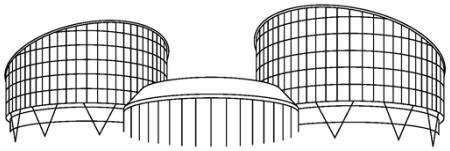

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF OTEGI MONDRAGON AND OTHERS v. SPAIN

(Applications nos. 4184/15 and 4 other applications - see appended list)

JUDGMENT

STRASBOURG

6 November 2018

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 Otegi Mondragon and Others v. Spain,

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

Vincent A. De Gaetano, *President,*
Helen Keller,
Dmitry Dedov,
Pere Pastor Vilanova,
Alena Poláčková,
Jolien Schukking,
María Elósegui, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 16 October 2018,

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

PROCEDURE

1. The case originated in applications nos. 4184/15, 4317/15, 4323/15, 5028/15 and 5053/15 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 five Spanish nationals, Mr Arnaldo Otegi Mondragón, Mrs Jacinto García, Mr Díez Usabiaga, Mrs Zabaleta Tellería and Mr Rodríguez Torres ("the applicants"), on 14 January 2015.

2. The first, second, fourth and fifth applicants were represented by Mrs J. Goirizelaia Ordorika and Mr O. Peter, lawyers practising in Bilbao (Spain) and Genève (Switzerland), respectively. The third applicant was represented by Mr. Iruin Sanz, lawyer practicing in Donostia. The Spanish Government ("the Government") were represented by their Agent, Mr R.A. León Cavero, State Attorney.

3. On 3 November 2015 the complaint concerning the right to a fair hearing before an impartial tribunal as guaranteed by Article 6 § 1 of the Convention was communicated to the Government and the remainder of the applications nos. 4184/15, 4317/15, 4323/15, 5028/15 and 5053/15 were declared inadmissible pursuant to Rule 54 § 1 of the Rules of Court. On the same date the Court decided to join the applications.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1958, 1977, 1956, 1981 and 1979, respectively (see appendix).

A. Previous proceedings before the *Audiencia Nacional* concerning the first applicant

5. On 2 March 2010 the first applicant was sentenced to two years' imprisonment by a panel of the Fourth Section of the *Audiencia Nacional* for encouragement of terrorism (*enaltecimiento del terrorismo*). He was also acquitted of the charges of unlawful assembly and association (*reunión ilícita y asociación ilítica*).

6. The first applicant brought a cassation appeal before the Supreme Court, challenging, *inter alia*, the impartiality of the President of the Fourth Section of the *Audiencia Nacional* and judge rapporteur of that judgment (hereinafter "the presiding judge"), as she had displayed hostility towards him during those criminal proceedings.

7. In particular, the first applicant argued that during the oral hearing, and once the applicant had finished his statement, the presiding judge had asked him whether he condemned ETA's (*Euskadi Ta Askatasuna*, the former armed Basque nationalist and separatist organisation) violence. The first applicant had refused to give an answer. The presiding judge had then replied that she "already knew that he was not going to give an answer to that question".

8. On 2 February 2011 the Supreme Court ruled in favour of the first applicant, finding that the presiding judge's declarations during the trial had cast doubts on the absence of prejudice or bias. The Supreme Court stressed the following:

> "The significance of the Judge's action...cannot be reduced to an isolated assessment of the question raised by her, yet it must be put in direct connection with the comment that she made after the appellant refused to give an answer, as well as the nature of the charges, their legal characterization and the moment the question and the answer take place...
>
> The question put by the presiding judge and, very particularly, her reaction to the appellant's refusal to give an answer, can be interpreted, from an objective perspective, as an expression of a previously formed opinion...about the significance assigned to the words spoken by the appellant...The appellant had objectives reasons to think that the judge was precipitately voicing out a value judgment on the criminal nature of [his statements]"

9. The Supreme Court, assessing the proceedings as a whole, found that there were "objective reasons" to consider that the presiding judge (and

judge rapporteur of the case) was expressing a prejudice against the first applicant about the significance that should be given to the phrases and words expressed by him, which had also led to a preconceived idea as to his guilt. This had taken place before the oral phase had terminated, i.e, before the presiding judge (as well as the whole panel) had had an opportunity to assess all the pieces of evidence brought before her and prior to the applicant's right to have a last word. Thus, the applicant's doubts as to the impartiality of this judge were "objectively justified". Consequently, the Supreme Court declared that the judgment was void and ordered a re-trial by a new panel formed by three other judges different from the ones that were part of the composition of that panel.

10. As a result, a new and different composition of the Fourth Section of the *Audiencia Nacional* tried the applicant on the charge of encouragement of terrorism. On 22 July 2011 the *Audiencia Nacional* acquitted the applicant.

