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OF JUSTICE

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DIRECCIÓN DEL SERVICIO JURÍDICO DEL ESTADO

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DEPUTY GENERAL DIRECTORATE OF CONSTITUTIONAL AND HUMAN RIGHTS*

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which judgments, decisions and any other documentation are published.*

## FIFTH SECTION

### **FRAGOSO DACOSTA MATTER c. SPAIN**

*(Demand 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 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 sentence will be final in accordance with the provisions of article 44.2 of the Convention.  
May be subject to editorial review.*



FRAGOSO DACOSTA SENTENCE c. SPAIN

**In the matter of Fragoso Dacosta c. Spain,**

The European Court of Human Rights (Fifth Section),  
gathered in a Room made up of:

Georges Ravarani, *President*

Martin Mits,

Stéphanie Mourou-Vikström,

Chanturia side,

María Elósegui,

Mattias Guyomar,

Kateřina Šimářková, *Jueces*,

and Martina Keller, *Deputy Section Secretary*,

Given:

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 application concerns the alleged violation of the applicant's right to freedom of expression under 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. was represented by MJ Arias Eibe, practicing lawyer in Fene.

3. The Government was represented by its Agent, A. Brezmes Martínez de Villarreal.

4. The facts of the case may 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 the facilities. Defending. 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 in front of

FRAGOSO DACOSTA SENTENCE c. SPAIN

to the 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 Arsenal sent a letter to the secretary of the *Confederación Intersindical Galega*, a Galician union, protesting the protesters' lack of respect for 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 in the morning on October 30, 2014, the plaintiff, along with 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*” [“you have to set fire to the fucking flag.”] There were no other incidents.

8. On February 6, 2015, the plaintiff was charged, pursuant to article 543 of the Penal Code, of a crime of outrages against Spain.

9. On March 22, 2017, the Criminal Court No. 1 of Ferrol convicted the plaintiff of the charges. He declared that the statements were made publicly in the presence of military personnel with the intention of showing contempt or offending, and noted 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

To decriminalize this crime in question, judges are subject to criminal law provided that 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 the event of non-payment.

10. The plaintiff appealed to the Provincial Court of A Coruña, alleging 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 for protection to the Constitutional Court, alleging the violation of his rights to ideological freedom and freedom of expression.

14. The Constitutional Court admitted the appeal for protection by order of February 25, 2019, after appreciating that it had “special constitutional significance.”

15. On May 7, 2019, the Public Prosecutor's Office asked the Constitutional Court to approve the amparo appeal, alleging that the criminal sentence had been disproportionate and that the courts in the first and second instance had not adequately weighed certain essential aspects of the matter, such as the context and purpose of the message.

16. On December 15, 2020, the Constitutional Court, by six votes to five, dismissed the appeal for protection. He explained that in principle his function was to verify whether the contested rulings balanced the plaintiff's freedom of expression with the protection of the general interest represented by 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 prosecuted conduct 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 recurring at the gate of the dock of the Ferrol military arsenal during the solemn ceremony of raising the national flag, constitute verbal outrages against 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 belittling or insulting, since the expressions uttered constituted his specific response to a prior 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:

FRAGOSO DACOSTA SENTENCE c. SPAIN

(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 have 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, furthermore, both words inserted in the expression "*hai que prenderlle lume á puta bandeira*", which was never used until that moment by the gathered people, as can be deduced from the declared facts 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 concentrates.

(iv) The lack of link or relationship of the expressions used with the claim labor 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 desire with the labor demands defended. in concentration. This information is relevant for our judgment 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. The 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 rally as a member of a nationalist union, has also not justified in the application what the objective pursued by using the terms used and what the eventual relationship of the phrases with the labor demands

which he has claimed to defend. This burden, which corresponded to the appellant, cannot be met by this Court.

Two other elements are also relevant to the prosecution of this case:

Firstly, the context in which those phrases were uttered. Although, up to that time 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 flag-raising act, with the formed guard and interpretation of the national anthem, such acts have not been subject to prosecution by the 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 sentence of the Criminal Court). Such words reflect the feeling of those people, participants in the rally, who did not share what the plaintiff had said and expressed their express rejection of those with their denial.

FRAGOSO DACOSTA SENTENCE c. SPAIN

...

But, if in these words and in one of the two phrases spoken, the speaker uses the terms "*hai que prenderlle lume*" (...) the expressions made make up the whole of a message that carries a burden, not only of rejection towards the political symbolism that represents the national flag 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

recurring 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, fortunately, we do not start 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 budget is very different since it was a peaceful concentration for work reasons that took place in front of some military installations, and in which, at a certain moment, one of the participants acted individually and uttered two sentences against the flag of Spain that were

unnecessary for the 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 claim; 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 limits in the means used in the context of an exercise, in principle legitimate, of that right.

FRAGOSO DACOSTA SENTENCE c. SPAIN

In the instant case, 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 in themselves meanings of contempt (*here tedes o sonido da puta bande. hai que prenderile lume á puta 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 alleged.

defender.

Consequently, it is not even possible to 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 qualifier of free.

(...)

Based 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 assessed. The penalty of fine (...) was applied to its minimum degree; 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 with no more limitations, in their 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 limit 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 the 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



FRAGOSO DACOSTA SENTENCE c. SPAIN

public workers. 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 union."

