

MINISTRY OF JUSTICE

SECTION FIFTH MATTER FRAGOSO DACOSTA v. SPAIN (Claim No. 27926/21)

JUDGMENT Article 10 • Freedom of expression • Disproportionate penalty imposed on a union representative for insulting the national flag on a military base during a protest as a result of non-payment of salaries – Hate speech or incitement to violence is not questioned – Not questioned riots or disorders occurred - Debate on a matter of general interest - A fair balance was not reached between the relevant interests at stake.

STRASBOURG

June 8, 2023

This ruling will be final in accordance with the provisions of article 44.2 of the Convention. It may be subject to editorial review. TRANSLATION CARRIED OUT BY THE TRANSLATION TEAM OF THE GENERAL SUBDIRECTORATE OF CONSTITUTIONAL AND HUMAN RIGHTS

The official languages of the European Court of Human Rights are English and French, in which judgments, decisions and any other documentation are published.

JUDGMENT FRAGOSO DACOSTA v. SPAIN 1 In the case of Fragoso Dacosta v. Spain, the European Court of Human Rights (Fifth Section), meeting in a Chamber formed by:

Georges Ravarani, President

Mārtiņš Mits,

Stéphanie Mourou-Vikström,

Chanturia side,

María Elósegui,

Mattias Guyomar,

Kateřina Šimáčková, Judges, and Martina Keller, Deputy Section Secretary, Taking into account: the application (no. 27926/21) filed against the Kingdom of Spain on May 14, 2021 before the Court, in accordance with Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by a Spanish citizen, Mr.

Pablo Fragoso Dacosta ("the plaintiff"); the decision to bring said claim to the attention of the Spanish Government ("the Government"); the observations of the parties, After deliberating behind closed doors on April 4 and May 9, 2023, the following ruling was issued on the latter date: INTRODUCTION 1.

The claim concerns the alleged violation of the plaintiff's right to freedom of expression in accordance with Article 10 of the Convention, as a consequence of his conviction for a crime of insulting the Spanish flag. FACTS 2. The plaintiff was born in 1986 and resides in Vedra. He was represented by M.

J. Arias Eibe, lawyer practicing in Ferrol. 3. The Government was represented by its Agent, A. Brezmes Martínez de Villarreal. 4. The facts of the case can be summarized as follows. 5. At the time of the events, the Ferrol Military Arsenal, a military base dependent on the Ministry of Defense, was involved in a conflict over the non-payment of salaries to the workers of the company in charge of the cleaning service of Defense facilities.

In response to said non-payment, the staff of the cleaning company went on strike from October 2014 to March 2015. During that period, the workers, together with some union representatives, held daily rallies against JUDGMENT FRAGOSO DACOSTA v. SPAIN

2 to Arsenal (i.e., their workplace), shouting slogans related to their protests (such as "the flag doesn't pay the bills"), beeping, and generally making noise.

These protests coincided with the daily raising of the flag in the presence of the military. 6. On October 28, 2014, the Chief Admiral of the Arsenal sent a letter to the secretary of the Confederación Intersindical Galega, a Galician union, protesting the lack of respect of the protesters towards the flag.

On October 29, the plaintiff, a representative of the aforementioned union, participated in a meeting with the Admiral, who asked him to "lower the tone" of the protests during the raising of the flag. 7. At 8 a.m. on October 30, 2014, the plaintiff, along with about thirty protesters, was in front of the Arsenal at the time of the solemn raising of the flag when, through a megaphone, he shouted: "here tedes o sonido da puta bandeira" ["here is the silence of the fucking flag"] and "hai que prenderlle lume á puta bandeira" ["we must set fire to the fucking flag"].

There was no other incident. 8. On February 6, 2015, the plaintiff was charged, in accordance with article 543 of the Penal Code, with the crime of insulting Spain. 9. On March 22, 2017, the Criminal Court No. 1 of Ferrol convicted the plaintiff of the charges brought against him. He declared that the expressions were made publicly in the presence of military personnel with the intention of showing contempt or offending, and pointed out that in two meetings held in previous days, the military authorities expressly asked the plaintiff to "lower" the tone of his protest during the solemn ceremony.

He added that, although a sector of the doctrine is in favor of decriminalizing this crime in question, judges are subject to the criminal law as long as the elements of the aforementioned type are present. He sentenced the plaintiff to a fine of 1,260 euros, which could be replaced by deprivation of liberty in case of non-payment.