B. Proceedings before the *Audiencia Nacional* concerning all the applicants

11. In 2009, criminal proceedings were brought against all the applicants before the *Audiencia Nacional*, on the grounds that a political party that the applicants intended to create was in fact under the control of the terrorist organisation ETA. The applicants were accused of being members of this terrorist organisation. The facts have been referred to as the "Bateragune Case". These proceedings were allocated to the Fourth Section of the *Audiencia Nacional,* whose composition consisted of the same judges that had taken part in the first set of criminal proceedings followed against the first applicant, which ended with the judgment of 2 March 2010, finally declared void by the Supreme Court on 2 February 2011. This time the presiding judge was not the judge rapporteur.

12. The first applicant initiated proceedings to challenge the whole panel, arguing that the Section's composition did not offer sufficient guarantees to exclude any legitimate doubt in respect of its impartiality, for the presiding judge had already showed signs of partiality and bias in previous criminal proceedings against him. According to the first applicant, the bias previously shown by the presiding judge created an objective situation which contaminated the impartiality of the judges. This also created a subjective situation of mistrust on the Section's composition.

13. On 26 April 2011 a special chamber of the *Audiencia Nacional* (a chamber that, according to Article 69 of the Judicature Act is *ex professo* formed to deal with challenge proceedings) ruled against the first applicant. According to the *Audiencia Nacional*, these new proceedings had a different object, *i.e.* his belonging to a terrorist organisation and the existence of strong and permanent links with ETA, which had nothing to do with his

previous charge of encouragement of terrorism. Neither the question previously put by the presiding judge (see paragraph 7 above) nor her subsequent reaction showed any sign of prejudice against the first applicant.

14. On 16 September 2011 the *Audiencia Nacional* delivered its judgment and sentenced the first and third applicants to ten years' imprisonment for being a member and leader of a terrorist organisation. The second, fourth and fifth applicants were sentenced to eight years' imprisonment for belonging to a terrorist organisation. All applicants were further disqualified from taking part in elections for the same length of time as their respective prison sentences.

15. All the applicants brought a cassation appeal before the Supreme Court. The first and fifth applicants contested in particular the impartiality of the panel of the Fourth Section of the *Audiencia Nacional* reiterating the same arguments that were brought during the challenging proceedings before the *Audiencia Nacional*.

16. On 7 May 2012 the Supreme Court, in a 3 to 2 decision, partially upheld the applicants' appeals and reduced their sentence to six years and six months' imprisonment in respect of the first and third applicants and six years in respect of the second, fourth and fifth applicants. The disqualification from taking part in elections was confirmed. However, the Supreme Court rejected the applicants' arguments concerning the alleged violation of the their right to an impartial tribunal by declaring that the bias displayed by the presiding judge against one of the applicants during previous and different proceedings did not reach the necessary threshold to believe that the judges (and, specifically, the presiding judge) had become again biased or prejudiced, not only against the first applicant but against all of them. According to the Supreme Court, there was no evidence apart from what happened in previous proceedings that supported the alleged partiality of the judges. The Supreme Court stressed the following:

> "To presume that every judge that has been declared biased in previous proceedings must be forcefully contaminated in any other further proceedings...implies to issue a universal judgment on bias that lacks a minimum objectives proofs *ad causam*...The question of subjective partiality or impartiality and even in many cases of objective impartiality is a very delicate one since it directly affect the composition of the Tribunals subject to the rule of law. Consequently, the appearances can only be relevant if they have a connection with the legal causes to challenge a judge as established by the lawmaker...in the sense that it is not possible to established different causes according to an analogic criterion or treating the appearance as an autonomous cause with its own procedural life...Therefore, the complaint must be rejected"

17. Two of the Supreme Court's judges issued two separate dissenting opinions. According to the first dissenting opinion (which was endorsed, in substance, by the second dissenting judge), the applicants' right to an impartial tribunal had indeed been violated, because the preconceived idea showed by the presiding judge in previous criminal proceedings against the

first applicant also affected her judgment during subsequent proceedings. This lack of impartiality also had affected the other two judges of the panel. Consequently, a new trial before a different panel of judges should have been ordered. According to the second dissenting opinion, however, there was not enough evidence to support the applicants' conviction. Consequently, the fact that the Fourth Section of the *Audiencia Nacional* lacked impartiality, although true, was irrelevant, for the applicants should have been acquitted by the Supreme Court.

C. Proceedings before the Constitutional Court

18. On 21 June 2012 the third applicant lodged a separate *amparo* appeal against the judgments of 16 September 2011 and of 7 May 2012, arguing, *inter alia*, that there was not sufficient evidence to substantiate the applicant's conviction. On 27 June 2012 the first, second, fourth and fifth applicants lodged an *amparo* appeal with the Constitutional Court against these judgments, arguing, *inter alia*, that the panel composition of the Fourth Section of the *Audiencia Nacional* fell short of the requirements of an impartial tribunal.

19. On 22 July 2014 the Constitutional Court, in a 7 to 5 decision, ruled against the first, second, fourth and fifth applicants. The majority of the Constitutional Court found that the doubts as to the presiding judge's impartiality were neither subjectively nor objectively justified. The Constitutional Court observed that the doubts on the presiding judge were in connection with previous proceedings dealing with a different subject*, i.e.* the determination on whether the first applicant had committed the crime of encouragement of terrorism, which differed from the charges they were all accused of in the framework of the second set of criminal proceedings. The two proceedings did not present enough similarities as to cast doubts on the judges' impartiality.