18. The relevant provision of the Penal Code (Organic Law 10/1995, of November 23) establishes the following:

**Article 543**

"Offences or outrages in words, in writing or in fact against Spain, its Autonomous Communities or its symbols or emblems, carried out with publicity, 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. Everyone has the 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 subject to certain formalities, conditions, restrictions or sanctions, provided for by law, which constitute necessary measures, in a democratic society, for national security, territorial integrity, or public security, 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 findings of the Constitutional Court may be interpreted as calling into question the applicability of Article 10 of the Convention (see paragraphs 16 above and 27 below), the Court notes that such application has not been challenged by the Government, therefore, like the parties, considers that said provision is undoubtedly applicable. The Court further indicates that the claim is neither manifestly ill-founded nor inadmissible for any reason other than those related to Article 35 of the Convention. Therefore, it must be declared admissible.

## **B. Fund**

### *1. Allegations 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 such expressions were made. He stressed that his statements were made against a symbol and did not incite violence or cause disturbances in public order. The applicant 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 had 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. He argued that the interference was "provided for by law" and pursued a legitimate purpose, that is, "to protect a common symbol of all the members of a nation, which is its national flag or ensign, without prejudice to the fact that many other flags may coexist." of nations or regions that coexist within said State." He alleged that the domestic courts took due account of 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 Member States of the Council of Europe. Furthermore, he observed that the possibility of the fine being replaced by deprivation of liberty was very unlikely.

### *2. Court Assessment*

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], No. 28470/12, § 151, April 5, 2022).

24. The Court understands that the interference denounced was "foreseen by the 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", referred to in the second paragraph of Article 10 (compare *Murat Vural v. Turkey*, no. 9540/07, § 60, of 21

October 2014; *Animal Defenders International v. United Kingdom* [GS], no. 48876/08, § 78, ECHR 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 union who had uttered abusive expressions using a megaphone in a peaceful protest against non-payment of wages, was found guilty of having insulted the Spanish flag and He 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, ECHR 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 disrespect 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. the 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 gives 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 the national authorities, and specifically the courts, to interpret and apply domestic legislation, it is ultimately up to the Court to establish whether the way in which said legislation is interpreted and applied produces effects compatible with the Convention (*ibid.*).

## FRAGOSO DACOSTA SENTENCE c. SPAIN

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 considered harmless or indifferent. , but also those that offend, scandalize or annoy the State or any other sector of the population (see *Handyside v. the United Kingdom*, December 7, 1976, § 49, Series A no. 24, and *Handzhiyski v. Bulgaria*, No. 10783/14, § 58, of April 6, 2021).

However, the Court has stated that a clear distinction must be drawn 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 result. a violation of Article 10.2 of the Convention (see *Skajka v. Poland*, no. 43425/98, § 34, 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 carried out, and establish whether the interference in question is

“proportionate to the legitimate objectives” and whether the reasons given by the national authorities to justify them are “relevant and sufficient” (ibid., § 35).

29. The Court accepts that language used by the plaintiff may 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 plaintiff's sentence by referring 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. declarations of having harmful consequences (see *Perinçek v. Switzerland* [GS], no. 27510/08, §§ 204-07, ECHR 2015, and *Erkizia Almandoz v. Spain*, no. 5869/17, § 40, 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*, no.

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 differs from those in which freedom of expression has been opposed to the right to respect for an individual's private life (see, among other precedents, *Axel Springer AG v . Germany* [GS], No. 39954/08, February 7, 2012; *Von Hannover v. Germany* (No. 2) [GS], No. 40660/08 and 60641/08, ECHR 2012; and *Mesij v. Croatia*, No. .<sup>o</sup> 19362/18, of May 5, 2022). Although the Court

is willing to accept that provocative statements directed against a national symbol can hurt people's sensibilities, the damage caused in his case is of a different nature 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 suit 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 applicant's statements had no connection with the protests. It indicates that the military authorities expressly asked the applicant to "tone down" 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. petition. The Court considers that it cannot guess the plaintiff's intentions, 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 military workers. 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 plaintiff 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 for the workers of the cleaning company (see, *mutatis mutandis*, *Palomo Sánchez and others v. Spain* [GS], no. 28955/06 and 3 others, § 72, ECHR 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 the workers of their company (*ibid.*, § 56; see also, *mutatis mutandis*, *Straume v. Latvia*, No. 59402/14, § 103, 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 with regard to respect for the reputation and rights

## FRAGOSO DACOSTA SENTENCE c. SPAIN

for others, a certain degree of exaggeration or even provocation is allowed; that is, a certain degree of excess is permitted (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 the event 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*, No. 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 *Skayka*, cited above, § 41). The foregoing considerations are sufficient to allow the Court to conclude that the sentence imposed on the plaintiff, 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 on him. 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 domestic law of the High Contracting Party only imperfectly allows for reparation for the consequences of such violation, the Court shall grant to the injured party, if appropriate, a equitable satisfaction."

36. The plaintiff claimed 19,260 euros in material damages and morals. He did not claim any amount for costs.

37. The Government requested the Court to dismiss the claim for just satisfaction. He stated that in the event of a violation of the Convention being declared, the plaintiff could claim reimbursement of the amount of the fine from the national authorities, and the amount claimed as 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 ordered to pay a fine of €1,260. Consequently, it awards said amount to the plaintiff. Furthermore, the Court notes that the applicant's conviction could have a deterrent effect on the exercise of his freedom of expression.

FRAGOSO DACOSTA SENTENCE c. SPAIN

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 FOR UNANIMITY,

1. *Declares* the claim admissible;
2. *Claims* that Article 10 of the Convention has been violated;
3. *States*:
  - 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 and sixty euros), plus any applicable tax, 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, of in accordance with rules 77.2 and 3 of the Rules of Court.

Martina Keller  
Deputy Section Secretary

Georges Ravarani  
President