10. The plaintiff appealed to the Provincial Court of A Coruña, alleging a disproportionate interference with the right to ideological freedom and freedom of expression. 11. On February 8, 2018, the Provincial Court dismissed the appeal and confirmed the sentence imposed in the first instance, specifically stating that the military personnel had experienced "an intense feeling of humiliation" due to the expressions made by the plaintiff.

12. On March 1, 2019, the Criminal Court No. 1 of Ferrol declared the plaintiff's subsidiary personal liability extinguished after having satisfied the obligation to pay the fine. 13. On March 27, 2018, the plaintiff appealed protection before the Constitutional Court, alleging the violation of their rights to ideological freedom and freedom of expression.

JUDGMENT FRAGOSO DACOSTA v. SPAIN 3 14. The Constitutional Court admitted the amparo appeal for processing by order of February 25, 2019, after appreciating that it had "special constitutional significance." 15. On May 7, 2019, the Public Prosecutor's Office requested that the Constitutional Court approve the amparo appeal, alleging that the criminal sentence had been disproportionate and that the courts in first and second instance had not adequately considered certain essential aspects of the matter, such as the context and purpose of the case. message.

16. On December 15, 2020, the Constitutional Court, by six votes to five, dismissed the amparo appeal. It stated that in principle its function was to verify whether the contested rulings weighed the plaintiff's freedom of expression with the protection of the interest general that involves the defense of the symbols of the State.

He observed that the plaintiff's statements had not referred to the non-payment of wages that were the subject of the protests, that these statements were made in the context of a solemn ceremony, and that some of the protesters had rejected them, saying "no, not that." The Constitutional Court concluded that the expressions conveyed a feeling of intolerance and were therefore not protected by freedom of expression, and that the sanction imposed on the plaintiff was proportionate.

As far as is relevant here, the ruling said the following:

"In short, the constitutionality control that this Court is responsible for carrying out in this type of cases must be limited, before entering into aspects of ordinary criminal legality referring to the specific application of the criminal type — which, where appropriate, could be subject to control under the invocation of the right to criminal legality (art.

25.1 CE)—, to verify whether the contested sentences, when imposing the criminal sentence, have assessed as a prior question whether the conduct prosecuted constitutes a lawful exercise of the fundamental right to freedom of expression [art. 20.1 a) CE] [art. 20.1 a) CE] and if, in that assessment framework, they have weighed the various circumstances in the case, since this is imposed by the principle of supremacy of the Constitution and respect for fundamental rights (...).

The contested sentences consider that those expressions, uttered by the appellant at the gate of the Ferrol military arsenal dock during the solemn ceremony of raising the national flag, constitute verbal insults to the Spanish flag, carried out with publicity, which cannot be understood. protected by freedom of expression.

This, unlike what happened with other slogans that were shouted at rallies held in previous days, which occurred in the same place, at the same time and on the occasion of the same event. It is reasoned in the sentences that the defendant acted with the intention of disparage or

outrage, since the expressions uttered constituted his specific response to a previous request from the military authority to the workers' union representatives, to lower the tone of the protests that they had been carrying out for months before the military establishment during the raising of the National flag (...).

However, the facts declared proven in the previous judicial process provide a series of elements that cannot escape our assessment: JUDGMENT FRAGOSO DACOSTA v. SPAIN

4 (i) The moment in which the expressions were uttered: It was the moment of the raising of the national flag, with the interpretation of the national anthem and the military guard in the presented weapon position, that is, the most solemn ceremony of all those that They take place in a military barracks, in which an act of special respect and consideration is made for symbols of the State, in this case the flag and the national anthem.

(ii) The use of the term "puta" to describe the "bandeira" and, in addition, both words inserted in the expression "hai que prenderlle lume á puta bandeira", which was never used until that moment by the concentrated people, according to It is deduced from the facts declared proven by the contested judicial resolutions.

(iii) The unnecessaryness of the two expressions uttered to support the meaning and scope of the labor demands defended by the concentrated people. (iv) The lack of link or relationship of the expressions used with the labor demand that the concentrated people were carrying out. .

