



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

## FIFTH SECTION

### DECISION

Application no. 22604/18  
ASOCIACIÓN DE ABOGADOS CRISTIANOS  
against Spain

The European Court of Human Rights (Fifth Section), sitting on 9 November 2023 as a Committee composed of:

Mārtiņš Mits, *President*,

María Elósegui,

Kateřina Šimáčková, *judges*,

and Martina Keller, *Deputy Section Registrar*,

Having regard to the above application lodged on 26 April 2018,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by the third parties,

Having deliberated, decides as follows:

### THE FACTS

1. The applicant association was created in 2008 and its purpose is to contribute to the restoration and maintenance of the principles of Christian faith in society. According to Article 4 of the statutes submitted by the applicant association, its objectives include taking action against any act which injures, damages, abuses or undermines the Christian religion in general or any of its followers, including members of the association. It was represented by Ms P. Castellanos Florez, a lawyer practising in Valladolid.

2. The Government were represented by their Agent, Mr A. Brezmes Martinez de Villareal, State Attorney.

#### **The circumstances of the case**

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

4. On 20 November 2015 the exhibition “Unearthed” (*Desenterrados*) by performance artist A.A. was inaugurated by the councillor for culture at the Pamplona City Council, at a municipal exhibition hall in that city. One of the pieces of art – called *Amen* – showed a series of pictures where the artist posed naked next to the word “paedophilia” (*pederastia*) spelled out on the floor with consecrated hosts. As the artist explained in several tweets, he took the hosts from 242 Masses that he had attended, and secretly put them into his pocket after receiving the Eucharist. Twelve of those hosts were exhibited in a bowl next to the pictures. The artist promoted the exhibition through a Facebook post that included hidden camera captures taken during the Masses that he had attended, and he explained that the pictures, hosts and documentation were all part of the *Amen* project. The exhibition was organised and subsidised by the department for culture of the Pamplona City Council.

5. On 21 November 2015 a regional newspaper covered the event in a press article and drew attention to the *Amen* artwork in an excerpt entitled “Provocation points” (*Puntos de provocación*), where it warned that the artwork could disturb Christian believers. Two parliamentary groups condemned the eucharistic desecration and requested in the Navarra Parliamentary Assembly that the City Council cancel the exhibition, arguing that it could hurt the Christian feelings and beliefs which were deeply rooted in the local area. Around the same date, the artist reported the theft of the exhibited hosts and the disappearance of one of the 10 metres of canvas decorating the external wall of the building.

6. As reported in the national and regional media, in the days that followed, hundreds of Catholics gathered at the doors of the exhibition hall, expressing their indignation and repulsion about the use of the consecrated hosts in the artwork. In the light of the public outrage, the City Council asked the artist to self-censor part of his work so as not to harm or offend religious sensitivities, although the City Council refused to withdraw the artwork, considering it a matter of freedom of expression.

7. On 23 November 2015 the applicant association, which had been gathering signatures to submit a petition to the Pamplona City Council to request the cancellation of the exhibition, lodged a criminal complaint against A.A. for an offence against freedom of conscience and religion under Articles 524 and 525 of the Criminal Code in relation to a breach of the right to freedom of religion under Article 16 § 1 of the Constitution. The applicant association relied on Article 24 of the Constitution to reiterate that the State must ensure the protection of the freedom of religion from any form of aggression in the face of the increasing attacks on churches. It did not waive the exercise of its right to bring a civil action in the context of those criminal proceedings. Under Spanish law, the criminal complaint also implied a claim for compensation for damage (see paragraphs 19 and 20 below).

8. On 3 December 2015 the applicant association lodged an additional complaint against the councillor for culture, who had inaugurated the event and in her capacity as councillor had given her approval for the exhibition to be held in a public hall managed by the Pamplona City Council.

9. The investigating judge decided on 10 November 2016 to discontinue the proceedings (*sobreseimiento libre y archivo de la causa*). The judge determined, as a matter of evidence, that four pictures, where the artist had posed naked next to the word “paedophilia” (*pederastia*) spelled out on the floor with “small round white objects”, had been exhibited with some of the objects used in the pictures, which had also been stolen a few days after the exhibition had opened its doors.

10. The investigating judge found that the facts could not be considered to constitute desecration for the purposes of Article 524 of the Criminal Code. In particular, desecration had to be understood as treating sacred objects with no respect, but the obligation imposed on Catholics in so far as the use of hosts was concerned could not extend to non-believers. The artist had placed the consecrated hosts in his pocket discreetly, which was not to be considered as a disrespectful, offensive or irreverent act. The investigating judge noted that the artist had certainly used the hosts for profane purposes, although outside of any place of worship. In consequence, the elements of the offence were not met.

