Constitutional Court Judgement 12/2012, of 30 January 2012 (Unofficial translation)

The First Chamber of the Constitutional Court, composed of Mr. Pascual Sala Sánchez, as President, Mr. Javier Delgado Barrio, Mr. Manuel Aragón Reyes, Mr. Pablo Pérez Tremps and Ms. Adela Asua Batarrita, as Honour judges, has pronounced

IN THE NAME OF THE KING

the following

JUDGMENT

Under the accumulated Amparo appeals No 4821-2009 and 4829-2009, respectively promoted by Canal Mundo Producciones Audiovisuales, S.A., to be initially represented by the Court Attorney Mr. Javier Zabala Falcó and subsequently by the Court Attorney Ms. María Luisa Montero Correal and to be initially assisted by the Lawyer Mr. Javier López Gutiérrez and subsequently by the Lawyer Mr. Juan Luis Ortega Peña, and by Televisión Autonómica Valenciana, S.A., represented by the Court Attorney Ms. Gloria Rincón Mayoral and assisted by the Lawyer Ms. María Jesús Villanueva Lázaro, against the Judgment of the Civil Chamber of the Supreme Court of 16 January 2009 and the court Order of 14 April 2009 rendered in the Appeal to the Spanish Supreme Court No. 1171-2002. The Public Prosecutor has intervened. The Judgement has been drawn up by Judge Ms. Adela Asua Batarrita and expresses the opinion of the Chamber.

II. Grounds

1. As stated in the background, the present Amparo appeals are aimed to the quashing of the Judgment of the Civil Chamber of the Supreme Court of 16 January 2009, being issued in appeal (*casación*) to the Spanish Supreme Court No. 1171-2002. The appellant alleges the infringement by the Civil Chamber of the Supreme Court of the Article 20.1 d) of the Spanish Constitution (*Constitución Española* in Spanish, CE hereinafter), in its specification on the right to freely communicate reliable information, referring to the fact that the appealed Judgment disregarded the moderation and proportionality criteria which were traditionally admitted by the precedents of the Constitutional Court and the European Court of Human Rights (hereinafter, ECHR), as legitimising facts of the freedom of information in opposition to the right to privacy (*derecho a la intimidad y a la propia imagen*). The Public Prosecutor is interested in the dismissal of the requested protection.

2. The controversy stated in these proceedings strictly refers to the dispute between the freedom to communicate reliable information by the media and the fundamental right to privacy beauty specialist/naturist whose image was recorded by means of a hidden camera in her own professional office by someone who pretended to be a client interested in her services. Her right to honour is not at stake here, and it has not been declared to be infringed by any of the three judicial authorities that have known about the controversy, to

the extent that offensive or injurious expressions have been thrown during the television programme. In sum, the object of the present Amparo appeal consists of deciding whether, on the assessment of the mentioned fundamental rights in play, the Judgment of the Civil Chamber of the Supreme Court infringed Article 20.1 d) CE in its specification of the freedom of information. In order to do that, we should be based on our reiterated jurisprudence, which we have recently remembered in the Judgement of the Constitutional Court (*Sentencia del Tribunal Constitucional*, STC hereinafter) 23/2010, of 27 April, Ground (*fundamento jurídico*, FJ hereinafter) 2, according to which, against complaints of this nature, "the power of this Court does not limit to examine the sufficiency and consistency of the reasoning of the contested judicial decisions under the perspective of art. 24 CE", but, on the contrary, under its condition of highest guarantor of the fundamental rights, the Constitutional Court must resolve the eventual dispute between the two rights confronted "dealing with the content which constitutionally corresponds to each of them, although for this purpose it is necessary to use different criteria to those applied by the jurisdictional bodies, since its reasons do not bind this Court", irrespective of the fact that the facts stated to be judicially proven do bind it [art. 44.1 b) of the Organic Law 2/1979, of 3 October, on the Constitutional Court].