20. The five dissenting judges were of the opinion that the applicants' right to an impartial tribunal had been violated. In particular, they considered that the presiding judge's conduct in previous proceedings was a clear sign of a preconceived idea regarding the first applicant's guilt, which made her impartiality during the proceedings against all applicants questionable.

21. On 22 September 2014 the Constitutional Court ruled against the third applicant in a 4 to 2 decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

22. Article 24 of the Spanish Constitution reads as follow:

"1. Every person has the right to obtain the effective protection of the judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended.

2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to declare themselves guilty; and to be presumed innocent.

The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences."

B. The Judicature Act

Section 217

"Judges and magistrates must withdraw and may, where appropriate, be challenged on the grounds prescribed by law."

Section 219

"Grounds for withdrawal or, where appropriate, a challenge, include:

...

9. Friendship or self-evident enmity between the judge and any of the parties.

10. Have direct or indirect interest in the outcome of the proceeding.

...

13. Having held public office or post where he or she previously participated directly or indirectly in anything related to the case

..."

Section 221

"A judge or magistrate who believes that he falls within the scope of one of the grounds set out in the preceding sections shall withdraw from the case without waiting to be challenged.

..."

C. The Criminal Procedure Code

Section 954 § 3, as modified by Law 41/2015, of 5 October 2015

" A request for review of a final decision may be made when the European Court of Human Rights has declared that this decision is contrary to the rights recognised in the European Convention on Human Rights and Fundamental Freedoms as well as in its Protocols, provided that the violation, by its nature and seriousness, entails persistent effects which can not cease otherwise than through this revision.

In this case, the review can only be requested by the person who, having the legitimacy to bring such an appeal, was the applicant to the European Court of Human Rights. The request must be made within one year after the judgment of the Court has become final. "

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

23. The applicants complain under Article 6 § 1 of the Convention that the Fourth Section of the *Audiencia Nacional* lacked impartiality, as this Section had previously been declared biased against the first applicant by the Supreme Court in the framework of previous criminal proceedings where the first applicant was finally acquitted of all charges. Article 6 § 1 which reads as follows in its relevant part:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)".

24. The Government contested that argument.

A. Admissibility

1. Lack of victim status of the second, third, fourth and fifth applicants

25. The Government submitted that the second, third, fourth and fifth applicants could not claim to be "victims", for the purposes of Article 34 of the Convention, of the facts of which they complained. In support of their objections, the Government claimed that these applicants had not taken part in the previous criminal proceedings that had been declared void by the Supreme Court in view of the presiding judge's lack of impartiality.

26. The applicants, for their part, submitted that the presiding judge's behaviour in the previous criminal proceedings followed against the first applicant casted serious doubts on her impartiality (as well as on the impartiality of the two other judges being part of the Section) which led to a subjective feeling of mistrust that was objectively justified.

27. The Court notes that all that Article 34 of the Convention requires is that an applicant should claim to have been affected by an act, omission or situation said to be in breach of the Convention. Thus, the questions

whether the applicants have in fact been so affected and whether they are actually the victims of a breach go to the merits of the case (see *Klass and Others v. Germany*, 6 September 1978, §§ 33 and 38, Series A no. 28; *Doğan and Others v. Turkey*, nos. 8803-8811/02, 8813/02 and 8815-8819/02, § 93, ECHR 2004-VI (extracts); *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 106-07, ECHR 2011-IV; and *Dimov and Others v. Bulgaria*, no. 30086/05, § 61, 6 November 2012).

28. Consequently, the Government's preliminary objection of a lack of victim status is rejected.

2. Non exhaustion of domestic remedies

(a) As regards the first applicant

29. The Government raised an objection of failure to exhaust domestic remedies as regards the first applicant by claiming the applicant did not bring a specific complaint about the alleged lack of "subjective" impartiality.

30. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of directly resolving the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004). The Court notes that the application of this rule must make due allowance for the context of the individual case including, among other things, the personal circumstances of the applicant. Accordingly, the Court has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-66 and 69, *Reports of Judgments and Decisions* 1996‑IV).

31. When assessing impartiality, the Court has distinguished between a subjective approach (*i.e.,* endeavouring to ascertain the personal conviction or interest of a given judge in a particular case) and an objective approach, i.e. determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (*Kyprianou v. Cyprus* [GC], § 118; *Piersack v. Belgium*, § 30; and *Grieves v. the United Kingdom* [GC], § 69). The Court recalls that there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction

(subjective test) (*Korzeniak v. Poland*, no. 56134/08, § 49, 10 January 2017; and *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII).

