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

FIFTH SECTION

CASE OF OLAECHEA CAHUAS v. SPAIN

(Application no. 24668/03)

JUDGMENT

STRASBOURG

10 August 2006

FINAL

11/12/2006

In the case of Olaechea Cahuas v. Spain,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 10 July 2006,

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

PROCEDURE

1. The case originated in an application (no. 24668/03) 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 Peruvian national, Mr Adolfo Héctor Olaechea Cahuas ("the applicant"), on 6 August 2003.

2. The applicant was represented by Ms Nuala Mole, of the Aire Centre (London). The Spanish Government ("the Government") were represented by their Agent, Mr I. Blasco Lozano, Head of the Legal Department for Human Rights at the Ministry of Justice.

3. On 18 October 2005, under the provisions of Article 29 § 3 of the Convention, the Fourth Section decided to examine the merits of the application at the same time as its admissibility.

4. On 1 April 2006 the application was assigned to the newly constituted Fifth Section (Rules 25 § 5 and 52 § 1 of the Rules of Court).

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1944 and currently lives in Peru.

A. The proceedings in Spain

7. On 3 July 2003 the applicant, a suspected member of the Shining Path (*Sendero Luminoso*) organisation, a terrorist group founded in 1970 whose aim is to transform Peru's political system by armed force into a communist proletarian regime, was arrested in Almería (Spain) under an international arrest warrant issued by the Peruvian authorities, following a routine police check of the lists of guests registered at hotels in that province. The applicant was taken into custody pending a ruling on his extradition.

8. In a decision of 3 July 2003 central investigating judge no. 6 of the *Audiencia Nacional* asked the applicant for his views on the extradition, in keeping with Article 17 of the bilateral extradition treaty of 28 June 1989 between the Republic of Peru and the Kingdom of Spain.

9. On 7 July 2003 the extradition hearing requested by central investigating judge no. 6 was held. The applicant agreed to the "simplified extradition" procedure (immediate return to the requesting country) and the application of the "special" rule (under which he could be tried only in respect of the offence for which extradition was requested). The extradition request was based on a terrorist offence.

10. At the hearing of 7 July 2003 the applicant declared that although he had agreed to simplified extradition, the Peruvian Government were required to guarantee his personal safety, his life, his health and his well-being, in conformity with the standards laid down in international conventions on detention conditions and a fair trial in a reasonable time, as he considered the charges against him unfounded. The Peruvian press having launched a campaign against him – which he considered warranted special protection measures – he also asked for guarantees that he would have access to the press.

11. The preliminary hearing provided for in Article 504 *bis* 2 of the Code of Criminal Procedure was also held on 7 July 2003, following which the applicant was detained with a view to his extradition.

12. In a decision of 9 July 2003 the examining judge, noting that the applicant had agreed to his extradition and that his requests had been granted at the hearing, called for the application of the measures provided for in Article 10 of the bilateral treaty between Peru and Spain and stated that in such cases it was for Spain, through its Ministry of Justice, to obtain the guarantees provided for in that provision from the Peruvian authorities. The extradition would be conditional on the official communication of those guarantees by the ministry, to enable the examining judge to reach a decision in the extradition proceedings.

13. On 10 July 2003 the applicant appealed against the decision of 7 July 2003 ordering his detention. The appeal was dismissed on 17 July 2003. On 23 July 2003 the applicant filed an appeal against that ruling.

14. In a decision of 18 July 2003 the *Audiencia Nacional* authorised the the applicant's extradition for trial by the Peruvian judicial authorities on the charge of terrorism. It stressed the content of the diplomatic note from the Peruvian Embassy, which read as follows:

> "Concerning the guarantee that the accused will not be subjected to punishment causing physical harm, or to inhuman or degrading treatment, we would remind the Spanish authorities that as Peru is party to the American Convention on Human Rights, the Inter-American Convention to Prevent and Punish Torture, and the International Covenant on Civil and Political Rights, the person concerned will enjoy sufficient guarantees under a treaty based on respect for human dignity, as well as the guarantees of physical, psychological and moral integrity enshrined in the main human rights protection instruments.
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> ...
>
> 1. Article 140 of the Peruvian Constitution provides: "The death penalty may be applied only for the crime of treason to the country in time of war, and for acts of terrorism ... According to Legislative Decrees no. 25475 and no. 921, the acts of terrorism with which the accused, Adolfo Olaechea Cahuas, is charged are not punishable by death.
>
> 2. However, the crime of terrorism referred to in Article 3 (a) of Legislative Decree no. 25475 is punishable by life imprisonment. In order to facilitate the extradition in accordance with Article 10 § 2 of the extradition treaty, it is guaranteed that even if the accused is found guilty in a fair trial, he will not be sentenced to life imprisonment but to the sentence immediately below that.
>
> 3. A fair trial is likewise guaranteed under the judicial safeguards enshrined in the Constitution, international human rights instruments and domestic law."

