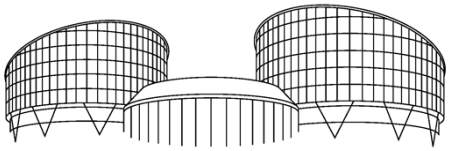

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF FRAGOSO DACOSTA v. SPAIN

(Application no. 27926/21)

JUDGMENT

Art 10 • Freedom of expression • Disproportionate criminal sanction imposed on a trade-union representative for verbally insulting the national flag of Spain during a protest at a military base regarding unpaid wages • Hate speech or incitement to violence not at issue • No resulting disturbances or disorder • Debate on a matter of general interest • Fair balance not struck between relevant interests at stake

STRASBOURG

8 June 2023

FINAL

08/09/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

In the case of Fragoso Dacosta v. Spain,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Georges Ravarani*, President*,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Lado Chanturia,
María Elósegui,
Mattias Guyomar,
Kateřina Šimáčková*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 27926/21) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Mr Pablo Fragoso Dacosta ("the applicant"), on 14 May 2021;

the decision to give notice of the application to the Spanish Government ("the Government");

the parties' observations;

Having deliberated in private on 4 April and 9 May 2023,

Delivers the following judgment, which was adopted 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 on account of his criminal conviction for having insulted the national flag of Spain.

THE FACTS

2. The applicant was born in 1986 and lives in Vedra. He was represented by Mr M. J. Arias Eibe, a lawyer practising in Fene.

3. The Government were represented by their Agent, Mr A. Brezmes Martínez de Villareal.

4. The facts of the case may be summarised as follows.

5. At the material time the Ferrol Military Arsenal, a military base under the responsibility of the Ministry of Defence, was involved in a dispute over unpaid wages with employees of the company in charge of cleaning the arsenal building. In response to the unpaid wages, the employees of the cleaning company went on strike from October 2014 until March 2015. During that period, the employees, together with some trade-union representatives, held daily gatherings in front of the arsenal (that is, their place of work), shouting slogans relating to their protests (such as "the flag does not pay the bills"), whistling and generally creating noise. Those protests

coincided with the daily solemn raising of the national flag in the presence of the military.

6. On 28 October 2014 the Chief Admiral of the arsenal sent a letter to the secretary of the Confederación Intersindical Galega, a Galician trade union, protesting about the lack of respect on the part of the protesters towards the national flag. On 29 October the applicant, who was a representative of the above-mentioned trade union, participated in a meeting with the admiral, who requested him to "tone down" the protest during the raising of the national flag.

7. At 8 a.m. on 30 October 2014 the applicant, together with some thirty protesters, was in front of the arsenal at the moment of the solemn raising of the national flag. He shouted through a megaphone: "Here you have the silence of the fucking flag" ("*aquí tedes o silencio da puta bandeira*") and "The fucking flag must be set on fire" ("*hai que prenderlle lume á puta bandeira*"). No other related incidents took place.

8. On 6 February 2015 the applicant was charged under Article 543 of the Spanish Criminal Code with the offence of insulting Spain.

9. On 22 March 2017 Ferrol Criminal Court no. 1 convicted the applicant as charged. It stated that his utterances had been made publicly in front of military personnel with the aim of showing contempt or causing offence and it noted that, in two meetings held during the preceding few days, the military authorities had expressly asked the applicant to "tone down" his protest during the solemn ceremony. It added that, even though legal scholars were in favour of decriminalising the offence in question, judges were bound to apply criminal law where the elements of an offence had been met. It sentenced the applicant to a fine of EUR 1,260, which could be replaced by deprivation of liberty in the event of non-payment.

10. The applicant appealed to the A Coruña *Audiencia Provincial*, alleging a disproportionate interference with the right to freedom of ideology and to freedom of expression.

11. On 8 February 2018 the *Audiencia Provincial* dismissed the appeal and upheld the first-instance conviction, stating, in particular, that the military personnel had experienced "an intense feeling of humiliation" on account of the applicant's statements.

