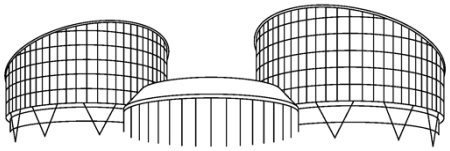

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GIL SANJUAN v. SPAIN

(Application no. 48297/15)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Appeal on points of law declared inadmissible for notice of appeal failing to comply with new formal requirement originating in subsequent case-law development • Issue concerning the principle of legal certainty • Retroactive application unforeseeable • No perceptible line of case-law development at time of introduction • No opportunity for the applicant to remedy any possible deficiencies in the notice of appeal to meet the new requirement • Excessive formalism

STRASBOURG

26 May 2020

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 Gil Sanjuan v. Spain,

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Alena Poláčková,
María Elósegui,
Gilberto Felici,
Erik Wennerström,
Ana Maria Guerra Martins, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application 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 Spanish national, Ms Maria Gil Sanjuan ("the applicant"), on 21 September 2015;

the decision to give notice to the Spanish Government ("the Government") of the complaint under Article 6 § 1 of the Convention concerning the decision of the Supreme Court to declare the applicant's appeal inadmissible, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 5 May 2020,

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

INTRODUCTION

The application concerns the Supreme Court's decision to declare the applicant's appeal on points of law inadmissible owing to non-compliance of the notice of appeal with the formal requirements set out in the law. The applicant complained that the Supreme Court had declared her appeal inadmissible on the basis of the retroactive application of a new interpretation of a procedural requirement not provided for by law but established by a decision of the Supreme Court rendered after her appeal had been submitted, without her having been given the opportunity to remedy any possible deficiencies which might have arisen as a result of the new interpretation. The principal issue is whether the applicant's right of access to a court under Article 6 § 1 of the Convention has been respected.

THE FACTS

1. The applicant was born in 1937 and lives in Murcia. She was represented by Ms Martínez García, a lawyer practising in Murcia.

2. The Government were represented by their Agent, Mr R.A. León Cavero, State Attorney.

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

4. The applicant owned a plot of land that was affected by a ministerial order of 27 September 2007, namely a decision of the Ministry of the Environment approving the delineation of the coastal area (*zona marítimo terrestre*) in accordance with the Coasts Act (*Ley de Costas*). In response, the applicant instituted judicial proceedings in the *Audiencia Nacional* against the delineation resulting from the ministerial order. The *Audiencia Nacional* ruled against the applicant in a judgment of 8 October 2010.

5. On 4 November 2010 the applicant submitted a notice of appeal (*escrito de preparación*) on points of law against the judgment of 8 October 2010 – a requirement prior to lodging an appeal on points of law (*recurso de casación*) with the Supreme Court (Administrative Chamber) – based on paragraphs (c) and (d) of section 88(1) of Law 29/1998 regulating judicial proceedings in administrative matters (*Ley reguladora de la Jurisdicción Contencioso-administrativa*). The *Audiencia Nacional* deemed the appeal prepared on 11 November 2010 and referred the case file to the Supreme Court.

6. On 4 January 2011 the applicant lodged an appeal on points of law with the Supreme Court.

7. On 28 October 2011 the Supreme Court informed the applicant of the possible existence of grounds for inadmissibility in the notice of appeal, specifically the lack of a reference to the grounds of appeal and to the corresponding legal rules or case-law that had allegedly been infringed by the impugned judgment. The court based the decision on sections 88(1), 89(1) and 93(2)(a) of Law 29/1998, as well as a Supreme Court decision (*auto*) of 10 February 2011. It granted a time-limit of ten days for the applicant to make comments in this connection.

8. On 21 November 2011 the applicant submitted comments arguing against declaring the appeal inadmissible. Nonetheless, by a decision of 9 February 2012 the Supreme Court (Administrative Chamber, First Section) declared the appeal inadmissible pursuant to section 93(2)(a) of Law 29/1998 owing to non-compliance of the notice of appeal with the formal requirements set forth in Law 29/1998. In the court's view, the notice of appeal had only announced the grounds of appeal (from among those prescribed in section 88(1) of Law 29/1998), but had failed to make any reference to the provisions or case-law that had allegedly been infringed or to the substance of the breaches of legal rules or case-law to be complained of in the appeal on points of law. Making reference to section 89(1) read in conjunction with section 88(1) of Law 29/1998, the court stated that such references were required in order to appeal against decisions of both the High Courts of Justice and the *Audiencia Nacional* on

the basis of any of the grounds provided for in section 88(1) of Law 29/1998 – in line with the case-law of the Supreme Court as clearly set out in that court's decision of 10 February 2011, followed by subsequent decisions such as that of 26 May 2011. In response to the comments submitted by the applicant as to the compliance of the notice of appeal with the requirements set forth in the law as interpreted at the time it had been lodged, the Supreme Court held that the case-law adduced by the applicant had been "superseded by the aforementioned recent doctrine".