3. For the analysis of the possible breach of the freedom of information, it seems appropriate to remember the general lines of the case-law of this Court delivered in Amparo appeals in which it has been suitable to make the necessary assessment opinion between the mentioned fundamental right and the fundamental rights to privacy and (art.18.1 CE). We shall start by summarising the constitutional case-law on the content of the freedom of information, on the one hand, and of the privacy rights on the other, in order to later state our criterion about the eventual disputes among these rights. Such criterion which shall be projected regarding this particular case where for the first time it shall be dealt about the particularities of the use of a hidden video recording camera as a means of intrusion in a private place where image and voice are wholly registered and the way a conversation has been held in a space of the professional activity of the affected person.

4. As stated repeatedly, the special place held by the freedom of information in our Legal System lies in the fact that "not only an individual interest is protected, but also its responsibility entails the acknowledgement and guarantee of the possibility of the existence of a free public opinion, which is indissolubly linked to the political pluralism of the democratic State itself" (STC 68/2008, of 23 June FJ 3). However, such special protection is submitted to certain immanent and external limits that this Court has progressively been outlining. Among the immanent limits are the requirements of truthfulness and of general interest or public significance of the information (STC 68/2008, FJ 3; and 129/2009, of 1 June, FJ 2); in absence of the mentioned two requirements the constitutional support of the freedom of information declines. On the other hand, the rights specifically stated in Article 20.4 CE are considered as external limits to the freedom of information.

As for the public significance of the information, this Court has highlighted that given that the constitutional protection limits to the transmission of "noticeable" facts for their importance or social significance to contribute to the public opinion thoughts, such facts must relate to aspects connected to the public projection of the person to which it refers, or to the features of the fact in which such person has been involved. Hence, "only after having confirmed the concurrence of these circumstances, it's possible to state that the information dealt with is especially protected for being susceptible to be framed in the space that must be ensured to a free press in a democratic system" (SSTC 29/2009, of 26 January, FJ 4). Likewise, the European Court of Human Rights has remarked that the decisive factor in the assessment between the protection of the private life and the freedom speech rests on the contribution made by the information published to a general interest debate, discarding the fact that the satisfaction of the curiosity of one part of the public regarding details of a person's private life can be considered a contribution for such purpose (from all, Judgment of the European Court of 24 June 2004, *Von Hannover v. Germany*, §§ 65 and 76).

5. In the present case the assessment must be made in respect to the affectation of the fundamental rights to privacy, which are those considered to be infringed by the appellant according to the quashed Judgment. It must be reminded that the fundamental rights to personal privacy, the same as the right to honour acknowledged in the same constitutional provision, have their identity and content in our Legal Order. So, none of them is subsumed in any other (SSTC 81/2001, of 26 March, FJ 2, and 156/2001, of 2 July, FJ 3). This is why, a certain form of information gathering, or of submission thereof, may produce at once both an unlawful intrusion in the privacy or an infringement of the right to honour, or else it may only affect some of them. Thus, in the present case, the breaching dimension of the conduct is projected on the right to privacy, without questioning the possible affectation of the right to honour, because what is important here is not the strict content of the information obtained, but how it has been gathered and registered by means of a surreptitious videotaping, and the place where it has been carried out, which is the reserved place of a professional consultation office.

Regarding the right to privacy, this Court has repeatedly stated that it is based on the need to ensure "the existence of an own and reserved area opposite to the action and knowledge of the others, to be necessary, according to the standards of our culture, in order to maintain a minimum quality of the human life, which may yield before the prevalence of the other rights, such as the right to the information when referring to facts with public significance, in the sense of noticeable facts, and to such information to be true" (STC 77/2009, of 23 March, FJ 2). Under certain or other terms, our constitutional case-law insists in the fact that the right to privacy attributes "the power to protect this reserved area by the individual for him/herself and his/her family from an unwanted publicity" (*inter alia*, SSTC 231/1988, of 2 December, FJ 3; 236/2007, of 7 November, FJ 11; and 60/2010, of 7 October, FJ 8), and, consequently, "the legal power to impose to third parties the duty to be restrained from any intrusion in the intimate sphere and the ban to disclose what they know in that very sphere" (*inter alia*, SSTC 196/2004, of 15 November, FJ 2; 206/2007, of 24 September, FJ 5; and 70/2009, of March, FJ 2).