32. The Court observes that the complaint concerning the impartiality of the Fourth Section of the *Audiencia Nacional* on the ground that it had previously been declared biased in former proceedings, was properly raised "in substance" in the framework of the domestic proceedings and in compliance with the formal requirements and time-limits laid down in domestic law (see *Castells v. Spain*, 23 April 1992, § 27, Series A no. 236; and *Guzzardi v. Italy*, 6 November 1980, § 72, Series A no. 39). Indeed, the applicant brought properly to the attention of the domestic tribunals his fears as to the lack of impartiality of the presiding judge (and, consequently, the whole new panel) on the grounds of her previous behaviour displayed in the framework of previous criminal proceedings where the Supreme Court had determined that it casted doubts on the absence of prejudice or bias against him.

33. Therefore, the Government's objection that the first applicant failed to exhaust domestic remedies must therefore be dismissed.

(b) As regards the third applicant

34. The Government observed that the third applicant did not raise this specific complaint before the domestic courts, namely, by challenging the judge(s) before the *Audiencia Nacional* or through the cassation appeal and the *amparo* appeal lodged with the Supreme Court and the Constitutional Court, respectively. The Government further argued that the *amparo* appeal was an effective remedy compatible with the requirements of Article 13 of the Convention.

35. The third applicant noted that the first applicant had properly raised this specific complaint before domestic courts and by that giving the opportunity to the State to put matters right through their own legal systems.

36. The Court notes that all of the applicants were defendants in the same criminal proceedings facing the similar criminal charges based on the similar incriminating evidence. The Court further notes that the remaining applicants brought to a sufficient degree all of the matters raised in the present complaint to the attention of the domestic courts in their appeal (specially their *amparo* appeal). Indeed, the first applicant challenged the presiding judge before the *Audiencia Nacional* and brought a cassation appeal and an *amparo* appeal with both the Supreme Court and the Constitutional Court where he specifically brought this particular complaint. In the same manner, the second, fourth and fifth applicant also brought this complaint before the Constitutional Court.

37. Accordingly, in so far as the third applicant was in the same situation as the other applicants and raised the same complaints before the Court, the domestic appeal lodged by the other applicants brought to the domestic authorities' attention all of the alleged defects in the trial that affected all of

them, including the third applicant (see *Huseyn and Others v. Azerbaijan*, nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 136-137, 26 July 2011).

38. In those circumstances, the Court is of the view, because all the appeal Courts (namely, the *Audiencia Nacional*, the Supreme Court and the Constitutional Court) examined the substance of applicants' complaint, that the Government's objection of non-exhaustion of domestic remedies must be dismissed.

(c) As regards the second, fourth and fifth applicants

39. Furthermore, the Government raised an objection of failure to exhaust domestic remedies as regards the second, fourth and fifth applicants applicant by claiming that they did not raise the present issue neither before the *Audiencia Nacional* (by challenging the composition of the Fourth Section) nor before the Supreme Court through the cassation appeal. The applicants raised the present complaint only before the Constitutional Court.

40. The Court observes that, despite the fact that these applicants did not raise the complaint concerning the lack of impartiality of the Fourth Section of the *Audiencia Nacional* before the *Audiencia Nacional* itself or the Supreme Court, they did bring properly to the attention of the domestic tribunals their fears as to the lack of impartiality of the presiding judge, namely, through the *amparo* appeal lodged with the Constitutional Court, which thoroughly addressed the issue and by that examined the substance of the applicants' complaint. It follows that the Government's objection of non-exhaustion of domestic remedies as regards the second, fourth and fifth applicants must be dismissed.

3. Conclusion

41. The applications cannot be dismissed on the grounds that the second, third, fourth and fifth applicants lacked victim status or that the applicants failed to exhaust domestic remedies. The Court therefore rejects the preliminary objections raised by the respondent Government. It further considers that the applicants' complaint is not manifestly ill‑founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

42. The applicants stressed that the presiding's judge behaviour in previous proceedings, where she and the whole composition had been

declared biased against the applicant by the Supreme Court, created a situation which had rendered their fears objectively justified.

43. According to the applicants, the fact that the first applicant was finally acquitted once a different composition of the *Audiencia Nacional* addressed his case was a clear sign that the former Section of the *Audiencia Nacional* had not been impartial.

44. The applicants further argued that the second set of criminal proceedings had a direct legal and factual connection with the first set of proceedings, as in both proceedings the nature of the links with ETA were assessed and judged upon. The act of refusing to condemn the actions of ETA was not in itself a clear sign of belonging to a terrorist organization, yet it could be considered as a relevant element (namely, circumstantial evidence) to support the believe that the first applicant did or did not belong to the terrorist organization ETA.

45. The fact that the same composition had sat on the bench of the Fourth Section of the *Audiencia Nacional* sufficed in itself to show that there had been a violation of Article 6 § 1 of the Convention.

(b) The Government

46. The Government argued that there were several differences between both set of criminal proceedings. The first set of proceedings was only brought against the first applicant, while the second set of proceedings was brought against all the applicants. The charges were also different. While in the first set of proceedings the first applicant was charged with unlawful assembly and association and for encouragement of terrorism, in the second set of proceedings all the applicants were charged with belonging to a terrorist organization (some of them were also charged with being a leader of a terrorist organization). Additionally, the Government stress the fact that the presiding judge was not the judge rapporteur in the second set of proceedings.