9. On 11 April 2012 the applicant lodged an application for annulment (*incidente de nulidad*). She complained that the decision to declare her appeal on points of law inadmissible had constituted a breach of her right to a fair trial on the basis that it had applied retroactively a new interpretation of a procedural requirement not provided for by law but developed in case-law after she had submitted her appeal, and without her having been given the opportunity to remedy any possible deficiencies which might have arisen as a result of the new criteria. The application for annulment was dismissed by the Supreme Court on 13 September 2012. The court noted the following:

> "Certainly, the doctrine reiterated by this Chamber since the decision [*auto*] of 10 February 2011 (appeal 2927/2010) incorporates new requirements into the notice of appeal on points of law with respect to [the requirements] contained in the criteria systematically set out in precedents of this Chamber, as has been stated in the reasoning of the decision whose annulment is sought, thus completing the case-law development that had already been pointed out in this Chamber's decision of 14 October 2010 (appeal no. 951/2010) ...
>
> Consequently, this Chamber shall apply the new judicial criterion to any case or legal situation submitted before it, regardless of the time when the appeal was lodged ..."

10. The applicant subsequently lodged an *amparo* appeal with the Constitutional Court, arguing that the notice of appeal had complied with the requirements set forth in Law 29/1998 as interpreted in the case-law at the time it had been lodged (4 November 2010). The applicant argued that the retroactive application of an *ex novo* requirement not provided for by law but established by the decision of 10 February 2011 – after her appeal had been submitted and without her having been given the opportunity to remedy any possible deficiencies which might have arisen as a result of the new criteria – had been in breach of Article 24 of the Spanish Constitution (right to a fair trial) and Article 6 of the Convention.

11. The Constitutional Court dismissed the applicant's *amparo* appeal by a judgment of 16 March 2015 (served on the applicant on 23 March 2015). The Constitutional Court firstly noted the development of the Supreme Court's case-law as regards the admissibility requirements for a notice of appeal (see paragraphs 15 and 16 below). As for the merits, the

Constitutional Court, making extensive reference to the Strasbourg Court's case-law, held as follows.

(i) The Supreme Court's criteria as outlined in the impugned decisions were proportionate and a legitimate exercise of its powers of interpretation. Firstly, the Constitutional Court noted that deciding on the admissibility of appeals on points of law and on the application and interpretation of the admissibility requirements for such appeals was primarily a task for the Supreme Court, and thus the Constitutional Court should not intervene unless the Supreme Court's decisions were found to be unreasonable or arbitrary. In the court's view, requiring the notice of appeal to contain a reference to the legal provisions and case-law allegedly infringed was within the authority of the Supreme Court. Secondly, the Constitutional Court considered that the Supreme Court had sufficiently weighed up the purpose of the rule and the consequences for the applicant.

(ii) The requirement of legal certainty and the protection of legitimate expectations did not involve the right to established case-law, and thus case-law development was not, in itself, contrary to the proper administration of justice. In this connection, the Constitutional Court noted that case-law was not strictly a source of law in the Spanish legal system. Making reference to one of its previous judgments (judgment no. 95/1993 of 22 March 1993), it highlighted that a judgment introducing a change in the case-law interpreted what a legal rule had meant since its creation. It could therefore not be inferred that the previous, contradictory case-law had changed such rules or could be imposed as customary law.

(iii) In the instant case there had been no exceptional circumstances such as those found in a similar case in which the Constitutional Court had upheld an *amparo* appeal (judgment no. 7/2015 of 22 January 2015). Unlike in that previous case, the applicant had not supplemented the notice of appeal as soon as she had become aware of the new criteria applied by the Supreme Court as regards the admissibility requirements, not even after the Supreme Court had informed her of the possible existence of grounds for inadmissibility within the notice of appeal.

12. The Constitutional Court's judgment contained a joint dissenting opinion of two judges (of a six-judge panel), who expressed the view that the *amparo* appeal should have been upheld for the same reasons as set out in a previous dissenting opinion attached to the Constitutional Court's judgments no. 7/2015 of 22 January 2015 and no. 16/2015 of 16 February 2015. In short, those dissenting opinions noted firstly that the new interpretation by the Supreme Court as to the requirements of the notice of appeal was unreasonable because such new requirements were not provided for by law. They further stated that the right to a fair trial and, more particularly, the right of access to a court and to judicial remedies might be breached if a new interpretation of formal requirements developed in case-law was applied to the examination of an appeal lodged when the new

criteria had not existed or had not been known to exist, and the applicant had not been given any opportunity to remedy any newly arising deficiencies in the notice of appeal. The dissenting judges stressed that any other conclusion would be unreasonable and contrary to the principles of legal certainty and good faith and would raise an issue as to the foreseeability of judicial interpretation.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

13. The relevant provisions of the Constitution read as follows:

Article 24

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

2. Likewise, everyone has the right to be heard by a court established by law, to be defended and assisted by a lawyer, to be informed of any charges brought against him or her, to a public trial without undue delay and with full guarantees, to make use of evidence relevant to his or her defence, not to incriminate him or herself, not to declare him or herself guilty, and to be presumed innocent."

14. The relevant provisions of Law 29/1998 regulating judicial proceedings in administrative matters (*Ley reguladora de la Jurisdicción Contencioso-administrativa*) as in force when the applicant lodged her notice of appeal and the appeal on points of law – which were later amended by Organic Law no. 7/2015 – read as follows:

Section 88

"1. An appeal on points of law [*recurso de casación*] shall be based on one or more of the following grounds:

(a) abuse, excess or a defect in the exercise of jurisdiction;

(b) lack of competence or inappropriateness of the procedure;

(c) failure to observe essential procedural requirements owing to a breach of the rules regulating judgments or those governing procedural acts and guarantees provided that, in the latter case, the party has gone undefended;

(d) breach of the legal rules or of the case-law applicable to resolve the issues at stake.