11. The investigating judge found that the artwork did not make a mockery of the dogmas, beliefs or rites of the Catholic Church nor of those belonging to the Christian religion. Article 525 of the Criminal Code required the insult to be directly addressed to individuals in order to be considered as actionable. The judge held that the purpose of the artist was to condemn cases of paedophilia in the Catholic Church, and noted that in one of his tweets, the artist had stated that he had acted without any intention of offending anyone. In consequence, the complaint against the councillor was also dismissed. The judge also found that there was no offence under Article 510 of the Criminal Code and concluded that neither the pictures nor the explanatory text in the exhibition had fostered or promoted hatred against the Catholic Church.

12. On 15 November 2016 the public prosecutor lodged an appeal with the Navarra *Audiencia Provincial*. The public prosecutor argued that the artist had deliberately generated and encouraged controversy through his numerous statements on social media that referred to the *Amen* artwork, and his scorn for the most sacred symbols of Christianity. The public prosecutor contended that the controversial artwork had to be understood as a performance, hence it consisted of not only the pictures but also the bowl exhibited in the hall with the consecrated hosts, and the reaction of those present. The artist’s tweets had played a crucial role in the artwork and had intentionally aroused public outrage, manifested, among other means, by the publication of pictures of priests kneeling at the door of the hall praying, and the Masses celebrated

in Pamplona and Tudela. As a result, when the judge had concluded that the artist did not intend to offend, he had disregarded all the comments on social media that made a *prima facie* case before the court.

13. On 18 November 2016 the applicant association lodged an appeal with the Navarra *Audiencia Provincial*. It argued that the investigating judge's disregard of the artist's statements on social media had resulted in an artificial limitation of the facts, while the judge had contradictorily referred to one of the artist's tweets to exonerate his conduct. In so doing, the investigating judge had failed to protect the adversarial procedure and had unfairly limited the right of the party commencing the proceedings to formulate an indictment and to demonstrate the criminal or civil responsibility of the accused. The assessment of the wilful misconduct of the artist should have relied on the relevant means of proof and not on the personal opinions of the judge nor on any further statements by the artist posted as tweets *a posteriori*.

14. The applicant association argued that, by describing the consecrated hosts as "small white objects", the investigating judge had omitted the fact that the Eucharist was a core belief within the Catholic Church. The applicant association alleged that the desecration had existed from the moment that the hosts had been taken out of the place of worship and used in a way that would, in a clearly contemptuous manner, associate the Eucharist with paedophilia, as the investigating judge had also observed. The wilful misconduct of the artist was also largely demonstrated by his numerous tweets, and further harsh criticism of the Catholic Church that he had expressed in interviews, that allowed him to achieve his aims, that is to offend the 4,500 Catholics who had attended the Masses of atonement celebrated after the exhibition, and a tenfold increase in his profits for the artwork. Article 16 of the Constitution provided that public authorities had to protect religious believers from arbitrary attacks, including protecting them by means of the criminal law, and that was the purpose of Article 525 of the Criminal Code, whose elements had been sufficiently proven in the case in question.

15. The *Audiencia Provincial* dismissed the appeal, observing that the *ius ut procedatur* did not provide for the applicant association's unconditional right to conduct criminal investigations and to start proceedings, and the judge's reasoned statement concerning the legal classification of the facts had provided, in the case in issue, the grounds for dismissal. The legal findings in the decision appealed against did not mean that there had been no defence, in so far as the investigating judge had sufficiently reasoned that the facts that were the subject of the proceedings – which had been sufficiently proven – should not be considered to constitute a criminal offence and had ordered that the case be dismissed.

16. First, the facts could only lead to the conclusion that the artist A.A. had received the hosts during the Eucharist and had kept them in his pocket without being seen or noticed, and without acting in a way that could offend religious feelings, which prevented the application of Article 524 of the

Criminal Code. Second, the case-law concerning Article 525 of the Criminal Code interpreted the *animus iniurandi* as the desecration of religious dogmas, beliefs, rites or ceremonies performed with the intention to offend religious beliefs. For the *Audiencia Provincial*, it was clear from the artist's statements on social media that he had had the training and knowledge necessary to grasp the effect that the use of "so-called" consecrated hosts in a secular setting could have on Catholics. However, the performance had aimed to draw attention to the paedophilia scandals that had occurred in the Catholic Church, by using the aforementioned means. The *Audiencia Provincial* concluded that it was not sufficiently proven that the artist had had any purpose other than encouraging and promoting the attendance of the public.

17. On 8 June 2017 the applicant lodged an *amparo* appeal with the Constitutional Court. On 2 November 2017 the *amparo* appeal was dismissed due to its lack of constitutional relevance.

