

Order No. 188/2008, of July 21 (Unofficial translation)

Reference number: 188/2008 (AUTO)

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Chamber: Chamber One. María Emilia Casas Baamonde, Javier Delgado Barrio, Jorge Rodríguez-Zapata Pérez, Manuel Aragón Reyes, Pablo Pérez Tremps.

Registration number: 1282-2008/

Appeal type: Appeal for protection of fundamental rights lodged by Eric Roger Maurice Langevin. On : Order of 23 November 2007 of Section Two of the Criminal Chamber of the National Court, ruling that the appellant should be imprisoned pursuant to the European warrant for arrest surrender and his extradition to France and subsequent Order of 14 January 2008, ratifying that order (OEDE no. 148-2006).

TEXT OF THE DECISION

Extracto:

Appeal for protection of fundamental rights lodged by Eric Roger Maurice Langevin against the Order of the Criminal Chamber of the National court to imprison him on grounds of a European arrest warrant surrender procedure issued by France in order to bring him to trial for a fraud offence. Preámbulo:

ORDER

Antecedentes:

I. Background

1. On 15 February 2008 the Court Agent (*procurador*) José Ángel Donaire Gómez, on behalf and in representation of Eric Roger Maurice Langevin, submitted to the General Registry of this court an appeal for protection of fundamental rights against the Order of 23 November 2007 of Section Two of the Criminal Chamber of the National Court, on the grounds of the European warrant for arrest and surrender (OEDE no. 148-2006), as well as against an Order of 14 January 2008, dismissing the appeal for a higher court hearing lodged against the previous court.

2. The facts on which the claim for protection is based are briefly as follows:

a) The European Arrest warrant and surrender procedure issued by the French Courts and received by the Central Court of Enquiry number 1 acting as duty court, on 13 November 2006, concerns trial of the appellant for an offence of fraud. On said date the appellant was accused of fraud in the Court of Enquiry number 2 Málaga, in preliminary enquiries no. 1459-2005, and held in provisional custody as a result of those proceedings.

b) In an Order of 22 December 2006, the Second Section of the Criminal Chamber of the National Court decided to surrender the appellant to the French authorities in virtue of the

European arrest warrant and surrender procedure indicated, without prejudice to suspending his material surrender until the criminal liabilities pending in Spain had been eliminated, or until authorisation of the Court of Enquiry number 2 of Malaga to proceed to his surrender.

c) The second Section of the Criminal Court of the National Court having heard that the Court of Enquiry number 2 of Málaga had decided to release the appellant provisionally, issued the Order of 23 November 2007, to imprison the appellant as instrumental in his surrender to France, on the grounds of the European warrant for arrest and surrender procedure number . 148–2006, informing the aforementioned court of enquiry of this decision.

The appellant then lodged an appeal to a higher court against this Order which was dismissed in a further Order of 14 January 2008.

3. In the claim for protection it is alleged that the contentious Orders have violated the appellant's right to effective judicial protection (art. 24.1 CE), in its point on the right to the intangibility of final judgments, because the Second Section of the Criminal Chamber of the National Court ruled in a final Order of 22 December 2006 to make the decision to surrender the appellant to the French authorities dependent on the extinction of his criminal liabilities pending in Spain or either the authorisation of the Court of Enquiry no. 2 of Malaga to proceed to his surrender, and therefore it was not appropriate for the Section to order his incarceration for surrender to France when neither his criminal liabilities pending in Spain had been extinguished and when the aforementioned Court of Enquiry had not authorised his surrender.

Fundamentos:

II. Legal findings

1. The admission to proceedings of this appeal for protection of fundamental rights, lodged following entry into force of the reform in the Organic Law of this Court (OLCC) by Organic Law 6/2007 of 24 May requires verification that the claim for protection complies with the requirements established in art. 50 .1 OLCC in the wording resulting from said reform.