..."

Section 89

"1. An appeal on points of law shall be prepared within a ten-day time-limit before the Chamber which rendered the impugned decision ... by submitting a notice [of appeal] expressing the intention to lodge an appeal [on points of law], including a brief statement on its compliance with the formal requirements ..."

Section 90

"1. If the notice of appeal meets the requirements laid down in the preceding section, and concerns a decision subject to [appeal on points of law], the court registrar shall deem the appeal prepared ..."

Section 92

"1. Within the time-limit, the appellant shall ... lodge the appeal on points of law with the Administrative Chamber of the Supreme Court, which shall give reasons on the ground or grounds on which it is based, citing the legal rules or case-law allegedly infringed.

..."

Section 93

"2. The Chamber shall render a decision of inadmissibility in the following cases:

(a) when, despite the appeal having been deemed prepared, ... the requirements [of the notice of appeal] are not met or the impugned decision is not subject to appeal on points of law ...;

(b) when the ground or grounds invoked in the appeal [on points of law] are not among those prescribed in section 88; when the legal rules or case-law allegedly infringed are not cited; when [the legal rules or case-law cited] bear no relation whatsoever to the issues at stake; or when, a request to remedy the defect having been necessary, there is no evidence of [any such request] having been made;

(c) when other appeals [which were] substantially the same have been dismissed on the merits;

(d) when the appeal is manifestly ill-founded;

...

3. The Chamber, before giving its decision, shall succinctly state the possible [existence of] grounds for inadmissibility in the appeal to the parties concerned for them to make, within a ten-day time-limit, the comments [they] consider appropriate.

..."

15. The criteria as regards the admissibility requirements for a notice of appeal which were applicable when the applicant lodged her notice of appeal were established by the Supreme Court's decisions of 14 October 2010 (appeals nos. 951/2010 and 573/2010), later confirmed by a number of subsequent decisions – some of them rendered after the applicant's notice of appeal had been submitted (for instance, on 18 November 2010, appeal no. 3461/2010, and on 2 December 2010, appeal no. 3852/2010).

The decisions of 14 October 2010 noted certain divergences in the Supreme Court's case-law concerning the formal requirements for the notice of appeal – in particular as regards the requirement to state the specific grounds on which the appeal on points of law was to be based – and considered it necessary to clarify the Supreme Court's own case-law in this connection. They read as follows:

"... [E]ven though section 89(1) of the Law [29/1998] does not establish a list of formal requirements to be met by the notice of appeal, the Supreme Court has in a number of decisions noted the need to state already in that document, first, the appealable nature of the decision to be contested; second, the legitimacy of the appellant; third, the compliance with the time-limit set for submitting the notice of appeal; and fourth, the intention to lodge an appeal on points of law against the impugned judgment or decision ... [T]o these requirements should be added the need to put forward within the notice of appeal the specific grounds – from among those provided for in section 88(1) [of Law 29/1998] – on which the appeal on points of law is to be based ...

...

[There is] settled and uniform case-law declaring in a number of decisions ... that when there is an intention to appeal on points of law against judgments rendered by the Administrative Chambers of the High Courts of Justice and the appeal on points of law is based on a breach of legal rules or of the case-law applicable to resolve the issues at stake (section 88(1)(d) [of Law 29/1998]), in the notice of appeal ... not only must the grounds [of appeal] be set out but sufficient justification must be given as to how the breach of a State or European Union legal rule has been relevant and decisive for the operative part of the judgment ... This ... is not applicable in respect of judgments rendered by the Administrative Chamber of the *Audiencia Nacional*, or of course in respect of decisions [*autos*].

...

Hence, [the Chamber] considers it necessary to clarify the case-law in relation to this issue, redirecting it in accordance with the following considerations.

(a) ... [I]t is for the appellant on points of law to state [within the notice of appeal] the specific ground or grounds on which the appeal [on points of law] will be based ...

(b) ... [T]he general rule applicable in all cases and to all grounds [of appeal on points of law] (section 89(1) [of Law 29/1998]) is that the ground [from among those] in section 88(1) [of Law 29/1998] on which the appeal on points of law will be based must be announced [within the notice of appeal]; moreover, there is a specific case ... concerning [appeals against] judgments rendered by the High Courts of Justice based on the ground provided for in [section 88(1)(d)], in which a further step is required in the notice of appeal, not only [entailing] the announcement of the ground but also the justification, succinctly but in any event sufficiently, of the relevance of the breach of a State or European Union legal rule on which that ground is to be based ..."

16. On 10 February 2011 (appeal no. 2927/2010) the Supreme Court gave a further decision concerning the admissibility requirements for a notice of appeal. The court began by reiterating its recent case-law (see paragraph 15 above), but it considered it appropriate to "further clarify" the case-law in order to "specify" the scope of the requirement to state within the notice of appeal the ground(s) on which the appeal on points of law is to be based. The court stated the following:

"[I]t is for the appellant on points of law to state [within the notice of appeal] the specific ground or grounds on which the appeal [on points of law] will be based ... with reference to the specific provisions or case-law allegedly infringed or to the substance of the breaches of the legal rules or case-law to be raised and developed within the appeal on points of law, even if briefly ...

