



## INFORMATION NOTE No. 9/2016

### THE TC GRANTS CONSTITUTIONAL PROTECTION TO A MOTHER WHO WAS PREVENTED FROM INCINERATING THE REMAINS OF HER UNBORN CHILD

Chamber One of the Constitutional Court (TC) has granted constitutional protection to a woman who was denied a permit, by the Provincial Appellate Court of Guipúzcoa, to incinerate the remains of a programmed abortion, enabling her to bid farewell to her unborn child along with her partner, in a civil ceremony. The Chamber has upheld a breach of the appellant's fundamental right to personal and family privacy (Art. 18.1 Spanish Constitution (CE)). The judgment, in which Andrés Ollero acted as Reporting Judge, includes the latter's particular concurrent vote and the dissenting votes of the President, Francisco Pérez de los Cobos, and the Judge Encarnación Roca.

According to the facts, included in the background details of the judgment, the applicant of constitutional protection underwent an abortion following serious malformations detected in the foetus, which at the time was 22 weeks old and weighed 362 grams. The applicant requested that she be provided with the remains in order to incinerate them, and was told by the hospital that she needed the court's authorisation.

On 17 October 2013, Court of First Instance and Preliminary Jurisdiction Number 1 in Éibar dismissed the petition on the grounds of Art. 45 of the Registry Office Act, whereby "*any persons obliged to declare or inform of a birth will also be obliged to notify any aborted unborn children in the same way, which are approximately more than 180 days old*". The order delivered by the First Instance Court had dismissed the authorisation as the foetal remains were not 180 days old. However, it recognised that, on a previous occasion, it had allowed a miscarried foetus to be registered on the grounds of a "*conflict with the right to freedom of religion*", as the mother was Muslim and incineration was contrary to her beliefs. The applicant for constitutional protection lodged an appeal for amendment before the Court, which was dismissed; the same occurred with a subsequent remedy of appeal brought before the Provincial Appellate Court of Guipúzcoa.

The appellant claims that these resolutions have infringed her fundamental rights to ideological freedom (Art. 16.1 CE), family privacy (Art. 18.1 CE) and equal treatment (Art. 14 CE).

The Chamber has explained that no precedents exist in the Constitutional Court on similar cases. However, decisions of the European Court of Human Rights (ECHR) have recognised that the right to dispose of human remains for interment are part of the right to respect of private and family life, which the European Convention on Human Rights acknowledges in Article 8. Consequently, the Chamber considers that the applicant's petition "*is enshrined in the right to personal and family privacy acknowledged in Art. 18.1 CE*".

The Court has acknowledged the "*difficulty*" faced by the First Instance Court and Provincial Appellate Court of Guipúzcoa due to "*the issue not being clearly regulated*", but it considers that both judicial bodies broadly interpreted Art. 45 of the Registry Office Act and consequently infringed the "*right to respect of family and personal life (Art. 18.1 CE)*". In fact, it explains, the judicial bodies "*have inferred from the obligation to register aborted babies*

*more than 180 days old, an obligation to register those aborted earlier, even if this means that the parents are unable to attend an incineration of their unborn child in a private or family funeral ceremony". "The obligation to register a foetus at a certain point in the pregnancy does not necessarily lead to a duty to hand over those aborted earlier for interment or incineration (...)", it adds.*

Finally, the Chamber explains that the applicant's incineration of the remains of her unborn child could not have hindered the legal interests protected in any way, as a voluntary termination of pregnancy had been conducted according to current law (pregnancy under 22 weeks and serious malformations in the foetus); nor was there any risk to public health, as the Mortuary Healthcare Police Act of the Basque Country provides that *"all human remains and/or corpses should be interred, incinerated or scattered at sea"*.

Consequently, concludes the judgment, the challenged resolutions have *"infringed the plaintiff's fundamental right to personal and family privacy (Art. 18.1 CE), due to not applying rules that could provide sufficient legal cover to their decision, entailing a disproportionate sacrifice, without there being any constitutional interests justifying a refusal to grant the incineration permit requested"*.

The granting of constitutional protection due to a breach of Art. 18.1 CE has made it unnecessary for the Chamber to pronounce itself on ideological freedom and the right to equal treatment.

In his particular vote, the President, Pérez de los Cobos, claims that the right to privacy in Art. 18.1 CE cannot be *"integrated"* into a right to respect of private and family life foreseen in Art. 8.1 of the Rome Convention, *"entailing an automatic and indiscriminate application of ECHR case-law"*. In his opinion, the judgment has not taken into account, as required by constitutional case-law, *"the regulatory differences existing between the Spanish Constitution and the European Convention on Human Rights"*, thereby *"unduly extending the scope protected by Art. 18.1 CE, which does not conform to the interpretation traditionally made by the TC"*. To conclude, *"regardless how respectable and understandable"* the applicant's request, the appeal should not have been granted leave to proceed and should have been dismissed at the judgment stage.

Judge Roca, in turn, also considers that constitutional protection should have been withheld and dismissed. She claims that the judgment renders Art. 18.1 CE equivalent to the provisions of Art. 8.1 European Convention on Human Rights, *"forgetting"* that the Constitution requires that all fundamental rights be interpreted *"pursuant to international treaties ratified by Spain"*, without *"requiring that the various types of rights gathered in each law be literally implemented into domestic law"*, particularly when, as in this case, ECHR judgments are settling different cases. In its opinion, the problem could have been analysed from the point of view of the right to effective judicial protection (Art. 24.1 CE), as to whether or not the judicial body's decisions were arbitrary when interpreting current law but, as this infringement was not claimed by the applicant, the Court was unable to conduct this analysis.

The Reporting Judge, Ollero, has signed a concurring vote expressing his agreement with the ruling but his disagreement with its arguments. He states that the judgment should have focused on a potential infringement of the right to ideological freedom (Art. 16.1 CE), which generated unequal treatment given that, previously, the Court had granted a similar request to a Muslim woman. The applicant was denied this treatment because she did not claim religious grounds. In his opinion, the Court *"has not taken advantage of a clear opportunity to highlight the need to respect personal convictions which"*- whether or not they are shared and considered consistent- *"follow the law and do not affect the public order, the only limit allowed by Art. 16.1 CE"*.

Madrid, 12 February 2016.