12. On 1 March 2019 Ferrol Criminal Court no. 1 declared the applicant's criminal liability extinguished following payment of the fine.

13. On 27 March 2018 the applicant lodged an *amparo* appeal with the Spanish Constitutional Court, alleging a violation of his rights to freedom of ideology and freedom of expression.

14. The Constitutional Court accepted the *amparo* appeal for examination by an order of 25 February 2019 on account of the case having "special constitutional significance".

15. On 7 May 2019 the public prosecutor requested the Constitutional Court to grant the applicant's *amparo* appeal, arguing that the criminal-law

sanction was disproportionate and that the courts at first and second instance had not duly considered the essential elements of the case, such as the context and the objectives of the message.

16. On 15 December 2020 the Constitutional Court, by six votes to five, dismissed the *amparo* appeal. It explained at the outset that its function was to establish whether the contested judgments had balanced the applicant's right to freedom of expression against the protection of the general interest involved in defending the symbols of the State. It observed that the applicant's statements had not concerned the unpaid wages at the heart of the protests, that those statements had been made in the context of a solemn ceremony, and that some of the protesters had rejected them, saying "no, not that" ("*no, eso no*"). The Constitutional Court concluded that the statements transmitted a feeling of intolerance and thus were not protected by freedom of expression and that the penalty imposed on the applicant was proportionate. Its judgment read, in so far as relevant, as follows:

> "In sum, the review of constitutionality that this court must carry out in this type of case must be limited, before it turns to aspects of ordinary criminal legality relating to the specific application of the type of criminal offence – which, where appropriate, could be subject to review following reliance on the right to criminal legality (Article 25 § 1 of the Spanish Constitution) – to determining whether the contested judgments, in imposing the criminal sentence, have assessed as a preliminary question whether the conduct subject to prosecution constitutes a lawful exercise of the fundamental right to freedom of expression [Article 20 § 1(a) of the Spanish Constitution] and whether, within this framework of assessment, they have taken into account the various circumstances of the case, as required by the principle of supremacy of the Constitution and respect for fundamental rights ...
>
> The contested judgments consider that the expressions uttered by [the applicant] at the gate of the Ferrol Military Arsenal during the solemn ceremony of the raising of the national flag constitute insults to the Spanish flag, expressed publicly, which cannot be understood as protected by freedom of expression [in contrast to] other slogans that were shouted in gatherings held on previous days, which had taken place in the same place, at the same time and on the occasion of the same act.
>
> The judgments state that [the applicant] acted with the intention of belittling or insulting, since the statements constituted his concrete response to a prior request by the military authority to the union representatives asking them to tone down the protests that they had been carrying out for a few months in front of the military establishment during the raising of the national flag ...
>
> However, the facts as established in the previous judicial proceedings provide a series of relevant elements:
>
> (i) The moment at which the expressions were uttered: it was the moment of the raising of the national flag, with the playing of the national anthem and the military guard presenting weapons – that is, the most solemn of all the ceremonies that may take place at a military headquarters, in which an act of special respect and consideration is performed towards symbols of the State, in this case the flag and the national anthem.
>
> (ii) The use of the word 'fucking' to qualify the 'flag' and, furthermore, with both words inserted in the expression 'the fucking flag must be set on fire', which had never

been used until that moment by those participating in the gatherings, according to the facts established in the judicial decisions.

(iii) The unnecessary nature of the two expressions to support the aim and scope of the labour claims defended by the protesters.

(iv) The lack of any connection or link in the expressions used with the labour claims defended by the protesters.

(v) In addition, the 'intense feeling of humiliation' that, according to the appeal judgment, the military staff present at the event had suffered, as well as the reaction of some of the workers participating in the protest, who said 'no, not that'.

...