> This requirement to state the specific breaches of legal rules or case-law within the notice of appeal applies when the impugned decision is given either by the High Courts of Justice or by the *Audiencia Nacional*, whatever the ground [from among those] in section 88(1) [of Law 29/1998] that has been alleged."

17. The Supreme Court has consistently reiterated that the notice of appeal is subject to the formal requirements set out in section 89 of Law 29/1998 and, owing to the extraordinary nature of an appeal on points of law, failure to comply with section 89(1) of Law 29/1998 is not a deficiency that can be remedied, since it cannot be regarded as a mere formal defect as it affects the very essence of the appeal on points of law (see, among many other authorities, the aforementioned Supreme Court decision of 10 February 2011, appeal no. 2927/2010, and more recently its decision of 5 May 2016, appeal no. 102/2015, with further references).

18. In connection with the ten-day time-limit for the parties to the proceedings to make comments on the possible existence of grounds for inadmissibility in the notice of appeal or the appeal on points of law pursuant to section 93(3) of Law 29/1998 (see paragraphs 7 and 14 above), the Supreme Court reiterated in a decision of 25 November 2010 (appeal no. 2990/2010) the following:

> "... [A]s this Chamber has reiterated, the comments provided for in section 93(3) of [Law 29/1998] can only be aimed at maintaining that the notice of appeal or the appeal on points of law, as they have been submitted, do not fall within the scope of the ground for inadmissibility subject to debate; therefore, this [procedural] step does not constitute an appropriate stage of the procedure for remedying the possible defects and omissions affecting such submissions ..."

19. The judgments of the Constitutional Court no. 7/2015 of 22 January 2015 (sitting in plenary) and no. 16/2015 of 16 February 2015 – referred to by the Constitutional Court in the judgment rendered in the case at hand (see paragraphs 11 and 12 above) – and judgment no. 139/2015 of 22 June 2015 dealt with cases raising issues similar to the one in the present case. The Supreme Court had also declared appeals lodged against judgments of the *Audiencia Nacional* inadmissible owing to non-compliance of the notices of appeal with the formal requirements set forth in the law as interpreted by the Supreme Court's decision of 10 February 2011 (rendered after the appellants' notices of appeal had been submitted). In the cases giving rise to judgments nos. 7/2015 and 139/2015 – unlike in the present case – the Constitutional Court ruled in the appellant's favour, and found a breach of the right to a fair trial, on the basis that the appellant had submitted a fresh notice of appeal (including a reference to the legal rules or case-law allegedly infringed) to comply with the new requirements soon after the appellant had known about the new criteria adopted by the Supreme Court, and that the Supreme Court had failed to consider that fact and take it into account in its decision to declare the appeal inadmissible. In this connection, it is important to note that in both cases the appellants had

supplemented the notice of appeal before the Supreme Court had noted the possible existence of grounds for inadmissibility in accordance with section 93(3) of Law 29/1998. In the case giving rise to judgment no. 16/2015, the appellant had not supplemented or submitted a new notice of appeal, and accordingly – as in the instant case – the appeal to the Constitutional Court was dismissed.

THE LAW

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

20. The applicant complained that her notice of appeal had complied with the requirements set forth in Law 29/1998 as interpreted in the case-law existing at the time she had submitted it. Accordingly, the decision to declare her appeal on points of law inadmissible had constituted a retroactive application of a new interpretation of a procedural requirement not provided for by law but established by the Supreme Court's decision of 10 February 2011 (after her appeal had been submitted) – without having given her the opportunity to remedy any possible deficiencies which might have arisen as a result of the new criteria – and had breached her right of access to a court as provided in Article 6 § 1 of the Convention, which in its relevant part reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

21. The Government asserted that the complaint should be declared inadmissible as being manifestly ill-founded. They argued that Article 6 § 1 of the Convention did not guarantee a right to a second level of jurisdiction in civil or administrative matters, and that in any event the applicant's case had followed administrative procedure with all the attendant safeguards, including an administrative appeal, and had been reviewed by a court (the *Audiencia Nacional*) before which she had been able to make any comments and submit any evidence she considered appropriate in defence of her rights. The Government further stated that the conditions of admissibility for an appeal on points of law could be stricter than for an ordinary appeal, and that the Supreme Court's interpretation as to the formal requirements for lodging an appeal on points of law was reasonable and in the interests of the proper administration of justice. Lastly, they asserted that the applicant had been given the opportunity to remedy the deficiencies found in her notice of appeal.

22. The applicant contested those arguments.

23. The Court considers that this complaint raises complex issues of law and fact which cannot be determined without an examination on the merits. It follows that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court therefore dismisses the Government's objection.

