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

Communicated on 12 November 2015

THIRD SECTION

Application no. 30614/15
Andrés LÓPEZ ELORZA
against Spain
lodged on 2 July 2015

## STATEMENT OF FACTS

1. The applicant, Mr Andrés López Elorza, is a Venezuelan and Colombian national, who was born in 1982 and is detained in Madrid. He is represented before the Court by Mr J.L. Mazón Costa, a lawyer practising in Murcia.

### A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. The applicant has been living in Spain with his family since 2003.

4. On 18 November 2005 the United States of America (hereinafter, "the US") authorities requested the Spanish authorities to arrest the applicant with a view to extradition. This request was based on an indictment issued by the Eastern District of New York Tribunal, that specifically charged the applicant with two offences of "illegal association for the purposes of drug trafficking", which carried a maximum penalty of life sentence. According to the indictment, the applicant was alleged to have been part of a criminal organization that used dogs as drug carriers, with the purpose of smuggling heroin from Colombia into the US.

5. On 13 December 2013 the applicant was detained by the Spanish police in Lugo. This same day the Central Court of Investigation No. 4 (*Juzgado Central de Instrucción*) initiated extradition proceedings and ordered his provisional release. The extradition request was then allocated to the Criminal Section of the *Audiencia Nacional*.

6. On 31 March 2014 the Public Prosecutor Office agreed to the applicant's extradition.

7. On 1 October 2014 the *Audiencia Nacional* granted the extradition request, on condition that the US authorities provided a guarantee that if life sentence were handed down it would not be irreducible. This ruling was

upheld on appeal on 3 November 2014 by the Plenary of the Criminal Section of the *Audiencia Nacional*.

8. The applicant subsequently submitted an application requesting that the *Audiencia Nacional*'s decision of 3 November 2014 be declared null and void (*incidente de nulidad de actuaciones*). On 19 December 2014 the Plenary of the Criminal Section of the *Audiencia Nacional* ruled against the applicant, arguing that the object and purpose of the annulment proceedings were not to serve as a second appeal against the extradition decision, but to correct any possible violation of a fundamental right committed by a decision which is not subject to an appeal.

9. On 3 December 2014 the US Embassy issued a one-and-a-half page *note verbale* informing the Spanish Government that, if convicted, the applicant "would have the right to introduce a revision appeal against the sentence, to ask for a pardon or to commute his sentence into a less severe one".

10. On 23 January 2015 the Public Prosecutor issued a report stating that the guarantees provided by the US were adequate and, consequently, the extradition should be granted.

11. On 24 February 2015 the *Audiencia Nacional* issued a decision (*providencia*) assessing the guarantees provided by the US and deeming them to be sufficient.

12. The applicant brought two appeals against this decision. On 25 March 2015 and on 3 June 2015 the *Audiencia Nacional* rejected the applicant's appeals on the grounds that, according to the Court's jurisprudence in the cases *Hutchinson v. the United Kingdom* (no. 57592/08, 3 February 2015) and *Bodein v. France* (no. 40014/10, 13 November 2014), the assurances given by the US authorities through the *note verbale* of 3 December 2014 were sufficient to conclude that the applicant was not facing an irreducible sentence contrary to the Court's jurisprudence.

13. On 19 June 2015 the applicant was detained for the purposes of being extradited to the US.

14. On 22 June 2015 the applicant lodged an *amparo* appeal with the Constitutional Court against the extradition decision and asked for interim measures requesting the Constitutional Court to order the stay of the extradition while the case was pending. He claimed, *inter alia*, that the assurances provided by the US authorities did not fulfil the criteria for assessing the reducibility of a life sentence and that the extradition would amount to a violation of his right not to be subjected to inhuman or degrading treatment or punishment.

15. On 1 July 2015 the Constitutional Court issued a decision declaring the *amparo* appeal –and, at the same time, the requested interim measures– inadmissible. In particular, as regards the part of the *amparo* appeal concerning the validity of the assurances given by the US authorities and the possible violation of the applicant's right not to be subjected to inhuman or degrading treatment, the Constitutional Court held that the *amparo* appeal had been introduced too late, for the alleged violations stemmed from a decision (*Auto*) of 25 March 2015. In this regard, the applicant argued that it was not the decision of 25 March 2015 but that of 3 June 2015 that had to be considered as the last decision for the purposes of that part of the *amparo* appeal.

16. On 2 July 2015 the applicant lodged with the Court a request for interim measures under Rule 39 of the Rules of Court, asking the Court to indicate to the Spanish Government that the extradition should be stayed pending the outcome of the proceedings before the Court. That same day the request was temporarily granted until 1 August 2015, and the Government were asked the following questions:

> "a.- Does the applicant risk under US criminal law, in respect of the charges, a maximum penalty that precludes early release and/or release on parole?
>
> b.- What are the concrete mechanisms and under what US legal basis is the applicant entitled to review his possible final life sentence? In this sense, are the appeal, pardon and other review mechanisms referred to in the *note verbale* of 3 December 2014 the ones described in the case of *Trabelsi v. Belgium* (application no. 140/10, 4 September 2014, § 27)?"