## RELEVANT LEGAL FRAMEWORK

18. The relevant parts of the Spanish Constitution read as follows:

### Article 16

"1. Freedom of thought, religion and worship shall be guaranteed to individuals and communities, without any restrictions on its expression other than those necessary to maintain public order as protected by law.

2. No one may be compelled to make statements regarding his or her ideas, religion or beliefs.

3. No religion shall have the nature of State religion. The public authorities shall take account of all religious beliefs within Spanish society and consequently maintain appropriate relations of cooperation with the Catholic Church and other faiths."

### Article 24

"1. Everyone has the right to effective protection by judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may defence rights be curtailed."

19. The relevant parts of the Criminal Code (Organic Law no. 10/1995 of 23 November 1995) read as follows:

### Article 109

"1. The execution of an act defined in the present Code as a crime or an offence shall result in an obligation to repair, in the terms provided for by the law, any damage or prejudice caused by it.

2. The injured party may, in any event, choose to bring a civil action before the civil courts."

**Article 110**

“The liability established in the foregoing Article shall include:

1. Restitution.
2. Reparation of the damage.
3. Compensation for pecuniary and non-pecuniary damage.”

**Article 115**

“When finding the existence of civil liability, judges and courts shall reasonably establish in their decisions the grounds on which they base the amount of damages and compensation ...”

**Article 116**

“1. Any person criminally responsible for a crime or offence shall also be civilly liable if the act gives rise to damage ...”

**Article 524**

“Whoever perpetrates profane acts that offend the feelings of a legally protected religious group in a religious building or place of worship, or at religious ceremonies, shall be punished with a sentence of imprisonment of six months to one year or a fine for a term of between twelve and twenty-four months.”

**Article 525**

“1. Whoever, in order to offend the feelings of the members of a religious group, publicly disparages the dogmas, beliefs, rites or public ceremonies thereof, orally or in writing, or insults, also publicly, those who profess or practice them, shall incur the punishment of a fine for a term of between eight and twelve months.

2. The same penalties shall be incurred by those who publicly disparage, orally or in writing, those who do not profess any religion or belief whatsoever.”

20. Concerning the civil-party complaints in the criminal proceedings, the following provisions of the Code of Criminal Procedure are relevant in the present case:

**Article 100**

“Any crime or minor offence shall give rise to criminal proceedings for the punishment of the responsible party and may also give rise to civil proceedings for the restitution of the thing, the reparation of the damage and the compensation for the harm caused by the punishable act.”

**Article 112**

“When only a criminal action is brought, the civil action shall also be deemed to be brought, unless the victim or offended person waives it or expressly reserves it for exercise after the conclusion of the criminal proceedings, if applicable.

...”

21. The relevant parts of the Law 29/1998 of 13 July 1998, regulating the Contentious-Administrative Jurisdiction, read as follows:

**Article 1**

“The Courts and Tribunals of the contentious-administrative order shall hear claims brought in relation to the actions of public administrations subject to administrative law, to general provisions of lower rank than the law and to legislative decrees when they exceed the limits of the delegation.

2. For these purposes, public administrations shall be understood to mean:

- a) The General State Administration.
  - b) The Administrations of the Autonomous Communities.
  - c) Entities forming part of the Local Administration.
- ...”

## COMPLAINTS

22. The applicant association complained that by providing organisational and financial support for an exhibition which included an artwork offending Christian religious believers, by refusing to cancel the exhibition despite protests and by refusing to prosecute the artist and a public official involved, the relevant authorities acted in breach of Articles 6, 8, 9 and 14 of the Convention.

## THE LAW

23. Reiterating that it is the master of the legal characterisation of the facts in the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, Reports 1998 I, and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114, 20 March 2018) and that, furthermore, it may decide not to examine a particular complaint separately, considering that it is subsumed or otherwise closely linked to another complaint, the Court, having regard to the facts of the case and the formulation of the complaints made, considers that all complaints fall to be examined under Article 9 of the Convention.

This provision reads as follows:

**Article 9**

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

24. The Court observes that the applicant association's complaints must be seen as concerning the following two closely connected but separate matters: firstly, that the local authorities financed, hosted and refused to suspend the exhibition of an artwork offending religious feelings and thereby interfered with the Article 9 right of Christian believers breaching their duty of neutrality and, secondly, that the judicial authorities did not prosecute and sanction the artist and a local councillor involved, thereby failing in their alleged Article 9 positive obligations to protect believers.