47. The Government additionally pointed out that what had happened in the previous set of criminal proceedings could not have had any effect on the second set of proceedings. They argued that the alleged partiality of the presiding judge had not prevented her from acquitting the first applicant of the other two charges he was accused of in that first set of criminal proceedings. In fact, that composition of the *Audiencia Nacional* had acquitted the applicant of the charge of illegal association, which presented some similarities with the charge of belonging to a terrorist organization. They also stressed the fact that the presiding judge had not displayed any sign of bias in the second set of proceedings that could cast doubts as to her impartiality. There were thus no doubts as to the subjective impartiality on the part of the judges who had tried the applicants.

48. The Government also added that, since the presiding judge was not the judge rapporteur in the second set of proceedings, her vote was not decisive.

49. They also pointed out the fact that the applicants had changed their legal strategy in the framework of the domestic proceedings, previously claiming that there had been a lack of objective impartiality and afterwards indicating that there had been a lack of subjective impartiality.

50. According to the Government, the applicants' intent to prevent the presiding judge from addressing any ETA-related issue was in clear violation of the right to a fair trial by a tribunal established by law.

51. The Government finally stressed that, in any case, the reasons that could cast doubts as to the Section's lack of impartiality towards the first applicant could not display a general effect on all the remaining applicants.

2. The Court's assessment

(a) General principles

52. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII; and *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009).

53. As to the subjective test, the principle that a tribunal must be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see *Kyprianou*, cited above, § 119, and *Micallef*, cited above, § 94). The personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, § 25, Series A no. 86).

54. In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see *Micallef*, cited above, § 95). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction

(subjective test) (see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports* 1996-III).

55. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96).

56. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings (*ibid*., § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38).

57. In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber*, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, Reports 1998-VIII; and *Micallef*, cited above, § 98).

(b) Application of those principles in the present case

58. The Court observes that in the present case the fear of a lack of impartiality laid in the fact that presiding judge had been previously declared biased against the first applicant in a previous set of criminal proceedings which not only had a connection with terrorist activities but also with the applicant's support (or lack of) of ETA as a central element.

59. The Court must firstly address the reference made by the Government as to the applicants' change of legal strategy, in that they firstly argued that the panel of the Fourth Section lacked impartiality from an objective approach, then changing to a subjective approach. The Court recalls that there is no watertight division between subjective and objective impartiality. In any case, the Court observes that the applicants properly raised in substance the complaint concerning the impartiality of the Fourth Section of the *Audiencia Nacional* before the domestic authorities, both from a subjective and an objective approach.

60. The Court is not persuaded that there is evidence that the presiding judge (or any other member of the panel) displayed personal bias against the applicants in the framework of the second set of criminal proceedings. In the Court's view, the case must therefore be examined from the perspective

of the objective impartiality test, and more specifically it must address the question whether the applicants' doubts, stemming from the specific situation, may be regarded as objectively justified in the circumstances of the case.

61. The Court firstly takes the view that, according to the Supreme Court in its judgment of 2 February 2011 the question put by the presiding judge and, very particularly, her reaction to the appellant's refusal to give an answer, could be interpreted, from an objective perspective, as an expression of a previously formed opinion on the first applicant's guilt (see paragraph § 7 above). This had also contaminated the whole composition of the panel which led the Supreme Court to order a re-trial by a new and different composition of the panel, where none of the three judges could take part. In addition to this, it cannot be ignored that the applicant, who had been initially declared guilty by the former panel of the Fourth Section of the *Audiencia Nacional*, was finally acquitted after a different panel of judges tried him. The Court notes that this fact, if not conclusively, strongly contributes to the existence of a legitimate fear as to the former panel's lack of impartiality.

62. The Court observes that that same panel of three judges was in charge of trying all the applicants in a second and different set of criminal proceedings, where they were accused, *inter alia*, of belonging to a terrorist organization, namely, ETA.

63. The Court observes that the very singular context of the case cannot be overlooked. It notes that the charge for which the first applicant had been convicted in the first set of proceedings (and later acquitted by a new and different panel composition) could in some way or another be associated with the acts, values and/or goals of the terrorist organization ETA. Indeed, the applicant was initially convicted for encouragement of terrorism, which, in the Spanish context in general at that time – and the first applicant's individual context in particular – was inevitably associated with the terrorist activity of ETA. The presiding judge had showed at that time, as it was confirmed by the Supreme Court, a prejudice against the applicant as regards what she thought was a sort of affinity with the terrorist organization ETA.

64. The second set of criminal proceedings, even if they did not deal with similar facts and charges addressed in the first set of criminal proceedings, had the ETA organization and its terrorist activities as a central element: all the applicants were accused either of belonging and being the leaders of or just belonging to a terrorist organization. Consequently, when analysing the first applicant's link with ETA, the previous prejudice concerning his possible affinity to this terrorist organization inevitably casts doubts, at least from an objective approach, as to the presiding's judge impartiality.

