proceedings before the Court. She stated that the amounts for her self-representation had been calculated on the basis of lawyers' fees according to the Madrid Bar Association.

42. The Government objected to these sums.

43. 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 (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). It follows that it cannot make an award under this head in respect of the hours the applicants themselves spent working on the case, as this time does not represent costs actually incurred by them (see *Dudgeon v. the United Kingdom* (Article 50), judgment of 24 February 1983, Series A no. 59, p. 10, § 22, and *Robins v. the United Kingdom*, judgment of 23 September 1997, *Reports* 1997-V, pp. 1811-12, §§ 42-44). In the present case, regard being had to the fact that the applicant represented herself in some of the domestic proceedings, and to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 8,720 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

44. The Court considers it appropriate that the default interest rate 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,

1. *Declares* the complaint under Article 6 of the Convention, regarding the rejection of the applicant's amparo appeal admissible and the remainder of the application inadmissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 9,600 (nine thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 8,720 (eight thousand seven hundred twenty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 15 December 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President