(v In addition to the "intense feeling of humiliation" that, according to the appeal ruling, the soldiers present at the event suffered, also the demonstration of some of the workers participating in the rally, who said "no, not that." ...) One of the two messages broadcast (...) only served to convey to public opinion the idea that the "fucking flag" had to be set on fire, without adding any other word that would associate that expressed wish with the labor demands defended in the concentration.

This information is relevant for our prosecution since these were expressions uttered by the plaintiff, singular and isolated from the rest of the acts of concentration and the slogans expressed in them, which were not related to what the concentrates defended. appellant, who, in accordance with the facts declared proven by the contested judicial resolutions, is charged with the phrases uttered and who claims to have participated in the concentration as a member of a nationalist union, has also not justified in the application what the objective could have been. what he was pursuing when using the terms used and what the possible relationship of the phrases with the labor demands that he has claimed to defend.

This burden, which corresponded to the appellant, cannot be met by this Court. Two other elements are also relevant for the prosecution of this case: Firstly, the context in which those phrases were uttered. and in subsequent days, the gathered people chose the time and place that, in their opinion, was the most relevant to make their labor demands known to the public, that is, the act of raising the flag, with the formed guard and interpretation of the national anthem, such acts have not been

subject to prosecution by criminal jurisdiction, as they are protected by freedom of expression.

However, this same context also takes on special importance for our judgment because, precisely, on that day and only occasion, the plaintiff used the aforementioned solemn moment to utter those expressions, unnecessary and unrelated to the labor demand.

And, secondly, although closely connected with the previous element, it is also necessary to assess that when those expressions were heard out loud, some of the people gathered declared "no, not that" (as stated in the Court's ruling). of the Criminal Law). Such words reflect the feeling of those people, participants in the concentration, who did not share what the plaintiff had said and expressed their express rejection of those with their denial.

JUDGMENT FRAGOSO DACOSTA v. SPAIN 5 ...But, if in relation to said words and in one of the two sentences pronounced, the speaker uses the terms "hai que prendrille lume" (...) the expressions made configure the whole of a message that It carries a burden, not only of rejection of the political symbology that the national flag represents and, therefore, disparaging of the feelings of unity and affinity that many citizens may feel for it, but also, what it reveals is the message of belligerence. that the appellant showed towards the principles and values that it represents.

Furthermore, the expression of this desire implies, not only the mere material destruction of the flag by fire, but also the diffusion to others of a feeling of intolerance and exclusion that is projected with its affirmation to all those citizens who They feel the flag as one of their own and national identity symbols.

(...) It was not, therefore, a criticism of people who, due to their function, are subject to special citizen scrutiny, in the context of an anti-monarchy rally and protest against the visit of the kings to a city, as occurred in the aforementioned case Stern Taulats and Roura Capellera against Spain, [nº 51168/15 and 51186/15, of March 13, 2018] but of objectively offensive expressions towards a symbol, the national flag, in a protest framework completely alien to the values that the flag represents.

In the present case, the context is very different, since it does not take place in the context of a political conflict between independent States, in which citizens of one of the States participating in the conflict burn the flag and an image of the president of the other. State, due to its rejection of it and not of its own State.

In the present case we do not start, fortunately, from that assumption of violence and hostility towards the symbol of another State in conflict with its own, in which the European Court had to place itself. Now, the factual assumption is very different since it is It was a peaceful concentration for work reasons that took place in front of military installations, and in which, at a certain moment, one of the participants acted individually and uttered two phrases against the Spanish flag that were unnecessary for the purposes labor demands that the concentrates defended and that had no relationship with those claims.

Even some of the people gathered expressly expressed their rejection, as a sign of disagreement with those expressions. When, as is the case in the present case, the expression of an idea or opinion becomes unnecessary for the purposes that can legitimately be pursued, in this case the labor demand; when it appears suddenly and has nothing to do, due to its disconnection, with the context in which it manifests itself; when, in addition, due to the terms used, an emotional reflection of hostility is projected; When, in short, it denotes contempt for a symbol respected and felt as part of their national identity by many citizens, the questioned message is outside the regular exercise of the right to freedom of expression.

(...) Based on the factual assumptions that we are now judging, we must advance that the conduct of the appellant falls outside the protective scope of the rights to freedom of expression and ideology invoked by him and that it is not possible to appreciate, even , a mere excess of the means used in the context of an exercise, in principle legitimate, of that right.