17. On 23 July 2015 the Government submitted their response and attached to it a document issued by the Office of International Affairs of the US Department of Justice called "supplemental Information to Spain on Sentencing Issues in Relation to Andres Lopez Elorza, a/k/a 'Andres Lopez Flores' (hereinafter, "the US report").

18. As regards the first question, the Government, on the basis of the US report, argued the following:

(a) According to the US report, "López Elorza could, with the advice of his lawyer, decide to give up the right to a trial and plead guilty to the charges in the indictment, with or without the agreement of the prosecution such as an agreement to allow him to plead guilty to fewer than all the charges in the indictment (with the remainder of the charges to be dismissed at sentencing), or even to lesser charges, or in exchange for the Government's promise to affirmatively recommend to the court that a particular lesser sentence be imposed". The report also stated that "if López Elorza were willing and able to provide substantial assistance to the US in the investigation or prosecution of another person who had committed a crime, a plea agreement might include a promise by the Government attorneys, in exchange for his guilty plea, to file a motion with the court asking that López Elorza's cooperation be taken into account and permitting the Court to impose a lower sentence that it might otherwise impose".

(b) If, however, the applicant decided not to plead guilty and instead exercised his right to a trial, and if he was found guilty of one or more charges, "his sentencing exposure [would] vary, depending on the nature of the charges on which he is found guilty". According to the US report, both the defendant and the Government had the "statutory right to appeal any sentence imposed on the grounds that it is substantively or procedurally unreasonable under the circumstances of the case".

(c) As regards the estimated sentence that the applicant could face, the US report stated that there were many factors that contributed to the imposition of a sentence and that it was "impossible to address every conceivable permutation that could occur or every possible scenario that might arise". However, the report indicated that, according to the US Sentencing Guideline factors, if the applicant was found guilty of all charges, the advisory sentencing range was "188 to 235 months incarceration, far less than the possible life sentence provided for under the statutes with which he was charged". Additionally, the report stated that,

under Title 18, US Code, Section 3553(a) there was a "need to avoid unwarranted sentence disparities". In this regard, the report indicated that several of the applicant's co-conspirators had already been sentenced in a related case that was pending before the same judge who was assigned to the applicant's case. One of these co-conspirators "faced a Guidelines range of 188 to 235 months and received a sentence of 72 months incarceration", another "faced a Guidelines range of 78 to 87 months and received a sentence of 14 months incarceration" and a third "faced a Guidelines range of 70 to 87 months and received a sentence of Time Served (approximately 12 months incarceration)". The US report also noted that none of these defendants had entered into cooperation agreements with the government. Consequently, the sentences imposed on the applicant's s co-conspirators by the same judge assigned to the applicant's case "[could] be of value in assessing the sentence that will be imposed on him".

19. The report concluded that while it was possible that the maximum sentence could be imposed in any case in which it is the maximum sentence available for an offence that an accused person is found guilty of, under the circumstances present in this case, "the risk of López Elorza receiving such a sentence was low."

20. As regards the second question, the Government argued, on the basis of the above-mentioned report, that, should the applicant be sentenced to a life term, he could benefit from a variety of mechanisms by which he could seek (a) to have that sentence invalidated or reduced or (b) to obtain early release:

(a) Concerning the applicant's right to invalidate or reduce his sentence, the Government argued that the applicant would have the right under US law to lodge an appeal with the US Court of Appeals asking for the reversal of his conviction "based on an error in the proceedings". The applicant would also be able to "ask the Court of Appeals to review the appropriateness of his sentence". He could argue that a life sentence was "unreasonable" in light of the circumstances of his case. The report also argued that even after the applicant had exhausted his rights at trial and on appeal, under US law, he could file "a motion in the trial court claiming that his life sentence was imposed 'in violation of the Constitution or the laws of the United States', or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack".

(b) Concerning the applicant's right to obtain an early release, the report specifically stated that "since 1987, there has been no federal parole system in the United States". The applicant, however, could ask for early release if he provided substantial assistance after his conviction and the imposition of his sentence. In addition, the US law also allowed for compassionate release pursuant to Title 18, US Code, Section 3582. The US report specifically stressed that the Bureau of Prisons could reduce the applicant's sentence if it found that there was "an extraordinary and compelling reason to do so; for example, if a medical condition arose with López Elorza that would warrant such a modification". Finally, the applicant could also seek executive clemency in the form of a commutation (reduction) of his sentence. The US report noted that, in cases similar to the applicant, commutation of life sentences was not "a rare occurrence" and set as an example that on 13 July

2015 President Obama had commuted the life sentences of "fourteen persons who had been convicted of drug related offenses".

21. On 31 July 2015 the interim measures under Rule 39 of the Rules of Court were extended and the Court requested the Government to stay the applicant's extradition to the US while the proceedings were pending before the Court.

## B. Relevant domestic law

### *1. Constitutional provisions*

22. The relevant provisions of the Spanish Constitution read as follows:

**Article 10**

"1. Human dignity, inviolable and inherent rights, the free development of the personality, and respect for the law and for the rights of others are the foundation of political order and social peace.