The explanation of grounds of the aforementioned Organic Law 6/2007 draws attention, among several other reforms which it addresses, to the new configuration of the appeal for protection of fundamental rights, and in particular that of the admission procedure. In that explanation of grounds it highlights the fact that although the system prior to the reform was based on the provision of "rated grounds for inadmissibility" the reform introduced a system in which the "appellant is required to allege and attest to the fact that the content of the appeal justifies the Court's issue of a judgment given its special constitutional significance, due to its importance for the interpretation, application or general efficacy of the Constitution". This innovation presupposes, as the explanation of grounds also infers, an inversion of the judgment of admissibility, since "from having been a procedure for verifying the inexistence of grounds for inadmissibility, it now becomes a verification of the existence of constitutional relevance in the appeal for fundamental rights lodged". In this way the examination of admission entails "ensuring that the appellant's allegations provide some evidence of the constitutional relevance of the appeal".

Consistent with this intention, arts. 49 and 50 of the OLCC have been given a new wording in Organic Law 6/2007 thus establishing a new legal system of admissibility of protection appeals.

To this effect art. 50.1 states that an appeal for protection of fundamental rights will only be admitted when " all the following prerequisites are fulfilled: a) that the claim complies with the provisions of articles 41 to 46 and 49. b) that the content of the appeal justifies a decision on the substance by the constitutional court due to its special constitutional relevance, which shall be noted taking into account its importance for the interpretation of the Constitution, for its application or for its general efficacy and for the determination of the content and scope of fundamental rights"

Thus, in compliance with this new basic requirement that, in order to admit an appeal for protection of rights it is necessary, not only that a fundamental right of the appellant, which is subject to protection (arts 53.2 and 161.1 b) EC and art. 41 OLCC) has been violated, but the case must also have a special constitutional relevance as (art. 50.1b) OLCC) art 49.1 *in fine* OLCC in the wording resulting from Organic Law 6/2007 establishes that "in any case the claim shall justify the special constitutional relevance of the appeal".

Therefore, the appeal for protection of rights pursuant to the terms of art. 50.1 a)OLCC cannot be admitted to proceedings if the appellant does not comply –in addition to the remaining procedural requirements established in arts. 42 to 44 of the OLCC, with the obligatory requirement imposed by art. 49.1 *in fine* OLCC of justifying in an express manner in the claim for protection, the special constitutional relevance of the appeal, the substantive nature of which is reflected in the expression "in any case" used in the precept. This is clearly without prejudice to Court's consideration, in respect of the criteria indicated in art. 50.1 b) OLCC regarding whether that requirement is fulfilled by the appellant, that the appeal for protection does have a special constitutional relevance which would justify a decision on the case by the Constitutional Court.

2. It should be pointed out that the requirement to justify the special constitutional relevance of the appeal for protection is somewhat different from arguing the existence of violation of a fundamental right. The arguments in proof of the fact a fundamental right has been violated by the contested decision is an essential prerequisite in any claim for protection of rights, and that requirement refers to the initial paragraph of art. 49.1 OLCC when it establishes as content of the claim the clear and concise explanation of the facts which form the basis of the case, and the citation of the constitutional precepts which are alleged to have been infringed, establishing precisely the protection requested to preserve and re-establish the right or freedom deemed to have been violated. However, in virtue of the reform introduced by Organic Law 6/2007, which adds the final transcribed paragraph to art. 49.1 LOTC, in any case, the appellant will be required to expressly justify in the claim for protection of fundamental rights the special constitutional relevance of the appeal, without it being the Court's task to officially reconstruct the claim when the appellant fails to comply with the burden of justifying the special constitutional relevance of the appeal lodged in his /her opinion.

3. The requirement established in art 49.1 *in fine* LOTC that the claim for protection should in any case justify its special constitutional relevance, is an irremediable prerequisite. Although art. 49.4 OLCC establishes that "should any of the requirements indicated in the preceding paragraphs fail to be fulfilled, Clerks of the Court shall duly notify the interested party within ten days that, should the appellant fail to remedy the defect, the appeal will not be

admitted”, however, the actual nature and function of the requirement established in the final paragraph of art. 49.1 OLCC, in relation to the terms of art. 50.1 OLCC, prevents any consideration that this requirement is in any way remediable.