24. The Court further notes that the complaint is not inadmissible on any other grounds and that no other preliminary objection was raised by the Government in that regard. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

25. The applicant maintained that, as reiterated by the case-law of the Supreme Court at the time, when she had lodged the notice of appeal on points of law there had been no requirement to state the legal rules or case-law that had allegedly been infringed. This was shown by the fact that the *Audiencia Nacional* itself had deemed the appeal prepared – after verifying that the notice of appeal had met the requirements provided for by law – and referred it to the Supreme Court. By declaring her appeal inadmissible, the Supreme Court had automatically applied a new interpretation of formal requirements developed through case-law to the examination of an appeal that had been lodged when the new criteria had not existed. In her view, such criteria had not been foreseeable when she had submitted the appeal, and the Supreme Court had not had regard to the particular circumstances of the case – namely that the case had only been examined at one national judicial level, that the judgment of the *Audiencia Nacional* had affected her right to protection of property, and that the appeal to the Supreme Court had been based on an alleged breach of her right to a fair trial in the judicial proceedings.

26. The applicant further stated that she had not been given the opportunity to remedy any possible deficiencies which might have arisen as a result of the new criteria. The purpose of the time-limit granted by the Supreme Court in the decision of 28 October 2011 was – as provided for by section 93(3) of Law 29/1998 – to allow comments to be made on the possible existence of grounds for inadmissibility in the notice of appeal. Hence, the decision had not granted a time-limit for the applicant to remedy the notice of appeal, and moreover, that would not have been possible at that stage of the proceedings in the light of the case-law of the Supreme Court (see paragraphs 17 and 18 above). The applicant contested the assertion that in cases similar to the present one the Supreme Court had allowed appellants to remedy the notice of appeal within the ten-day time-limit for making comments on possible grounds for inadmissibility. She further noted that in the only relevant cases in which the Constitutional Court had upheld *amparo* appeals (see paragraph 19 above), the appellants

had remedied the appeal on points of law before the Supreme Court had granted a time-limit for making comments on possible grounds for inadmissibility in the notice of appeal.

27. Reiterating their arguments relating to the admissibility of this complaint (see paragraph 21 above), the Government, for their part, submitted that the Supreme Court's criterion requiring the notice of appeal to contain a brief reference to the legal provisions or case-law allegedly infringed was not arbitrary or unreasonable, and was furthermore foreseeable in the light of the development of the Supreme Court's case-law in this connection – which was becoming stricter when it came to interpreting the formal requirements for submitting an appeal on points of law. Such an interpretation stemmed from a combined reading of the relevant provisions of the law (see paragraph 14 above), and accordingly was provided for by law. The Government further cast serious doubts as to the compliance of the applicant's notice of appeal with the formal requirements.

28. The Government also argued that the Supreme Court, in view of the deficiencies found in the notice of appeal on points of law, had granted a ten-day time-limit for the applicant to make comments, and accordingly she had been given an opportunity to remedy such deficiencies, but instead of doing so, she had insisted that the notice of appeal submitted should have been declared admissible. Hence, in their view, this procedural step had provided the applicant with the possibility of remedying deficiencies in her notice of appeal. Making reference to judgments of the Constitutional Court (see paragraph 19 above), the Government stated that in all cases similar to the present one in which appellants on points of law had made use of such an opportunity to remedy their notice of appeal in order to comply with the Supreme Court's new criteria, either the Supreme Court had declared the appeals admissible or the Constitutional Court had ruled in the appellants' favour.

2. The Court's assessment

(a) General principles

29. The Court refers to the general principles on access to a court, as set out in the case of *Zubac v. Croatia* ([GC], no. 40160/12, §§ 76-79, 5 April 2018).

30. The Court reiterates that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the determination of their civil rights and obligations (see *Zubac*, cited above, § 80, and the authorities cited therein; see also *Arribas Antón v. Spain*, no. 16563/11, § 42, 20 January 2015, and

Arrozpide Sarasola and Others v. Spain, nos. 65101/16 and 2 others, § 94, 23 October 2018). The manner in which Article 6 § 1 applies to courts of appeal or of cassation depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted in the domestic legal order and the court of cassation's role in them; the conditions of admissibility of an appeal on points of law may be stricter than for an ordinary appeal (see *Zubac*, cited above, § 82, with further references therein).

31. It is well enshrined in the Court's case-law that "excessive formalism" can run counter to the requirement of securing a practical and effective right of access to a court under Article 6 § 1 of the Convention. This usually occurs in cases involving a particularly strict construction of a procedural rule, preventing an applicant's action being examined on the merits, with the attendant risk that his or her right to the effective protection of the courts would be infringed (ibid., § 97). An assessment of a complaint of excessive formalism in the decisions of the domestic courts will usually be the result of an examination of the case taken as a whole, having regard to the particular circumstances of that case (ibid., § 98). In making that assessment, the Court has often stressed the issues of "legal certainty" and "proper administration of justice" as two central elements for drawing a distinction between excessive formalism and an acceptable application of procedural formalities. In particular, it has held that the right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court (see, for instance, *Zubac*, cited above, § 98; *Kart v. Turkey* [GC], no. 8917/05, § 79, 3 December 2009; and *Arrozpide Sarasola and Others*, cited above, § 93).