The privacy protected by art. 18.1 CE is not necessarily reduced to that developed in a home or private environment. The European Court of Human Rights has stated that it would be very restrictive to limit the notion of private life protected by art. 8.1 of the European Convention for the protection of the Human Rights and of the fundamental freedoms into an "intimate circle" in which the individual may lead his/her personal life in his/her own way and fully exclude the external world, which is not included in this circle. It must also be known that in other areas too, and particularly in that related to work or the profession, interpersonal relationships are developed, or bonds or actions that may constitute a sign of the private life (Judgment of the European Court of 16 December 1992, *Niemietz v. Germany*, § 29; doctrine reiterated in the Judgments of the Court of 4 May 2000, *Rotaru v. Romania*, § 43, and of 27 July 2004, *Sidabras and Džiautas v. Lithuania*, § 44). The protection of the private life in the scope of the European Convention of Human Rights, in sum, is extended beyond the private family circle and it may also reach other areas of social interaction (Judgments of the European Court of Human Rights of 16 December 1992, *Niemietz v. Germany*, § 29; of 22 February 1994, *Burghartz v. Switzerland*, § 24; and of 24 June 2004, *Von Hannover v. Germany*, § 69).

A criterion to be taken into account in order to determine when one may find itself before signs of the private life to be protected against unlawful intrusions is that of the reasonable expectations that the person himself/herself, or any other person in his/her place under that circumstance, may have to be protected from the external observation or scrutiny. For instance, when such person is in an inaccessible location or in a lonely place due to the time of the day, he/she may act with full spontaneity under the grounded trust of the absence of observers. On the contrary, reasonable expectations cannot be considered in this regard when intentionally, or at least consciously, a person participates in activities which, due to the circumstances around them, may clearly be object of registration or public information (Judgments of the European Court of Human Rights of 25 September 2001, *P.G. y J.H. v. United Kingdom*, § 57, and of 28 January 2003, *Peck v. United Kingdom*, § 58).

In accordance with the reasonable expectation criterion of not being heard or observed by third parties, it is clear that a conversation held in a place particularly aimed at ensuring the discretion of what has been said, as happens, for example, in a law firm where professional consultations are made, falls within the scope of privacy.

According to our case-law, the other fundamental right under dispute, the right to own image, is summarised, in the "right to establish which graphical information generated by the personal physical features of the owner may be publicly spread. Its scope of protection comprises, basically, the power to be able to prevent the obtaining, reproduction or publication of the personal image by an unauthorised third party, whatever the goal pursued by the one who captures and discloses the image is", and, therefore, it includes "the defence against the unauthorised uses of the public portrayal of the person which are not protected by any other fundamental right, notably against the use of the image for clearly profit-making purposes" (STC 23/2010, of 27 April, FJ 4)

We had already noted in STC 117/1994, FJ 3, that "[t]he right to one's own image, recognised by art. 18.1 of the Spanish Constitution as well as the right to honour and to personal privacy, is part of the personality rights and, as such, it guarantees the freedom scope of a person regarding his/her most characteristic, typical and immediate attributes such as the physical image, the voice or the name, distinctive features of the self attributed as inherent and indomitable possession to all persons. To the extent that a person's freedom appears in the physical world by means of the action of his/her body and the qualities thereof, it is clear that with image protection we safeguard the scope of privacy and, at the same time, the power to decide on the purposes to which a person's manifestation shall be applied through his/her image, identity or voice." In the event of a hidden recording as in this case, the capture, not only of the image but also of the voice intensifies the infringement of the right to one's image through an unauthorised capture of specific distinctive features of a person making it easier to identify him/her.