65. The Court considers that the fact that the presiding judge had publicly used expressions which implied that she had already formed an unfavourable view of the first applicant's case before that case had been finally decided, appears clearly incompatible with her participation in the second set of criminal proceedings. The statements made by the presiding judge, her subsequent behaviour, as well as the following annulment of the judgment were such as to objectively justify the first applicant's fears as to her impartiality (see *Morice v. France* [GC], no. 29369/10, §§ 79-92, ECHR 2015, *Olujić v. Croatia*, no. 22330/05, § 59, 5 February 2009, *Buscemi v. Italy*, no. 29569/95, § 68, ECHR 1999‑VI; and, *mutatis mutandis*, *Lavents v. Latvia*, no. 58442/00, §§ 118 and 119, 28 November 2002).

66. As regards the presiding's judge lack of impartiality concerning the remaining applicants, the Court observes that all the applicants were charged with belonging to the same terrorist organization. This type of crime necessarily implies a certain degree of collectivity. Indeed, the domestic courts analysed several pieces of evidence involving all the applicants, their strong interpersonal relationship and their common activities. Thus, in the context described, it cannot be completely ruled out that the unfavourable view of the presiding judge as regards the first applicant's guilt may have had also a negative impact on the remaining applicants. The presiding judge's previous behaviour (as well as the later annulment of the judgment by the Supreme Court) could objectively justify the remaining applicants' fears as to her impartiality.

67. The last question would be whether the presiding's judge lack of objective partiality could also cast doubts as to the two remaining members of the panel of the Fourth Section. The Court takes the view that the same *rationale* that led the Supreme Court to believe that the presiding's judge lack of impartiality made it necessary to repeat the trial with a new and different composition of the panel must be applicable to the present case. Additionally, the Court notes that the Government's argument to the effect that the presiding judge was no longer the judge rapporteur is not decisive for the objective impartiality issue under Article 6 § 1 of the Convention. Indeed, in view of the secrecy of the deliberations, it is impossible to ascertain the presiding's judge's actual influence on that occasion (see, *mutatis mutandis*, *Morice* [GC], cited above, § 89). Therefore, the impartiality of that court could be open to genuine doubt.

68. Having regard to the foregoing, the Court finds that in the present case the applicants' fears could have been considered objectively justified.

69. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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."

71. The first, second, fourth and fifth applicants did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award them any sum on that account.

A. Damage

72. Only the third applicant claimed EUR 40,000 euros in respect of non-pecuniary damage.

73. The Government argued that the applicant's claim was mostly unsubstantiated.

74. Where, as in the instant case, a person is convicted in domestic proceedings that have entailed breaches of the requirements of Article 6 of the Convention, the Court has held that the most appropriate form of redress would, in principle, be a retrial or the reopening of the case, at the request of the interested person (see, among other authorities, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; *Sejdovic*, cited above, § 126; and *Cudak v. Lithuania* [GC], no. 15869/02, § 79, ECHR 2010). In this connection, it notes that Section 954 § 3 of the Spanish Criminal Procedure Code, as modified by Law 41/2015, of 5 October 2015, it appears to provide for the possibility of revision of a final decision where it has been determined in a ruling of the Court that there has been a violation of the Convention or one of its Protocols.

75. The Court furthermore notes that it has previously concluded that a finding of a violation of Article 6 of the Convention constitutes sufficient just satisfaction for the purposes of Article 41 of the Convention when such procedural arrangements were in place under the domestic law (see, among recent authorities, *Hokkeling v. the Netherlands*, no. 30749/12, §§ 67-68, 14 February 2017; and *Zadumov v. Russia*, no. 2257/12, §§ 80-81, 12 December 2017). It reiterates that the payment of monetary awards under Article 41 is designed to make reparation only for such consequences of a violation that cannot be remedied otherwise (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 250, ECHR 2000-VIII). Therefore, the finding of a violation constitutes sufficient just satisfaction in the present case.

B. Costs and expenses

76. The third applicant also claimed EUR 4,000 for the costs and expenses incurred before the Court.

77. The Government contested this claim.

78. The Court notes that the applicant failed to provide the Court with any justification of the costs incurred. It therefore rejects this claim.

FOR THESE REASONS, THE COURT,

1. *Declares,* unanimously, the complaint concerning the alleged violation of Article 6 § 1 of the Convention in relation to the judicial proceedings carried out before the *Audiencia Nacional* admissible;

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

3. *Holds,* by six votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the third applicant;

4. *Dismisses*, by six votes to one, the remainder of the third applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 November 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Keller is annexed to this judgment.

V.D.G.
J.S.P.

PARTLY DISSENTING OPINION OF JUDGE KELLER

1. For the reasons stated in paragraphs 58 to 68 of the judgment, I agree with my colleagues that there has been a violation of Article 6 § 1 in the present case owing to the lack of impartiality of the Fourth Section of the *Audiencia Nacional*.