15. In the aforementioned decision of 18 July 2003 the examining judge requested that the Spanish Ministries of Justice and Foreign Affairs be informed of the extradition measure and stated that the agreement of the Council of Ministers was not needed for the extradition.

16. On 24 July 2003 the applicant lodged an appeal to have the decision of 18 July 2003 overturned and the ordinary extradition procedure applied, under which the Criminal Division of the *Audiencia Nacional* would decide on his extradition.

17. In an order of 4 August 2003 the investigating judge dismissed the appeal. He reminded the applicant that he had agreed to the simplified extradition procedure and that that decision was irrevocable.

B. The proceedings before the Court

18. On 6 August 2003 the applicant requested the application of the measures provided for in Rule 39 of the Rules of Court, to have his extradition to Peru suspended. He relied on Articles 3, 5 and 6 of the Convention.

19. On the same day the Vice-President of the Fourth Section of the Court decided to apply Rule 39 of the Rules of Court and invited the

Spanish Government not to extradite the applicant before the Chamber had examined the case at its meeting of 26 August 2003. The Government's Agent and the Permanent Delegation of Spain to the Council of Europe were informed of that decision by telephone at 7 p.m., with subsequent confirmation by fax.

20. On 7 August 2003 the Spanish Government sent the Court a decision of investigating judge no. 6 of the *Audiencia Nacional*, to whom the Court's request concerning the temporary suspension of the extradition had been transmitted. In it the judge rejected the request for the application of Rule 39 for the following reasons:

> "The applicant agreed to the extradition of his own free will, being fully aware of the consequences. That being so, the decision ordering his extradition is final and no appeal lies against it.
>
> Furthermore, the Peruvian authorities have provided the guarantees requested by the Spanish courts. Finally, the applicant applied to the European Court of Human Rights without exhausting the remedies available to him in Spanish law."

21. On 7 August 2003 the applicant was extradited to Peru, where he was incarcerated.

22. On 8 August 2003 the Court asked the Spanish Government, in accordance with Rule 39 § 3 of the Rules of Court, what steps had been taken to ensure the application of the interim measure indicated.

23. Having received no reply from the Spanish Government, on 2 September 2003 the Court communicated the application under Articles 3, 6 and 34 of the Convention.

24. In November 2003 the applicant was granted conditional release by the Peruvian anti-terrorism authorities for lack of sufficient evidence that he was a member of the Shining Path. The applicant's freedom was restricted by an order prohibiting him from leaving Lima and Peru or changing his place of residence without the authorisation of a judge, and obliging him to report to the judge once a week. The decision of the anti-terrorism authorities also indicated that as the criminal charges against the applicant were maintained, the proceedings against him remained open pending new developments in the investigation.

25. In January 2004 the Peruvian authorities asked the Spanish authorities to extend the extradition charges so that the applicant could be tried in Peru for financing the Shining Path terrorist group from abroad. Following that request a hearing before the *Audiencia Nacional* was scheduled for 13 February 2004.

26. On 22 January 2004 the applicant once again asked the Court to apply Rule 39 and ask the Spanish Government to suspend the hearing until it had ruled on his application.

27. On 27 January 2004 the Fourth Section of the Court considered that the circumstances underlying the applicant's request were not of the kind to

which, in the Court's practice, Rule 39 was applied. The request was accordingly dismissed.

28. The hearing went ahead as planned and, by a decision of 25 February 2004, the *Audiencia Nacional* allowed the requested extension. The applicant lodged an *amparo* appeal against that judgment which is still pending before the Constitutional Court.

29. Following the judgment handed down by the Grand Chamber on 4 February 2005 in the case of *Mamatkulov and Askarov v. Turkey* ([GC], nos. 46827/99 and 46951/99, ECHR 2005-I), the applicant requested permission to submit additional pleadings to the Court. The Court agreed and the Government were informed. In April 2005 the parties submitted their observations.