In effect, this Court has reiterated on numerous occasions the importance of the claim for protection as a guiding document for defining and delimiting the claim, and therefore the judgment in the appeal for protection (for all references see JCC 7/2008, of 21 January, LF 1). In relation to this on one hand, and with reference to the requirements of precision and clarity contained in the first section of art. 49.1 OLCC, it has been emphasised that these should not be considered as mere formalities, as they are justified by the need to "provide the elements required for formulating the opinion that this Court undertakes to deliver"(JCC 82/1995, of 5 June, LF 5); and on the other hand, it has been pointed out several times that this Court cannot be required to integrate the defective arguments of the claim for protection (for all references see JCC 143/1994, of 9 May, LF 5), 'as whomsoever seeks constitutional protection not only has to initiate the channel through which this Court may declare on the alleged violations of the Constitution, but it must also provide any factual and legal grounds which may be reasonably expected and which are part of the duty of collaborating with the constitutional jurisdiction, without it corresponding to this Court to supply the reasoning of the parties, or to reconstruct the claim officially when the claimant has failed to provide evidence of the arguments behind the claim" (JCC 76/2007, of 16 April, LF 5)"

However, given that the justification for the special constitutional relevance of the appeal (art. 49.1 *in fine* OLCC) is an essential requirement of the argument for the appellant, linked to a requirement for substantive order, clear compliance with which is required for improved organisation overall of the appeal for protection of rights, as results from the reform introduced by the Organic Law 6/2007, it is not possible to admit that non-compliance with this requirement in the claim for protection constitutes a remediable defect, and therefore as a result it is not appropriate to initiate the procedure for remedy established in art. 49.4 OLCC (nor obviously, remedying the defect on the appellant's own initiative). To consider otherwise would furthermore, be failing to recognise that the appeal lodged is subject to preclusive terms of expiry, which cannot be reinitiated in order to comply with a requirement which directly affects determination of the claim made in the appeal for protection of rights.

In any jurisdictional procedure, remedying defects in the claim may refer to formal requirements such as provision of documents or consignment of certain data, however, it is not possible to extend this to the content of the allegations sustaining the claim, because they constitute a material substrate and this would reverse the general principles of the procedure and the guarantees of juridical security, which would be seriously harmed if there were any possibility of an opportunity to introduce *ex novo*, subsequent to filing the claim, arguments and reasoning which would lead to admission to proceedings. And this is particularly apparent in this appeal for protection, given the significance and purpose conferred by the new legal regulation, the most distinctive characteristic of which is the need for a "special constitutional relevance" in the case brought before this Court.

4. A reading of the claim for protection of rights makes clear that the appellant has confined himself to explaining the facts on which his claim is based and explaining the reasons why he considers that the judgments he has contested have violated his right to effective judicial protection (art. 24.1 SC), as well as specifying the protection he seeks. Having done so, the appellant has complied with the requirements of the content of the claim established in the first section of art. 49.1 OLCC.

Nevertheless, the claim does not contain any express argument for fulfilling the requirement, established in the second section of art. 49.1 OLCC, to justify the special constitutional relevance of the appeal for protection (that is, the claimant reasons that in his opinion "the content of the appeal justifies a decision on the matter from the Constitutional Court given its special constitutional relevance", as is explicit in art. 50.1 b) OLCC], therefore it is only possible to conclude that the appellant has failed irremediably to fulfil the requirement and therefore the appeal is deemed to be inadmissible [art. 50.1 a) OLCC, in relation to art. 49.1 *in fine* OLCC].

In virtue of the foregoing,

the Chamber shall not admit this appeal for protection of fundamental rights. This Order shall be published in the "*Boletín Oficial del Estado*". (Official State Gazette) Madrid, on the twenty first of July two thousand and eight .-María Emilia Casas Baamonde.-Javier Delgado Barrio.-Jorge Rodríguez-Zapata Pérez.-Manuel Aragón Reyes.-Pablo Pérez Tremps.-Signed and marked.