2. As regards the application of Article 41 of the Convention, unlike the majority, I am of the opinion that an award in respect of non-pecuniary damage to the third applicant was called for in this case.

I. *Restitutio in integrum* under Article 41 of the Convention

3. To begin with, under Article 41 of the Convention, the Court has the possibility of affording just satisfaction to the injured party. The principle with regard to damage is that the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation not taken place, in other words, *restitutio in integrum*. However, I believe that, when finding a violation of Article 6, the principle of *restitutio in integrum* does not mean that if domestic law provides for the possibility of retrial or reopening of the case the Court should *automatically* conclude that there is no need to afford just satisfaction to the injured party.

4. The application of Article 41 of the Convention is dependent on the Court's discretion and on the particular circumstances of the case. The wording of Article 41, which provides that the Court will only award such satisfaction as is considered to be "just" in the circumstances, and only "if necessary", makes this clear. Moreover, should the Court find that a monetary award in respect of non-pecuniary damage is necessary, it will make such assessment on an equitable basis. Therefore, the *ex aequo and bono* character of just satisfaction does – in my view – exclude any automatic conclusion. The granting of just satisfaction has always to be made on the assessment of the concrete circumstances of the case.

5. The Court follows a case-by-case approach in providing just satisfaction in the event of finding a violation of Article 6 § 1. For instance, in a number of cases, the Court has found that the applicant suffered non-pecuniary damage for which the finding of a violation of the Convention was not sufficient as a remedy (see *mutatis mutandis*: *Alony Kate v. Spain*, no. 5612/08, § 83, 17 January 2012; *Almenara Alvarez v. Spain*, no. 16096/08, § 54, 25 October 2011; *Porcel Terribas and Others v. Spain*, no. 47530/13, § 33, 8 March 2016; *Gómez Olmeda v. Spain*, no. 61112/12, § 44, 29 March 2016; and *Visan v. Romania*, no. 15741/03, § 41, 24 April 2008). In several other judgments, the Court decided to make an award in respect of non-pecuniary damage despite highlighting the fact that where an individual, as in the present case, had been convicted following proceedings in breach of the requirements of Article 6 of the Convention, a retrial or

reopening of the proceedings at the request of the person concerned was in principle an appropriate means of redressing the violation (see *Atutxa Mendiola and Others v. Spain*, no. 41427/14, §§ 51 and 52, 13 June 2017; *Spînu v. Romania*, no. 32030/02, § 82, 29 April 2008; *Paykar Yev Haghtanak Ltd v. Armenia*, no. 21638/03, §§ 56 and 58, 20 December 2007; and *Satik v. Turkey (No. 2)*, no. 60999/00, § 74, 8 July 2008).

6. I thus take the view that the issue of compensation for non-pecuniary damage is one that has to be determined in the light of the particular circumstances of each case. By contrast, the reasoning adopted by the majority under paragraphs 74 and 75 – as to the possibility under domestic law of reopening the case – prematurely restricts the scope for awarding compensation in respect of non-pecuniary damage on account of a breach of Article 6 § 1.

II. Specific circumstances in question

7. The necessity of a case-specific approach is heightened because of the particular circumstances in this case that need to be carefully reviewed.

8. Only the third applicant submitted a claim for just satisfaction in respect of non-pecuniary damage (paragraphs 71 and 72 of the judgment). This applicant had no criminal record at the time of conviction. He was criminally charged on the ground that a political party that the applicants intended to create was deemed to be under the control of the terrorist organisation ETA (paragraph 11 of the judgment). The third applicant, along with the first one, was found to be a member and leader of a terrorist organisation; he was sentenced to ten years' imprisonment and disqualified from taking part in elections for the same length of time (paragraph 14 of the judgment). This sentence was then reduced to six years and six months of imprisonment, while the disqualification remained. The third applicant served his sentence in full and was released in 2017.

9. In my view, it is inappropriate to hold that, in the present case, the finding of a violation of Article 6 § 1 of the Convention constitutes sufficient just satisfaction on the basis that the applicant has the possibility, under Section 954 § 3 of the Spanish Criminal Procedure Code, of requesting a review of the domestic court's decision (paragraphs 74 and 75 of the judgment).

10. Indeed, such a finding inevitably means that the third applicant, who is now out of prison, would be faced with a Cornelian dilemma: going through lengthy legal proceedings once more, with the anxiety that this inevitably entails, or not requesting such revision, therefore losing any possibility of being compensated. Furthermore, the Court should also take into account the sensitive social and political dimensions of the case, which could raise interrogations about reaching a different outcome should the applicant's case be retried.

11. In any case, I consider that the applicant's detention, which lasted more than six years, prevented him from participating in political life in his country, and naturally caused him feelings of anxiety, injustice and frustration – amongst others –, such that a mere finding of a violation cannot in itself suffice to compensate for the non-pecuniary damage from which he suffered.