25. The Government alleged, regarding the first aspect, that the complaint must be dismissed as inadmissible because the applicant association had not exhausted the remedies under domestic law: it has not appealed before the contentious administrative jurisdiction against the acts of Pamplona City Council in relation to the organisation of the exhibition where the artist exhibited his work. Regarding the second complaint, the Government argued that, by choosing to proceed by way of a criminal action without preserving the right to a civil action, which in fact was the most suitable way to defend the right to honour in accordance with Organic Law no. 1/1982 on Civil Protection of the Right to Honour, the applicant association did not use all available remedies at its disposal to complain about the violation alleged before the Court.

26. The third parties, the Polish Government, the Spanish Episcopal Conference and European Centre for Law and Justice (ECLJ), the *Unione Giuristi Cattolici Italiani*, the Observatory for Religious Freedom, *Ordo Iuris*, the Observatory on Intolerance and Discrimination against Christians in Europe, *L'Observatoire de la Christianophobie* and the *Conferentia Episcoporum Slovachiae*, submitted comments on the merits of the complaints. All of them focused their observations on the protection of the Christian faith, especially the moment of consecration in the celebration of Mass. They also highlighted the many serious attacks on Christians that are taking place under the guise of the exercise of other fundamental rights such as freedom of expression.

27. The Court observes that although the first part of the complaint appears to concern an interference with rights protected by Article 9 and the second part - a failure to take measures and thus alleged positive obligations under that provision -, both complaints are centred on the applicant association's claim that the authorities did not protect the religious feelings of its members and of Christian believers and breached the duty of religious neutrality. Indeed, as the Court has stated, although the boundary between the State's positive and negative obligations under the Convention is not susceptible to an exact definition, the applicable principles are nonetheless



comparable (see *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, § 96, 26 April 2016).

28. Concerning the complaint related to the municipality organising and financing the controversial exhibition, the Court observes the applicant association gathered signatures and submitted a petition to the Pamplona City Council to request the cancellation of the exhibition which harmed or offended religious sensitivities (see paragraph 7 above). Nonetheless, when the City Council refused to cancel the exhibition the applicant association did not challenge the City Council's decision by bringing contentious administrative proceedings as provided for in the Spanish legal system (see paragraph 21 above).

29. The Court reiterates that it is intended to be subsidiary to the national systems safeguarding human rights and that it is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law or of decisions by the public authorities with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries (*Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008).

30. In the present case the applicant association has not argued that bringing contentious administrative proceedings was a remedy which for some reason was inaccessible or ineffective. It is therefore clear that had the applicant association instituted such proceedings against the City Council's relevant decision, the administrative domestic courts would have had the opportunity to examine the substance of the complaint about a breach of the State religious neutrality and dealt with the question about the balance to be found between freedom of expression and the rights of believers in the circumstances of the case.

31. In the light of the foregoing, as the applicant association did not use the above mentioned remedy, the Court considers that this complaint must be declared inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 and must be rejected pursuant to Article 35 § 4 of the Convention.

32. Regarding the second limb of the complaints, the Court observes that the applicant association lodged a criminal complaint against the artist and against a councillor who had inaugurated the exhibition and that, as a result, the national judicial bodies analysed the facts exclusively from a criminal law point of view, i.e. whether or not they constituted a criminal offence, and held that they did not. While some elements of the language used in their decisions are criticised by the applicant association as inappropriate, the conclusion that the acts in question did not constitute a criminal offence cannot be described as arbitrary. In so far as the applicant association considers that it was erroneous under domestic law, the Court reiterates that it is not a court of

fourth instance and cannot deal with allegations about errors of fact and law; its task is to examine whether the facts complained of disclose a breach of a right protected by the Convention.

33. Furthermore, the Court notes that the applicant association sought a criminal penalty for acts which it considered to constitute a criminal offence but did not deny that it or its members had the possibility of bringing a civil action instead and thus seeking to hold the defendants liable for what it considered to be unlawful acts which offended its members and Christian believers in general.

34. The right to freedom from interference with the rights guaranteed by Article 9 does not necessarily and in all circumstances imply a right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals. Moreover, the fact that the authorities eventually found that no offence had been committed does not in itself amount to a failure to protect the applicants' rights guaranteed under Article 9 of the Convention (see *Dubowska and Skup v. Poland*, nos. 33490/96 and 34055/96, Commission decision of 18 April 1997, Decisions and Reports 89, p. 156).

35. The Court finds, therefore, that the refusal to prosecute the artist and the local councillor, which was not arbitrary, in a situation where the possibility to seek protection via civil remedies was open to the applicant association, cannot be seen in any way as a failure by the respondent State to observe its positive obligations under Article 9 to protect believers against an attack on their freedom of religion.

36. In the light of the foregoing, the Court considers that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 30 November 2023.

Martina Keller  
Deputy Registrar

Mārtiņš Mits  
President