6. With regard to the possible conflicts between the freedom of information and the rights to privacy and the right to one's own image, we must remember that these last two constitute external limits to the proper exercise of the freedom of information. Thus, in the recent STC 23/2010, of 27 April, FJ 3, we have reiterated that "section 4 of art. 20 CE stipulates that the freedoms recognised in the rule have their limit in the right to honour, to privacy to freedom from injury to reputation, honour or feeling and to protection of youth and childhood, which play what we have called a 'limiter function' with regard to said freedoms". Additionally we have noted that "the right to communicate and broadcast reliable information does not grant holders an unlimited power over any scope of reality. It can only, since it is acknowledged as a means of shaping public opinion, legitimize the intrusions in other fundamental rights which are consistent with the stated purpose, lacking legitimizing effect when it is exercised in a disproportionate and excessive way with regard to the purpose in reference to which the Constitution gives it special protection" (STC 185/2002, of 14 October, FJ 3), or that, "in those cases in which, even though an intrusion in privacy occurs, such intrusion shows itself to be necessary to achieve a constitutionally legitimate purpose, provided to achieve it and it is carried out using the necessary means to assure the least affectation of the field guaranteed by this right, it could not be considered illegitimate" (STC 156/2001, of 2 July, FJ 4). To sum it up, the intrusion in the fundamental rights of third parties resulting from the exercise of the freedom of information will only be legitimate to the extent that the affectation of such rights is appropriate, necessary and proportionate for the constitutional realisation of the freedom of information. Therefore, where it is possible to access the information sought without the need to conflict with said rights, the information activity which unnecessarily invades the privacy or the reputation, honour or feeling of others for being excessive or disproportionate is made illegitimate.

This case shows certain peculiar outlines or profiles derived from the special intrusive capability of the specific means used to obtain and keep a person's images and voice registered. On one hand, as reasoned by the Office of the Public Prosecutor, the hidden nature which characterises the journalistic investigation technique called "hidden

camera" prevents the person who is being recorded from being able to exercise his/her legitimate exclusion power, opposing to his recording and subsequent publication, since the secret and clandestine context remains until the very moment of television broadcasting of what has been recorded, thus staging a situation or a conversation that, originally, answers to a prior provocation of the intervening journalist, the real driving force of the news which are intended to be spread afterwards. The unawareness and, therefore, the lack of consent of the person in the picture with regard to the intrusion in his/her private life is a decisive factor in the necessary consideration of the rights under dispute, as emphasised by the European Court of Human Rights (Judgments of 24 June 2004, *Von Hannover v. Germany,* § 68, and of 10 May 2011, *Mosley v. United Kingdom,* § 11).

On the other hand, it is clear that the use of a hidden device for the capture of voice and image is based on a scheme or trick used by the journalist pretending a convenient identity in accordance with the context, in order to access a private area with the aim of recording an uninhibited behaviour or conduct, provoking comments and reactions as well as surreptitiously registering statements about facts or persons, which the journalist might not have obtained if the concerned person had appear with his/her true identity and true intentions.

The usual purpose of image and sound recording obtained by means of the use of hidden cameras is its unauthorised spread in the television medium whose capacity of impact on the expansion of what has been published is much higher than that of written press (in this regard, the Judgment of the European Court of Human Rights of 23 September 1994, *Jersild v. Denmark,* § 31). There is no doubt that this makes it necessary to step up vigilance in the protection of private life in order to fight against the dangers derived from an invasive use of new communication technologies which, among other things, facilitate the systematic taking of pictures without the person concerned being able to notice it as well as their spread to wide segments of the public, as emphasised by the European Court of Human Rights with regard to a case of capture of pictures at a distance of hundreds of metres (Judgment of 24 June 2004, *Von Hannover v. Germany* § 70).