2. The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain."

**Article 15**

"Everyone shall have the right to life and to physical and moral integrity, and may under no circumstances be subjected to torture or to inhuman or degrading punishment or treatment. The death penalty is hereby abolished, except as provided by military criminal law in times of war."

### *2. Extradition Act no. 4/1985 of 21 March*

23. Under section 1, extradition is only possible between Spain and foreign States under a treaty concluded on a mutual basis.

24. Under section 4(6), extradition may not be granted if the requesting State does not personally guarantee that the person will not be executed or subjected to a punishment amounting to inhuman and/or degrading treatment.

25. In accordance with section 7, the extradition request will be lodged with the Ministry of Foreign Affairs through a diplomatic note or directly with the Ministry of Justice. The Ministry of Justice will then issue its recommendations on the request and send it to the Government, who will decide on the continuation of the proceedings (section 9).

26. According to section 12, if the Government decide on the continuation of the proceedings, the request will be sent to the competent judge.

27. Pursuant to sections 14 and 15, after the investigatory proceedings and after a hearing has taken place, the judge will decide whether to grant or deny the request. The decision is open to appeal (*recurso de súplica*) before the Plenary of the Criminal Division of the *Audiencia Nacional*.

28. Pursuant to Section 18, if the domestic courts grant the extradition, the request will be sent back again to the Government, who will ultimately decide whether or not to hand over the foreigner to the requesting State.

## C. The extradition agreement between Spain and the United States

29. A treaty on extradition between Spain and the US was signed in Madrid on 29 May 1970. This bilateral agreement was amended and updated by additional treaties of 25 January 1975, 9 February 1988 and 12 March 1996 and pursuant to the 25 June 2003 agreement between the European Union and the US on extradition, under a bilateral "instrument" of 18 January 2010.

30. The Article 2 of the 29 May 1970 agreement as amended reads as follows:

> "A. An offense shall be an extraditable offense if it is punishable under the laws in both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty, or in the case of a sentenced person, if the sentence imposed was greater than four months
>
> B. Extradition shall also be granted for participation in any of these offenses, not only as principals or accomplices, but as accessories, as well as for attempts to commit or conspiracy to commit any of the aforementioned offenses, when such participation, attempt or conspiracy is subject, under the laws of both Parties, to a term of imprisonment exceeding one year.
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> C. For the purposes of this Article, an offense shall be an extraditable offense whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology.
>
> ..."

## D. Relevant United States law

31. According to Rule 35(b) of the Federal Rules of Criminal Procedure, the applicant could ask for early release if he provided substantial assistance after his conviction and the imposition of his sentence:

> **Rule 35. Correcting or Reducing a Sentence**
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> "...
>
> (b) Reducing a Sentence for Substantial Assistance.
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> (1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.
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> (2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:
>
> (A) information not known to the defendant until one year or more after sentencing;
>
> (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
>
> (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.
>
> (3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's pre-sentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

...”

32. Pursuant to Section 3582 of Title 18 of the US Code, the US law also allows for compassionate release:

**§ 3582. Imposition of a sentence of imprisonment**

“...

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT

The court may not modify a term of imprisonment once it has been imposed except that

(1) in any case

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that

(i) extraordinary and compelling reasons warrant such a reduction; or (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g); and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure;

...”

33. Finally, the applicant could also seek executive clemency in the form of a commutation (reduction) of his sentence. Article 2 (II) of the US Constitution empowers the President to commute or reduce a sentence or grant a pardon in cases of conviction for a Federal offence.

34. The Constitution does not restrict the President’s power to grant or refuse executive clemency, but the Department of Justice Office of the Pardon Attorney (hereinafter, the “Office of the Pardon Attorney”) prepares a recommendation to the President for every application for a pardon. This Department evaluates the merits of commutation requests by considering various factors including the disparity or undue severity of sentence, critical illness or old age, and meritorious service to the Government by the applicant that has not been adequately rewarded by other official actions, as well as other equitable factors that may be present in a given case. The seriousness of the offense, the applicant’s overall criminal record, the nature of the applicant’s adjustment to prison supervision, the length of time the already served, and the availability of other remedies are also considered in evaluating the merit of an application. The Office of the Pardon Attorney then makes a non-binding recommendation as to whether or not clemency should be granted. The President’s decision is final and not open to appeal.

## COMPLAINT

The applicant complains under Article 3 of the Convention about his intended extradition to the United States of America on the basis that if convicted he could face the risk to be sentenced to life imprisonment without parole.

## QUESTIONS TO THE PARTIES

1. Has the applicant exhausted all effective domestic remedies, as required by Article 35 § 1 of the Convention in relation to the right on which he now wishes to rely before the Court?

2. Does the applicant risk the imposition of a life sentence without the possibility of parole? If so, would his extradition be consistent with the requirements of Article 3 of the Convention (see in particular *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012; *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts); and *Trabelsi v. Belgium*, no. 140/10, ECHR 2014 (extracts))?