...

THE LAW

...

III. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

63. Lastly, the applicant relied on Article 34 of the Convention, alleging that the failure to comply with the interim measure indicated in accordance with Rule 39 of the Rules of Court had prevented the Court from effectively examining his application. He based his arguments on the case of *Mamatkulov and Askarov*, cited above. The relevant provisions read as follows:

Article 34 of the Convention

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Rule 39 of the Rules of Court

"1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

2. Notice of these measures shall be given to the Committee of Ministers.

3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."

A. Admissibility

64. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The merits

65. The Government pointed out that in normal circumstances they complied with the measures indicated by the Court. Their failure to do so in the instant case was owed to the fact that the applicant had requested the interim measure too late, and had not given the Spanish authorities time to take the necessary steps to avoid the extradition. The application had been made on 6 August, whereas the applicant's transfer was scheduled for the next day. The Government considered that there was no violation of Article 34 where, as in the instant case, they were given less notice than could objectively be considered necessary and reasonable.

66. The applicant pointed out that, in view of the Court's practice in the matter, if he had requested the interim measure before 6 August, his request would have been disallowed because the date of his extradition had not yet been set. He was not convinced by the Government's argument that they had not had enough time, alleging that two or three hours' notice would have sufficed to take the necessary steps to prevent his extradition.

67. The Court notes that the fact that the Government failed to comply with the measures indicated by the Court by virtue of Rule 39 of its Rules of Court raised the question whether the respondent State had failed to honour its commitment, under Article 34 of the Convention, not to hinder the applicant's right of application.

68. In the present case the Court must analyse the Government's response in both instances to the interim measures indicated.

69. First of all, upon receipt of notification of the decision to apply Rule 39 of the Rules of Court, the domestic authorities sent the Court a court decision confirming the correctness of the extradition. That attitude revealed implicit disregard for the interim measure adopted by the Court (see paragraphs 18-20 above).

70. Secondly, the Court points out that in their observations on the subject the Government justified their failure to comply with the measure by arguing that they had not had enough time to suspend the extradition. It should be noted in this connection that upon receiving notification of the decision to apply the interim measure to suspend the extradition, the Government transmitted the request to the competent court then relayed that court's negative reply to the Court. It would not have taken any longer for the Government, the domestic authority, to order the suspension of the

extradition in compliance with the measure indicated by the Court. That being so, the justification given for non-compliance with the measure cannot be accepted.

71. Having established the Government's failure to comply with the interim measure, the Court must establish whether the non-compliance constitutes a violation of Article 34 of the Convention. Here the Court must refer to the way in which the principles embodied in its case-law on the matter have developed.

72. In its above-cited *Mamatkulov and Askarov* Grand Chamber judgment the Court departed from its earlier case-law (see, amongst other authorities, *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, series A no. 201, pp. 29-30, and *Čonka and Others v. Belgium* (dec.), no. 51564/99, 13 March 2001) concerning the nature of the interim measures adopted under Rule 39 of the Rules of Court. After stating that "the Court applies Rule 39 only in restricted circumstances" (paragraph 103), the Court went on to explain that "Interim measures [had] been indicated only in limited spheres" and that "in practice the Court applie[d] Rule 39 only if there [was] an imminent risk of irreparable damage" (paragraph 104). It concluded with the assertion that "A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34" (paragraph 128).

73. That conclusion was qualified in the *Shamayev and Others v. Georgia and Russia* judgment (no. 36378/02, §§ 473 and 478, ECHR 2005-III), where the Court held: "The fact that the Court was able to complete its examination of the merits of [the] complaints against Georgia does not mean that the hindrance to the exercise of that right did not amount to a breach of Article 34 of the Convention".

74. Lastly, in the *Aoulmi v. France* judgment (no. 50278/99, § 100, ECHR 2006-...) the Court examined the Government's submission "that the applicant's expulsion had taken place before the delivery of the *Mamatkulov and Askarov* judgment and ... that the Court was required to reach its findings with reference to the applicable legal context at the time of the impugned measure". The Court's conclusion in that judgment is clear and leaves no room for doubt: "[The Court] stresses that ... even though the binding nature of measures adopted under Rule 39 had not yet been expressly asserted at the time of the applicant's expulsion, Contracting States were nevertheless already required to comply with Article 34 and fulfil their ensuing obligations" (paragraph 111). That was the first time the Court used the adjective "binding" in reference to interim measures.