With regard to the journalistic techniques which may be used to present information, it is true, as indicated by the appellant in its appeal for legal protection, that the European Court of Human Rights recognises the freedom of the relevant professionals to choose the methods or techniques they consider more appropriate to broadcast information, which must be in accordance with the objectivity and neutrality requirements (Judgment of 23 September 1994, *Jersild v. Denmark,* § 34). But, in addition, the European Court has pointed out that in the choice of the referred means, the freedom recognised to journalists is not exempt from limits and that, in no case may those techniques invading protected rights and those methods infringing the demands of journalistic ethics with regard to the solvency and objectivity of the information content be considered legitimate (Judgments of the European Court of Human Rights of 18 January 2011, *MGN Limited v. United Kingdom,* § 141; and of 10 May 2011, *Mosley v. United Kingdom,* § 113).

7. The application of the criteria described in the previous grounds to this case requires taking under consideration, first of all, by paying attention to the immanent limits, the specific circumstances in which the freedom of communication has been exercised, appropriately considering, next, the possible affectation of the other fundamental rights at stake.

The appellants have insistently alleged the reliability of the report's content, both in the judicial proceedings and in support of their claim for the quashing of the Supreme Court Judgment. This argument cannot be accepted, not only because in the previous judicial proceedings the reliability of the information disclosed has not been questioned alleging, for example, manipulation or alteration of the image and sound records obtained, but basically because this Court has been reiterating that, when the right to privacy is affected, the decisive point in order to settle the conflict of rights is the public relevance of the information and not the reliability of the content of the information disclosed, since, contrary to what happens in honour intrusions, the reliability is not palliative circumstance but a presupposition of damage to privacy (for all of them, STC 185/2002 of 14 October, FJ 4).

With regard to the report's general interest alleged by the appellants, it is appropriate to note that, even if the information had had public importance, the terms under which it was obtained and recorded, by means of a hidden camera, constitute in any case an illegitimate intrusion in the fundamental rights to personal privacy and to one's own image. With regard to the infringement of privacy, first of all we must reject the fact that both the publicly accessible character of the part of the house used as a consultation office by the beauty specialist/naturist and the apparent professional relationship established between such person and the journalist who pretended to be a patient have the capacity to place the appellants' action outside the scope of the right to privacy of the other, constitutionally protected as well in professional relationships. The contested Supreme Court Judgment rightly states that the relationship between the journalist and the beauty specialist/naturist developed in an undoubtedly private sphere. Since there is no express, valid and effective consent given by the holder of the affected right, it is mandatory to conclude that there was an illegitimate intrusion in the fundamental right to privacy.

And with regard to the right to one's image we must reach an identical conclusion. Indeed, as correctly observed in the Judgment of the Supreme Court's Civil Chamber, the person who was surreptitiously recorded was deprived of the right to decide, either to consent it or to impede it, on the reproduction of the representation of her physical appearance and voice, which determine her full personal identification.

The Judgment contested correctly evaluates the data that concur in this situation and concludes with the denial of the pretended prevalence of the freedom of information. An appropriate conclusion from the constitutional point of view, not only because the method used to obtain the intrusive capture, the so-called hidden camera, was not

necessary or appropriate at all for the purposes of discovering the activity developed, for what it would have been sufficient to conduct interviews with the clients, but, above all, and in any case, because, whether the investigation made by the journalist was publicly relevant or not, what is constitutionally prohibited is just the use of the method itself (hidden camera) for the reasons set out above.

From all the above, it can be concluded that the restriction imposed by the Supreme Court in its Judgment to the appealing institutions, by means of the corresponding condemnation, is constitutionally justified.

RULING

For all the above, the Constitutional Court, BY THE AUTHORITY VESTED IN IT BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To dismiss the appeals for protection requested by Canal Mundo Producciones Audiovisuales, S.A. (no. 4821-2009) and by Televisión Autonómica Valenciana, S.A. (no. 4829-2009),

The Judgment shall be published in the Official State Gazette (*Boletín Oficial del Estado*).

This Judgment was handed down in Madrid, 30 January 2012.