(b) Application to the present case

32. The Court observes that, in the context of a property dispute, on 4 November 2010 the applicant submitted a notice of appeal on points of law against a judgment of the *Audiencia Nacional* finding against her – she lodged the appeal on points of law with the Supreme Court (Administrative Chamber) on 4 January 2011. The formal requirements of the notice of appeal on points of law which had been applicable at the time had been established by the Supreme Court's decisions of 14 October 2010 (see paragraph 15 above). The applicant's appeal was, however, declared inadmissible by the Supreme Court on 9 February 2012 owing to non-compliance of the notice of appeal with the formal requirements. The inadmissibility decision was based on new criteria concerning the interpretation and application of the admissibility requirements for a notice of appeal on points of law which had been set out in a prior decision of the Supreme Court on 10 February 2011. The new criteria had the effect of

incorporating new requirements into the notice of appeal provided for in section 89(1) of Law 29/1998 regulating judicial proceedings in administrative matters in comparison with the previous case-law as set forth in the Supreme Court's decisions of 14 October 2010 (see paragraph 16 above). In particular, as a result of the new criteria – and although section 89(1) of Law 29/1998 did not expressly set out a list of formal requirements to be met by the notice of appeal – appellants on points of law against judgments of the *Audiencia Nacional*, as in the instant case, were required not only to state within the notice of appeal the specific grounds on which the appeal would be based but also to include a reference to the specific provisions or case-law that had allegedly been infringed or to the substance of the breaches to be raised in the appeal on points of law. As the Government have stated, the formal requirements for submitting a notice of appeal became stricter. In this connection, it is important to note that the above-mentioned Supreme Court decision of 10 February 2011 setting out the new criteria was delivered after the applicant had submitted both her notice of appeal and her appeal on points of law.

33. The Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic law (see, *inter alia*, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 49, 20 October 2011, and *Brualla Gómez de la Torre v. Spain*, no. 26737/95, § 31, 19 December 1997). Hence, the Court's role is not to resolve disputes over the interpretation of domestic law regulating access to a court but rather to ascertain whether the effects of such an interpretation are compatible with the Convention (see *Zubac*, cited above, § 81, and further references therein). This applies in particular to the interpretation by courts of rules of a procedural nature, such as time-limits governing the submission of documents or the lodging of appeals (see *Arribas Antón*, cited above, § 46; *Sociedad Anónima del Ucieza v. Spain*, no. 38963/08, § 33, 4 November 2014; and *Pérez de Rada Cavanilles v. Spain*, no. 28090/95, § 43, 28 October 1998).

34. The Court has already been called upon to examine in a number of cases lodged against Spain whether a decision by the Supreme Court to declare an appeal on points of law inadmissible owing to non-compliance of the notice of appeal with the requirements set forth in the Law regulating judicial proceedings in administrative matters was compatible with the Convention. On the one hand, in the cases of *Saez Maeso* (no. 77837/01, 9 November 2004), *Salt Hiper S.A.* (no. 25779/03, 7 June 2007), *Barrenechea Atucha* (no. 34506/02, 22 July 2008), *Golf de Extremadura S.A.* (no. 1518/04, 8 January 2009) and *Llavador Carretero* (no. 21937/06, 15 December 2009) the Court found a violation of Article 6 § 1 of the Convention. It had regard, in particular, to the fact that the Supreme Court had expressly declared the appeals on points of law admissible whereas a

number of years later (ranging from three to seven years, depending on the case) the same court had declared them inadmissible by means of a judgment for failure to comply with formal requirements – on the basis that the notices of appeal had not given sufficient justification as to how the alleged breaches had been relevant and decisive for the operative part of the impugned judgment or, in the case of *Llavador Carretero*, on the basis that the notice of appeal had not stated whether the impugned judgment was subject to an appeal on points of law, the time-limit had been observed and the appellant had *locus standi*. The Court also took into account that the appellants had not been allowed to submit comments on the possible existence of grounds for inadmissibility or to remedy the deficiencies found in the notices of appeal. On the other hand, in the cases of *Sociedad General de Aguas de Barcelona S.A.* ((dec.), no. 46834/99, 25 May 2000), *Llopis Ruiz* ((dec.), no. 59996/00, 7 October 2003) and *Ipamark* ((dec.), no. 38233/03, 17 February 2004), which were declared inadmissible by the Court, the appeals on point of law had from the outset been declared inadmissible by the Supreme Court on the same formal grounds.

35. All the cases cited in the paragraph above concerned the (particularly strict) interpretation or application by the Supreme Court of the admissibility requirements for a notice of appeal on points of law set out in the law, as it stood at the relevant time. The Court notes that the present case, in contrast, raises issues as to the retroactive application of new criteria concerning the admissibility and formal requirements of a notice of appeal on points of law developed by the Supreme Court after the date on which both the notice of appeal and the appeal on points of law were lodged by the applicant.

36. The Court accordingly considers that the issues raised by the present case concern the principle of legal certainty. They do not merely involve a problem of interpretation of a legal provision in the usual way but rather an unreasonable construction of a procedural requirement which prevented a claim from being examined on the merits (see *Saez Maeso*, cited above, § 28, and *Miragall Escolano and Others v. Spain*, nos. 38366/97 and 9 others, § 37, 25 January 2000). The case thus concerns the question whether the Supreme Court, by declaring the applicant's appeal on points of law inadmissible, disproportionately affected the possibility for her to obtain a final determination of her property dispute by that court, as otherwise guaranteed under the relevant domestic law.