FRAGOSO DACOSTA v. SPAIN JUDGMENT

6 In the case at hand, what the appellant did was rhetorically invoke the exercise of those rights to try to justify his conduct materialized in the expressions uttered against the flag of Spain. Such expressions incorporated terms, which together contained meanings in themselves. of contempt (here you or silence da puta bande.

you have to turn on the light on the fucking bandeira); They were unnecessary and, furthermore, they had been uttered outside the context and without any connection to the legitimate objective of formulating labor demands, even provoking feelings of rejection on the part of some of the people who supported the protest.

Finally, the appellant, in his request for protection, has not explained the objective he pursued when using the terms used and the possible relationship of the phrases uttered with the labor demands that he has claimed to defend. Consequently, it is not even possible appreciate an excess in the exercise of freedom of expression, since their conduct, for the reasons expressed, cannot be protected by this right, given that it does not contribute to the formation of a public opinion that deserves the description of free.

(...) Based, therefore, on this background, we must reach the conclusion that the punitive response applied to the appellant was proportionate to the nature of the criminal conduct appreciated. The penalty of fine (...) was applied to its degree minimum; the daily quota assigned (...), was appropriate to their economic capacity, (...); and, finally, subsidiary personal liability has not come into effect."

RELEVANT LEGAL FRAMEWORK 17. The relevant provisions of the Spanish Constitution establish the following: Article 16 "1. The ideological, religious and cult freedom of individuals and communities is guaranteed without further limitation, in its manifestations, than that necessary for the maintenance of public order protected by law."

Article 20 "1.The rights are recognized and protected: a) To freely express and disseminate thoughts, ideas and opinions through words, writing or any other means of reproduction.(...) 4.These freedoms have their limits in respect for the rights recognized in this Title, in the precepts of the laws that develop it and, especially, in the right to honor, privacy, one's own image and the protection of youth and childhood."

Article 28 "1.Everyone has the right to unionize freely. The law may limit or exempt the exercise of this right to the Armed Forces or Institutes or to other Bodies subject to military discipline and will regulate the peculiarities of its exercise for the JUDGMENT FRAGOSO DACOSTA c .SPAIN 7 public officials.

Freedom of association includes the right to found and join trade unions of one's choice, as well as the right of trade unions to form confederations and to found or join international trade union organizations. No one may be forced to join a trade union." 18.The relevant provision of the Penal Code (Organic Law 10/1995, of November 23) establishes the following: Article 543 "Offenses or outrages in word, in writing or in fact against Spain, its Autonomous Communities or its symbols or emblems, made with advertising, will be punished with a fine of seven to twelve months."

LEGISLATION I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION 19. The applicant complained that the sentence imposed violated his right to freedom of expression guaranteed by Article 10 of the Convention, the relevant parts of which read as follows: "1.Every person has right to freedom of expression.

This right includes freedom of opinion and the freedom to receive or communicate information or ideas without interference from public authorities and without regard to borders (...).2.The exercise of these freedoms, which entail duties and responsibilities , may be subjected to certain formalities, conditions, restrictions or sanctions, provided for by law, that constitute necessary measures, in a democratic society, for national security, territorial integrity or public safety, the defense of order and the prevention of crime, the protection of health or morals, the protection of the reputation or rights of others, to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary.

A.Admissibility

20.In the present case, although some of the conclusions of the Constitutional Court can be interpreted as calling into question the applicability of Article 10 of the Convention (see paragraphs 16 above and 27 below), the Court observes that such application has not been challenged by the Government, which is why, like the parties, it considers that said provision is undoubtedly applicable.

The Court further indicates that the claim is not manifestly ill-founded nor is it inadmissible for any other reason than those related to Article 35 of the Convention. Therefore, it must be declared admissible. JUDGMENT FRAGOSO DACOSTA v. SPAIN

8 B. Merits 1. Arguments of the parties 21. The plaintiff alleges that even if the language used had been aggressive, the domestic courts should have taken into account the

context in which said expressions were made.

He stressed that his statements were made against a symbol and did not incite violence or cause disruption of public order. The plaintiff argued that the interference had not pursued a "legitimate objective" within the meaning of Article 10.2 of the Convention. Finally, he stated that the Statements were to be interpreted as a symbolic expression of dissatisfaction.