12. Moreover, I believe that the Court itself has added to the length of the violation by not issuing a judgment earlier. The applicants lodged their applications with the Court in 2015. Because the applicants were incarcerated at the time, the case was prioritised. Nonetheless, it still took the Court more than three years to come to a decision on this case, during which time the applicants served their prison sentence in full and were released. Such failure of this Court to provide a timely remedy should have been taken into account in an award for non-pecuniary damage in the present case.

III. Domestic law and practice

13. Section 954 § 3 of the Spanish Criminal Procedure Code, as modified by Law 41/2015 of 5 October 2015, provides for the possibility for the victim of a violation of the Convention to request review of the domestic court's decision which led to such violation. However, there is still no consistent domestic practice to rely on in order to assess the availability and effectiveness of such remedy.

14. Law 41/2015 creates a right for the applicant to request a review of the domestic court's decision based on a finding of a violation by this Court. It does not, however, create a corresponding obligation for the domestic judge to grant such request.

15. Section 954 § 3 further renders the request for revision dependent on the condition that "the violation, by its nature and seriousness, entails persistent effects which cannot cease otherwise than through this revision". Assuming that the applicant would request a review of the domestic court's decision, the wording of this provision leads me to question whether such request would be granted. As stated above, the applicant has now been released and has fully regained his political rights. In any case, it is difficult to ascertain the scope of this provision given that, as mentioned above, there is no consistent practice to rely on.

16. In view of the above, I conclude that it cannot be ascertained with sufficient clarity that a genuine opportunity to reopen the proceedings is available to the applicant under domestic law.

17. In the event that the national authorities would refuse to review the domestic court's decision, the applicant could file another application with the Court to claim non-pecuniary damage once again. In my opinion, such a solution is still unsatisfactory as it would further delay the possibility of

reparation, when the applicant has already spent more than six years in prison and has waited more than seven years to obtain the recognition of the violation of his right under Article 6 § 1 of the Convention. Time is always precious in life, but it becomes even more precious here if we take into account that the applicant was born in 1956 and wants to take part in the political life of Spain.

IV. General considerations: functions of reparation and universality

18. The Convention confers on the Court two separate functions: firstly, to determine whether a violation of a fundamental right has taken place, and secondly, to award just satisfaction should the breach be ascertained. In the case at hand, the Court, having addressed the first function, dispenses itself from discharging the second. In doing so, the Court fails to bear in mind that just satisfaction goes beyond mere compensation and also holds a broader function, which is both preventive and instructive. The award of just satisfaction, besides reinstating the victim in his fundamental right, serves as a concrete warning to governments. It creates a financial incentive for the respondent State to change its practice and to prevent circumstances similar to those that led to a violation from arising again.

19. Finally, any finding of violation(s) in cases involving prisoners, criminals or terrorists is highly sensitive and rarely well received by the general public (see *Scoppola v. Italy (No. 2)*, no. 10249/03, 17 September 2009; and *Öcalan v. Turkey*, no. 46221/99, 12 May 2005).

20. However, the Court should not lose sight of the fact that, when setting out the need for just satisfaction, Article 41 does not distinguish between "good" and "bad" victims. The Court should thus remain consistent in its interpretation of Article 41 of the Convention and avoid making an award for non-pecuniary damage to the former while resorting to a mere finding of a violation with regard to the latter.

21. This argument is rooted in the principle of universality of human rights. Under this principle, all individuals are inherently entitled to inalienable freedoms and rights. Human rights are thus universal and belong to everyone, independently of any personal characteristics. The Convention similarly requires the member States to protect the rights and freedoms of every individual within their jurisdiction (Article 1 of the Convention), without discrimination.

22. Therefore I do not agree with the refusal of the Court to make an award of non-pecuniary damage to the third applicant, as it creates a distinction that does not exist under Article 41 of the Convention, and goes against one of the primary characteristics of human rights.

V. Conclusion

23. In the light of the above and under the circumstances of the present case, it would have been preferable for the Court to award the injured party (the third applicant) some equitable satisfaction rather than simply state that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage sustained.

APPENDIX

No.	Application No.	Lodged on	Applicant Date of birth	Represented by
1.	4184/15	14/01/2015	**Arnaldo OTEGI MONDRAGON** 06/07/1958	Jone GOIRIZELAIA ORDORIKA Olivier PETER
2.	4317/15	14/01/2015	**Sonia JACINTO GARCIA** 28/11/1977	Jone GOIRIZELAIA ORDORIKA Olivier PETER
3.	4323/15	14/01/2015	**Rafael DIEZ USABIAGA** 21/08/1956	Iñigo IRUIN SANZ
4.	5028/15	14/01/2015	**Miren ZABALETA TELLERIA** 26/10/1981	Jone GOIRIZELAIA ORDORIKA Olivier PETER
5.	5053/15	14/01/2015	**Arkaitz RODRIGUEZ TORRES** 01/02/1979	Jone GOIRIZELAIA ORDORIKA Olivier PETER