37. In assessing this complaint the Court will first examine whether the new criteria as regards the formal requirements of a notice of appeal that emerged as a result of the Supreme Court's decision of 10 February 2011 were foreseeable. It will then seek to establish whether the applicant had the opportunity to remedy any possible deficiencies which had arisen as a result of the new criteria, and whether the Supreme Court's decision declaring her

appeal on points of law inadmissible could be said to have involved "excessive formalism".

38. The Court firstly reiterates that the accessibility, clarity and foreseeability of legal provisions and case-law, notably as regards rules on form, time-limits and prescription, ensure the effectiveness of the right of access to a court (see *Petko Petkov v. Bulgaria*, no. 2834/06, § 32, 19 February 2013). While case-law development is not, in itself, contrary to the proper administration of justice (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 116, 29 November 2016; *Nejdet Şahin and Perihan Şahin*, cited above, § 58; and *Legrand v. France*, no. 23228/08, § 37, 26 May 2011), in previous cases where changes in domestic case-law had affected pending civil proceedings, the Court was satisfied that the way in which the law had developed had been well known to the parties, or had at least been reasonably foreseeable, and that no uncertainty had existed as to their legal situation (see *Petko Petkov*, cited above, § 32, and the authorities cited therein).

39. The Court attaches particular weight to whether the procedure to be followed for an appeal on points of law could be regarded as foreseeable from the point of view of the litigant (see, as regards the requirement of foreseeability for a restriction on access to a higher court, *Zubac*, cited above, §§ 87-89; see also *Arrozpide Sarasola and Others*, cited above, § 101). It notes in that connection that the aforementioned Supreme Court decisions of 14 October 2010 – setting out the criteria as regards the admissibility requirements for a notice of appeal – were delivered less than a month before the applicant had submitted her notice of appeal and were later confirmed by a number of subsequent decisions, some even given after the applicant's notice of appeal had been submitted. In particular, they had the purpose of clarifying the Supreme Court's case-law concerning the formal requirements of a notice of appeal (see paragraph 15 above), emphasising the need to address inconsistencies in its own case-law. The Court considers that at the time when the applicant submitted her notice of appeal on points of law, there was no indication of any perceptible line of case-law development departing from the criteria set out in the Supreme Court's decisions of 14 October 2010. The applicant therefore had no reason to believe that the Supreme Court would depart from its previous case-law. Accordingly, the Supreme Court's new criteria resulting from the decision of 10 February 2011, given in proceedings to which the applicant was not a party and which had the effect of thwarting her pending action, were not foreseeable or consistent with the case-law existing at the time when she had lodged both her notice of appeal and her appeal on points of law.

40. The Court secondly notes that the instant case does not involve procedural errors occurred during the proceedings, but the retroactive application of a new interpretation of formal requirements that did not exist when the applicant had submitted her appeal on points of law. The Supreme

Court had developed new criteria concerning the admissibility and formal requirements of a notice of appeal on points of law after the date on which both the notice of appeal and the appeal on points of law were lodged by the applicant. The Court therefore considers important to establish whether the applicant had the opportunity to remedy any possible deficiencies which had arisen as a result of the new criteria. In this connection, it observes that the parties differed as to whether the applicant had the opportunity to remedy any deficiencies in the notice of appeal to meet the new requirements, and particularly as to whether the ten-day time-limit for making comments as provided for in section 93(3) of Law 29/1998 allowed her to rectify the notice of appeal.

41. In this connection, the Court notes that the applicant was at no time (implicitly or expressly) requested or invited by the Supreme Court to remedy any possible deficiencies which had arisen in the notice of appeal as a result of the new criteria. By a decision of 28 October 2011, she was given a time-limit for making comments on the possible existence of certain grounds for inadmissibility in the notice of appeal (see paragraph 7 above). This is confirmed by the fact that the Supreme Court did not, either in its decision of 9 February 2012 declaring the applicant's appeal on points of law inadmissible (see paragraph 8 above) or in its decision of 13 September 2012 dismissing the application for annulment lodged by the applicant (see paragraph 9 above), reproach her for having failed to rectify the notice of appeal. The sole ground for declaring her appeal on points of law inadmissible was that the notice of appeal had not complied with the requirements laid down in the law as interpreted by the Supreme Court's decision of 10 February 2011. Indeed, the fact that the applicant was not allowed to remedy the newly arising defects was precisely one of the arguments she raised in her appeal to the Constitutional Court (see paragraph 10 above). This was consistent with the well-established case-law of the Supreme Court (see paragraphs 17 and 18 above), which had reiterated that any deficiency in the notice of appeal resulting from a failure to comply with the formal requirements set out in section 89(1) of Law 29/1998 could not be remedied, and that the time-limit provided for in section 93(3) of Law 29/1998 for making comments gave appellants the opportunity to argue against possible grounds for inadmissibility in the notice of appeal or the appeal on points of law, and therefore did not constitute a procedural step for remedying possible defects and omissions affecting such submissions. In those circumstances, the applicant could reasonably have foreseen that if she were to supplement her notice of appeal to the Supreme Court or to submit a fresh one in order to remedy the newly arising deficiencies, she would have been unsuccessful.