22.The Government accepted that the sentence imposed on the applicant represented an interference with his right to freedom of expression. It argued that the interference was "provided for by law" and pursued a legitimate aim, that is, "to protect a common symbol of all the members of a nation, what is its national flag or ensign, without prejudice to the fact that many other flags of nations or regions that coexist within said State may coexist."

It alleged that the domestic courts had duly taken into account the circumstances of the matter, concluding that the interference had been proportionate and therefore "necessary in a democratic society." The Government provided a report on the existence of similar crimes in the domestic legal system of the States. members of the Council of Europe.

Furthermore, it observed that the possibility of the fine being replaced by deprivation of liberty was very unlikely.2.Assessment of the Court

23.The Court indicates that the parties do not dispute that the sanction imposed on the plaintiff represented an interference with his right to freedom of expression. Such interference constitutes a violation of article 10 unless it is "provided for by law", pursues one or more legitimate objectives established in said provision, and is "necessary in a democratic society" to achieve said objectives (see NIT SRL

v. the Republic of Moldova [GS], n° 28470/12, § 151, of April 5, 2022).24.The Court understands that the alleged interference was "provided for by law", that is, by article 543 of the Spanish Penal Code, which provides, by election of the Spanish Parliament, for the classification of certain behaviors that may violate the symbols of Spain and that are considered harmful to the feelings of Spanish society.

Regarding the legitimate objective, the Government referred to the protection of "a symbol common to all members of a nation". Given the importance of promoting social cohesion, the Court accepts that this corresponds to the legitimate objective of protecting the "rights of others", to which the second paragraph of article 10 refers (compare Murat Vural v.

Turkey, n° 9540/07, § 60, of 21 FRAGOSO DACOSTA JUDGMENT v. SPAIN October 9, 2014; Animal Defenders International v. United Kingdom [GS], n°.48876/08, § 78, ECtHR 2013; and NIT SRL, cited above, § 175) 25. To this end, the Court's assessment will focus on establishing whether the sentence imposed on the plaintiff was "necessary in a democratic society."

The relevant general principles are consolidated in the Court's jurisprudence (for a recent summary, see NIT SRL, cited above, § 177).26.With regard to the circumstances of the present case, the Court notes that the applicant, a member of a trade union there was

uttered insulting expressions using a megaphone in a peaceful protest against non-payment of salaries, he was found guilty of having violated the Spanish flag and was punished for it.

The Court emphasizes that the expressions complained of were not directed at a person but at a symbol (compare *Otegi Mondragón v. Spain*, no. 2034/07, ECtHR 2011, and *Stern Taulats and Roura Capellera v. Spain*, no. 51168/15 and 51186/15, of March 13, 2018, in which the plaintiffs were convicted of having insulted the king of Spain, in the first case, and for having set fire to a photograph of the kings, in the second).

27. The Constitutional Court considered that the applicant's statements fell outside the right to the protection of freedom of expression under Article 20 of the Constitution, since they were undoubtedly insulting to a national symbol, showed hostility and lack of respect towards said symbol in a context completely unrelated to the values it represents, and were unnecessary and unrelated to the claims regarding non-payment of wages (see paragraph 16 above).

In this regard, the Court reiterates that it is aware of its essentially subsidiary role established by the Convention, according to which the Contracting States have the fundamental responsibility to guarantee the rights and freedoms proclaimed in the Convention and its Protocols (see *Dubská and Krejzová v.*

Czech Republic [GS], n° 28859/11 and 28473/12, § 175, of November 15, 2016). In principle, national authorities are better positioned than the international judge to evaluate the meaning and impact of insults, specifically when they are directed at a national symbol. However, it also points out that the principle of subsidiarity imposes a shared responsibility between the States Parties and the Court, and that national authorities and courts must interpret and apply domestic law in a way that provides of full effect to the Convention (see *Guðmundur Andri Ástráðsson v.*

Iceland [GS], No. 26374/18, § 250, December 1, 2020). It follows that, although it is primarily up to national authorities, and specifically courts, to interpret and apply the domestic legislation, it is ultimately up to the Court to establish whether the way in which such legislation is interpreted and applied produces effects compatible with the Convention (*ibid.*).