75. In spite of the principles established in the three judgments mentioned above, one question remains unanswered: should a Contracting State's obligation to comply with interim measures be linked with a

subsequent finding that the effective exercise of the right of individual application has been hindered?

76. In the above-cited case of *Mamatkulov and Askarov* (§ 127), the fact was that "the applicants were hindered in the effective exercise of their right of individual application guaranteed by Article 34 of the Convention, which the applicants' extradition rendered nugatory".

77. In the case of *Shamayev and Others* (cited above, § 478), the Court found that "the difficulties faced by [certain of the applicants] following their extradition to Russia were of such a nature that the effective exercise of their right under Article 34 of the Convention was seriously obstructed".

78. In the *Aoulmi* case, cited above, "Counsel for the applicant pointed out that he had not been able to make contact with his client since his removal to Algeria" (§ 93), which prompted the Court to find that "the applicant [had] been hindered in the effective exercise of his right of individual application" (§ 110).

79. However, it appears from the documents submitted by the parties in the instant case that after having been extradited in spite of the interim measures indicated by the Court, the applicant had been placed in a Peruvian prison then granted conditional release three months later, and that he had constantly been in touch with his counsel in London. It is therefore not possible to conclude that the applicant's right to an effective remedy was hindered in the same way as in the cases cited above.

80. However, that fact, which became known after the decision to apply the interim measure had been taken, does not mean that the Government complied with their obligation not to hinder in any way the effective exercise of the right enshrined in Article 34. That Article is closely linked to Rule 39 of the Rules of Court, which provides for the Court to determine whether or not there is a "risk of irreparable damage [to the aplicant] through the acts or omissions of the respondent State" (see the *Mamatkulov and Askarov* judgment, cited above, § 108) and consequently whether such an act or omission might "hinder the effective exercise of an individual applicant's right of application" (see the *Aoulmi judgment*, cited above, § 111).

81. More particularly, the Court wishes to point out that an interim measure is provisional by nature and the need for it is assessed at a given moment because of the existence of a risk that might hinder the effective exercise of the right of individual application protected by Article 34. If the Contracting Party complies with the decision to apply the interim measure, the risk is avoided and any potential hindrance of the right of application is eliminated. If, on the other hand, the Contracting Party does not comply with the interim measure, the risk of hindrance of the effective exercise of the right of individual application remains, and it is what happens after the decision of the Court and the government's failure to apply the measure that determines whether the risk materialises or not. Even in such cases,

however, the interim measure must be considered to have binding force. The State's decision as to whether it complies with the measure cannot be deferred pending the hypothetical confirmation of the existence of a risk. Failure to comply with an interim measure indicated by the Court because of the existence of a risk is in itself alone a serious hindrance, at that particular time, of the effective exercise of the right of individual application.

82. In the light of the evidence in its possession, the Court finds that in failing to comply with the interim measures indicated under Rule 39 of its Rules of Court, Spain failed to honour its commitments under Article 34 of the Convention.

83. Consequently, there has been a violation of that provision.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicant claimed 29,132.84 euros (EUR) for the non-pecuniary damage allegedly sustained.

86. In respect of pecuniary damage he claimed EUR 90,000, to cover in particular the wages lost when deprived of his liberty, the expenses incurred by his wife travelling from Spain or the United Kingdom to Peru to visit him, and the personal items the Peruvian authorities allegedly consfiscated from him.

87. The Government considered that amount excessive and left the issue to the Court's discretion. They emphasised in particular the lack of any causal link between the damages claimed by the applicant and the Spanish authorities' participation in the extradition procedure.

88. Being unable to establish any causal link, on the basis of the information in the case file, between the alleged pecuniary losses and the violation of the Convention found, the Court dismisses that part of the applicant's claim.

89. However, in the light of the findings in the *Mamatkulov and Askarov* case cited above, the Court considers that the applicant undeniably sustained non-pecuniary damage as a result of the violation by Spain of Article 34 of the Convention, and that the simple finding of failure by the respondent State to honour its commitments under Article 34 does not suffice to repair that damage.

90. Making an assessment on an equitable basis, as is required by Article 41, the Court accordingly awards the applicant EUR 5,000 in respect of non-pecuniary damage.

...

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 34 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 5,000 (five thousand euros) in respect of non-pecuniary damage ...

...

Done in French, and notified in writing on 10 August 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

P. LORENZEN,
President