42. Accordingly, the Court is not persuaded by the Government's argument that the applicant had an opportunity to remedy the deficiencies found by the Supreme Court in her notice of appeal in order to comply with

the new criteria. No examples of cases in which the Supreme Court has allowed such an approach have been cited by the Government, and the procedure followed before the Constitutional Court in the similar cases referred to by the Government (see paragraph 19 above) shows that even when the appellants had supplemented the notice of appeal, the Supreme Court declared their appeals on points of law inadmissible. Therefore, the Court is of the view that the Supreme Court applied the new interpretation of the formal requirements of a notice of appeal retroactively and automatically, without giving the applicant the opportunity to remedy any newly arising deficiency, regardless of its consequences for her right to have her pending case determined on the merits.

43. The Court also notes that the domestic courts, in particular the Supreme Court, did not find that either the applicant's notice of appeal or her appeal on points of law had failed to meet the requirements as interpreted in the case-law existing at the time they had been lodged. It cannot be said that the applicant or her legal representative acted negligently or erred in lodging the appeal, or that they did not display the requisite diligence in pursuing the relevant procedural actions. The Court thus concludes that the applicant should not bear the adverse consequences of the application of the Supreme Court's new criteria in her pending case that led to the applicant's being denied access to the Supreme Court.

44. The foregoing considerations are sufficient to enable the Court to conclude that the unforeseeability of the procedural requirement applied retroactively in the applicant's pending case, without her having been given the opportunity to remedy any newly arising deficiency in her notice of appeal on points of law, restricted her access to a court to such an extent that the very essence of that right was impaired.

45. Lastly, having regard to the findings mentioned above, the Court finds it useful to also observe that the applicant's case was only heard by a court at one national judicial level (the *Audiencia Nacional*) exercising full jurisdiction in the matter, and that she raised issues relating to the fairness of the proceedings conducted before the *Audiencia Nacional* – concerning the reasoning and the assessment of evidence in the impugned judgment – in her appeal to the Supreme Court. Furthermore, it is particularly noteworthy that the applicant's appeal on points of law was declared inadmissible on the basis that the notice of appeal had not made reference to the provisions or case-law allegedly infringed by the impugned judgment or to the substance of the breaches of legal rules or case-law that were to be complained of in the appeal on points of law. However, such information had to be included in the appeal on points of law, as required by section 92(1) of Law 29/1998. Thus, even if it had not been duly stated in the notice of appeal, by the time the Supreme Court requested the applicant to make comments on the possible existence of grounds for inadmissibility in the notice of appeal, it had already received her appeal on points of law,

which, having regard to the aforementioned legal requirements and taking account of the fact that the domestic courts did not find otherwise, can be assumed to have complied with the requirements set out in the relevant law. In view of this, coupled with the above finding that a new interpretation of the formal requirements for submitting a notice of appeal on points of law was applied retroactively and without the applicant being given the opportunity to remedy any deficiencies in her submissions, the Court is of the opinion that the Supreme Court's decision declaring the applicant's appeal on points of law inadmissible amounted to excessive formalism involving an unreasonable and particularly strict application of procedural formalities unjustifiably restricting her access to its jurisdiction.

46. The Court therefore finds a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage. She argued that this amount should take into account her old age and the fact that she was a widow.

49. The Government contested that claim.

50. The Court reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which she would have been had this provision not been disregarded (see *Atutxa Mendiola and Others v. Spain*, no. 41427/14, § 51, 13 June 2017, and the authorities cited therein). It finds that this principle applies in the present case as well. In this connection, the Court notes that domestic law provides for the possibility of lodging an application for review (*recurso de revisión*) of a final court decision when the Court finds that the decision has breached any of the rights enshrined in the Convention.

51. Consequently, taking account of the nature of the violation found, the Court considers that in the present case the most appropriate form of redress would be the reopening of the proceedings, should the applicant so request, in accordance with the provisions of section 102(2) of Law 29/1998 regulating judicial proceedings in administrative matters (as amended by Organic Law no. 7/2015).

52. Furthermore, the Court is of the view that the applicant must have suffered a certain amount of distress, which cannot be compensated for solely by the finding of a violation or the reopening of the proceedings (see, *mutatis mutandi*s, *Elisei-Uzun and Andonie v. Romania*, no. 42447/10, § 78, 23 April 2019). It therefore awards the applicant EUR 9,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

53. The applicant claimed a total of EUR 3,374.10 for the costs and expenses incurred before the domestic courts, including EUR 1,202.15 for the costs before the Supreme Court (legal representative's fees and court costs) and EUR 2,171.95 for those before the Constitutional Court (lawyer's and legal representative's fees). She further claimed EUR 6,870.57 for the costs and expenses incurred before the Court. Lastly, the applicant claimed EUR 2,900 in respect of possible future costs related to the lodging of an application for review (*recurso de revisión*) seeking the reopening of the proceedings.

54. The Government submitted that the claim in respect of costs and expenses appertaining to the domestic proceedings should be rejected. As regards the award in respect of the costs and expenses incurred before the Court, they left that matter to the latter's discretion.

55. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 10,000 covering costs under all heads, plus any tax that may be chargeable to the applicant. The Court dismisses the claim for future costs linked to the lodging of an application for review, as such costs have not been actually incurred by the applicant.

C. Default interest

56. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* admissible the complaint under Article 6 § 1 of the Convention concerning the applicant's right of access to a court;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 9,600 (nine thousand six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 May 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Paul Lemmens
Registrar	President