FRAGOSO DACOSTA v. SPAIN JUDGMENT

10 28. In the circumstances of the present case, the Court refers to its established position that freedom of expression applies not only to “information” or “ideas” that are received favorably or are considered harmless or indifferent, but also those that offend, scandalize or annoy the State or any other sector of the population (see *Handyside v.*

United Kingdom, 7 December 1976, § 49, Series A No. 24, and *Handzhiyski v. Bulgaria*, No. 10783/14, § 58, 6 April 2021). However, the Court has stated that it must A clear distinction must be made between criticism and insults and that, in some circumstances, if

the sole intention of any form of expression is to insult an institution or a person, an appropriate sanction would not in principle constitute a violation of Article 10.2 of the Convention (see *Skalka v.*

Poland, no. 43425/98, § 34, of May 27, 2003). In any case, even in this type of case, the Court, in the exercise of its supervisory jurisdiction, must examine the contested interference in the light of the case as a whole, including the content of the observations made against the plaintiff and the context in which they were made, and establish whether the interference in question is “proportionate to the legitimate objectives” and whether the reasons alleged by the authorities to justify them are “relevant and sufficient” (*ibid.*, § 35).

29. The Court accepts that language used by the plaintiff can be considered provocative, and the use of expletives gratuitous. However, it states that there are no signs of disorder or disturbances following the plaintiff's statements. Neither the Provincial Court nor the Government attempted to justify the conviction of the plaintiff with reference to incitement to violence or hate speech.

Although the Constitutional Court referred to a “feeling of intolerance” transmitted by the plaintiff, it did not analyze whether there were sufficient reasons to consider that his statements amounted to incitement to hatred, such as the existence of a political or social background or the capacity of such statements to have harmful consequences (see *Perinçek v.*

Switzerland [GS], no. 27510/08, §§ 204-07, ECHR 2015, and *Erkizia Almandoz v. Spain*, no. 5869/17, § 40, of June 22, 2021). The Court also takes into account the fact that the comments were made orally during a protest, so the plaintiff had no possibility to reformulate, redefine or retract them (see *Otegi Mondragón*, cited above, § 54, and *Fuentes Bobo v.*

Spain, n° 39293/98, § 48, of February 29, 2000), and observes that the Government has not alleged that the statements had a wide public impact.³⁰ On the other hand, the Court considers that the present case is different of those in which freedom of expression has been opposed to the right to respect for the private life of an individual (see, among other precedents, *Axel Springer AG v.*

Germany [GS], n° 39954/08, February 7, 2012; *Von Hannover v. Germany* (no. 2) [GS], no. 40660/08 and 60641/08, ECtHR 2012; and *Mesić v. Croatia*, no. 19362/18, of May 5, 2022). Although the Court is willing to accept that provocative statements directed against a national symbol can hurt the sensibilities of people, the damage caused in their case is of a different character compared to that caused by the attack on the reputation of a specific individual.

In the present case, although the Provincial Court declared that the military personnel had experienced “an intense feeling of humiliation” (see paragraph 10 above), the truth is that the plaintiff's statements were not directed at a person or a group. The Court also observes that the plaintiff's statements did not cause any personal or material damage, the criminal procedure was initiated solely at the initiative of the Public Prosecutor's Office (an institution that, in the procedure followed before the Constitutional Court, requested the admission

of the appeal for protection) and that no civil lawsuit was filed in relation to the plaintiff's statements (see *Fuentes Bobo*, cited above, § 48).

31. The Court cannot accept the Government's and the Constitutional Court's assertion that the plaintiff's statements had no relation to the protests. It indicates that the military authorities expressly asked the plaintiff to "lower the tone" of his protest during the solemn ceremony. (see paragraphs 6 and 9 above).

The applicant's references to the silence of the flag (see paragraph 7 above) may also be considered to be related to said request, as indicated in the criminal court's ruling, and represent an expression of frustration against said request. The Court considers that it cannot guess the intentions of the plaintiff, but indicates that his statements could reasonably be considered not as mere offenses, but as criticism and an expression of protest and discontent against military personnel in their capacity as employers of the workers of the cleaning company (see, *mutatis mutandis*, *Fuentes Bobo*, cited above, § 48, on offensive statements against employers; *Stern Taulats and Roura Capellera*, cited above, § 38; and *Genov and Sarbinska v.*

