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

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Applicants in trial related to banned group ETA had justified fears about judges' lack of impartiality at trial

In today's **Chamber** judgment[1] in the case of **Otegi Mondragon and Others v. Spain** (applications nos. 4184/15 4317/15 4323/15 5028/15 and 5053/15) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

It also held, by six votes to one, that the finding of a violation alone was sufficient just satisfaction in the case.

The case concerned the applicants' complaint of bias on the part of judges who convicted them for being members of the ETA organisation.

The Court found in particular that the first applicant in the case had previously won an appeal against a conviction on different ETA-related charges because the presiding judge had shown a lack of impartiality, which had contaminated the whole panel in that case and had led to a retrial.

The same panel, including the judge who had presided in the earlier trial, had convicted all five applicants in a second set of proceedings on different charges a year later. The applicants had thus had objectively justified fears that these judges lacked impartiality in their case.

Principal facts

The applicants are Arnaldo Otegi Mondragón, born in 1958, Sonia Jacinto Garcia, born in 1977, Rafael Diez Usabiaga, born in 1956, Miren Zabaleta Telleria, born in 1981, and Arkaitz Rodriguez Torres, born in 1979. They are all Spanish nationals.

In March 2010 the first applicant was tried and convicted of the crime of encouraging terrorism and sentenced to two years' imprisonment by a three-judge panel. He challenged the verdict, alleging that the presiding judge was biased. She had asked him during the proceedings if he condemned violence by ETA, the former armed Basque separatist organisation, and he had refused to reply. She had then said that she "already knew that he was not going to give an answer to that question".

The Supreme Court overruled his conviction in February 2011 owing to a lack of impartiality on the part of the presiding judge. Another panel of the same first-instance court later acquitted Mr Otegi Mondragón.

All five applicants faced different criminal proceedings, which began in 2009, on ETA-related charges. The case was allocated to the same panel of the first-instance court which had originally convicted Mr Otegi Mondragón. He challenged the panel on the grounds of doubts about its impartiality, but a special chamber of the first-instance court dismissed his action.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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The first-instance court convicted the applicants and gave them jail sentences of various lengths in September 2011. They lodged cassation appeals with the Supreme Court, the first and fifth applicants arguing in particular that the three-judge court panel had not been impartial.

In May 2012 the Supreme Court partially upheld their appeal and reduced their sentences, however, it rejected their contention about partiality, considering that the presiding judge's lack of impartiality in Mr Otegi Mondragón's 2010 proceedings did not mean that she or the other judges in the five applicants' case had also been biased.

The applicants lodged appeals with the Constitutional Court in June 2012, with four out of five of them again alleging bias on the part of the panel.

In a 7-5 judgment in July 2014 the Constitutional Court rejected those claims. In particular, it held that doubts about the impartiality of the presiding judge in the first case, and who was part of the panel in the second case, were neither subjectively nor objectively justified. The earlier concerns about her impartiality had been raised in connection with different charges – encouraging terrorism – whereas the proceedings against the five applicants had been about different alleged crimes.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 of the Convention, the applicants complained that the panel of the first-instance court which had convicted them had lacked impartiality.

The application was lodged with the European Court of Human Rights on 14 January 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Vincent A. **De Gaetano** (Malta), *President*,
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Jolien **Schukking** (the Netherlands),
María **Elósegui** (Spain),

and also Stephen **Phillips**, *Section Registrar.*

Decision of the Court

The Court had established an objective and subjective test for a court or judge's lack of impartiality. The subjective test focussed on a judge's personal convictions or behaviour while the objective one looked at whether there were ascertainable facts which could raise doubts about impartiality. Such facts could include links between a judge and people involved in the proceedings.

In the five applicants' case the Court could not discern any signs of subjective bias and so examined whether there were objective reasons for their concerns about impartiality.

It noted the findings of bias against the presiding judge in the case against the first applicant, which had contaminated the whole panel and had led to him being acquitted by a different set of judges. Such circumstances raised a legitimate fear about the first panel's impartiality. However, the same three judges from that panel had examined the case against the five applicants.

The Court then noted that even though the two sets of proceedings had concerned different charges, there was a common link in them both being concerned with matters related to ETA. The presiding judge's remarks in the trial against Mr Otegi Mondragón could therefore have raised legitimate doubts in the minds of all the applicants in the second case about her being prejudiced.

When it came to her influence on the other two judges in the second case, the Court held that the same rationale which had led to the first applicant's trial being held again had to apply to the case of him and the other four applicants.

Overall, the applicants' fears of a lack of impartiality had been objectively justified and there had been a violation of Article 6 § 1 of the Convention.

Just satisfaction (Article 41)

Only the third applicant submitted a claim for just satisfaction and for costs and expenses.

The Court noted that Spain had a domestic procedure that could lead to judgments being reviewed and revised where the Court had found a violation of the Convention. Where such remedies existed they were the most appropriate form of redress.

It thus held by a majority of six votes to one that the finding of a violation alone was sufficient just satisfaction and rejected, by six votes to one, the remainder of his claim in that regard.

Separate opinion

Judge Keller expressed a partly dissenting opinion.

The judgment is available only in English.

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