Bulgaria, No. 52358/15, § 82, of November 30, 2021). 32. The Court also notes that the applicant was a union representative who made the statements during a protest against non-payment of wages. It can therefore be admitted that it was a debate on a question of general interest to the workers of the cleaning company (see, *mutatis mutandis*, *Palomo Sánchez and others v.*

Spain [GS], n° 28955/06 and others 3, § 72, ECtHR 2011). In this sense, the Court reiterates that the members of a union must be able to express to their employer the demands with which they intend to improve the situation of workers. workers of his company (*ibid.*, § 56; see also, *mutatis mutandis*, *Straume v.*

Latvia, No. 59402/14, § 103, of June 2, 2022). Likewise, although any individual who participates in a public debate of general interest, as in the case of the plaintiff, must not exceed certain limits, specifically regarding which refers to respect for reputation and rights
JUDGMENT FRAGOSO DACOSTA c.

SPAIN

12 of others, a certain degree of exaggeration or even provocation is allowed; that is, a certain degree of excess is allowed (see *Otegi Mondragon*, cited above, § 54). 33. Finally, the Court observes that the plaintiff was sentenced to pay a fine of 1,260 euros, which could be replaced by deprivation of liberty in case of non-payment.

In the Court's opinion, the amount of the fine imposed on the plaintiff was considerable and the fact that deprivation of liberty could be imposed as an alternative penalty is particularly relevant (see *Benítez Moriana and Iñigo Fernández v. Spain*, nos. 36537/15 and 36539 /15, §§ 49 and 59, of March 9, 2021, and *Rodríguez Ravelo v.*

Spain, n°.48074/10, § 44, of January 12, 2016). Although, in principle, it is up to the national courts to set the sentence, in view of the circumstances of the specific case there are common criteria that the Court must guarantee in accordance with the principle of proportionality. These criteria are the degree of guilt of the person concerned, the seriousness of the offense and recidivism (see *Skalka*, cited above, § 41).

The above considerations are sufficient to allow the Court to conclude that the sentence imposed on the applicant, in the specific circumstances of this case, was disproportionate in relation to the objective pursued.³⁴ Taking into account the circumstances of the case, the Court is not convinced that the national authorities have struck a fair balance between the relevant interests at stake in convicting the applicant and imposing an excessive penalty.

Consequently, there has been a violation of Article 10 of the Convention. II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention establishes that: "If the Court declares that there has been a violation of the Convention or its Protocols and if the internal law of the High Contracting Party only imperfectly allows reparation for the consequences of such violation, the Court shall grant to the injured party, if appropriate, equitable satisfaction."

36. The plaintiff claimed 19,260 euros in material and moral damages. He did not claim any amount for costs. 37. The Government requested the Court to dismiss the claim for equitable satisfaction. It stated that if a violation of the Convention, the plaintiff could claim reimbursement of the amount of the fine from the national authorities, and the amount claimed for non-material damages was exorbitant.

38. The Court finds a causal link between the violation found and the material damage claimed, since the plaintiff was sentenced to pay a fine of €1,260. Consequently, it awards said amount to the plaintiff. Furthermore, the Court points out that the sentence of the plaintiff could have a deterrent effect on the exercise of his freedom of expression.

JUDGMENT FRAGOSO DACOSTA v. SPAIN 13 Taking into account the specific circumstances of the matter, that is, the context of the labor dispute and the plaintiff's status as a union representative, the Court awards him 6,000 euros in moral damages, plus any tax payable.

IN ACCORDANCE WITH THE ABOVE, THE COURT UNANIMOUSLY,

1. Declares the claim admissible; 2. Affirms that Article 10 of the Convention has been violated; 3. Affirms: a) that the defendant State must pay the plaintiff, within a period of three months from the finality of this judgment, in accordance with Article 44.2 of the Convention, the following amounts: (i) 1,260 euros (one thousand two hundred sixty euros), plus any tax payable, for material damage; (ii) 6,000 euros (six thousand euros), plus any tax payable, as moral damages; b) that from the expiration of the aforementioned three months until its settlement, simple interest will be paid on the above amounts equal to the interest rate of the marginal credit facility of the European Central Bank during the period of default, increased by three percent. hundred.

4. Dismisses the rest of the equitable satisfaction claimed by the plaintiff. Written in

English, and notified in writing on June 8, 2023, in accordance with rules 77.2 and 3 of the Rules of Court. Martina Keller Georges Ravarani Deputy Section Secretary President