One of the messages expressed ... only served to convey to the public the idea of setting the 'fucking flag' on fire, without adding any other words that would associate that expressed wish with the labour demands made in the assembly. This information is relevant for our assessment since they were expressions uttered by [the applicant], which were isolated from the rest of the acts of the assembly and the slogans expressed in that context, and which were unrelated to what the participants were defending. The [applicant], to whom, according to the facts established by the contested judicial decisions, the sentences uttered were attributed, and who claims to have participated in the assembly as a member of a nationalist trade union, has not justified what possible objective he was pursuing when using the relevant terms and what relationship the statements might have had with the labour claims he alleged he was defending. This burden, which fell on the [applicant], cannot be shifted to this court.

Two other elements are also of relevance to the analysis of this case.

Firstly, the context in which the statements were uttered. Although, until that date and on subsequent days, the people who had gathered chose what, in their opinion, was the most relevant time and place to bring their labour claims to the attention of the public – that is, the act of raising the flag, with the guard formed and the playing of the national anthem – such acts have not been prosecuted by the criminal court, as they are protected by freedom of expression. However, this same context also has special importance for our analysis because it was precisely on that day and on that one occasion that the [applicant] made use of the above-mentioned solemn moment to utter those expressions, unnecessary and unrelated as they were to the labour claim.

And, secondly, although closely connected to the previous element, it is also necessary to appreciate that when those expressions were heard, some of the people who had gathered there declared 'no, not that' (as stated in the criminal court ruling). These words reflect the feelings of those people, participants in the assembly, who did not agree with what the [applicant] had said and demonstrated their explicit rejection of the statements.

...

[I]f in addition to these words, in one of the two sentences pronounced, the person who utters them uses the phrase 'it must be set on fire' ('*hai que prenderlle lume*') ..., the statements together form a loaded message, not only of rejection of the political symbolism that the national flag represents and, therefore, a belittling of the feelings of unity and affinity that many citizens may feel for it, but what this also reveals is the message of belligerence that the [applicant] showed towards the principles and values that the national flag represents.

In addition, the expression of this wish implies not just the mere material destruction of the flag by fire, but also the dissemination to others of a feeling of intolerance and exclusion that is projected through such statements to all those citizens who consider the flag to be one of their symbols of national and personal identity.

...

It was not, therefore, a criticism of people who, owing to their role, are subject to particular scrutiny by citizens in the context of an anti-monarchist protest against a visit by the King and Queen to a city, as occurred in the ... case of *Stern Taulats and Roura Capellera v. Spain* [nos. 51168/15 and 51186/15, 13 March 2018], but rather expressions that are objectively offensive towards a symbol – the national flag – against the background of claims that were completely unrelated to the values that the flag represents.

[In this case] the facts are very different, because it was a labour-related peaceful assembly which took place in front of military premises, and in which, at a certain moment, one of the participants acted individually and uttered two sentences against the Spanish flag that were unnecessary for the purposes of the labour claims that the protesters were defending and were unconnected to those claims. Even some of the participants expressly showed their disapproval, as a sign of disagreement with those expressions.

When, as in the present case, the expression of an idea or opinion is unnecessary for the purposes that may legitimately be pursued, in this case the labour claim; when it occurs suddenly and has nothing to do, owing to its lack of connection, with the context in which it is expressed; when, in addition, on account of the terms used, it reflects a feeling of hostility; when, in short, it denotes contempt for a symbol that is respected and felt as being part of their national identity by many citizens, the message in question falls outside the regular exercise of the right to freedom of expression.

...

On the basis of the facts before us, we must find that the [applicant's] conduct falls outside the scope of protection of the rights to freedom of expression and ideology that he has invoked and that it is not even possible to discern a mere excess in the means used in the context of what would in principle constitute a legitimate exercise of that right.

In the present case, what the [applicant] did was rhetorically invoke the exercise of those rights to try to justify his conduct which had manifested itself in the expressions uttered against the Spanish flag. Such expressions included terms that, taken together, represented contempt ('[h]ere you have the silence of the fucking flag', '[t]he fucking flag must be set on fire'); they were unnecessary and, furthermore, had been uttered regardless of the context and without any connection to the legitimate objective of formulating labour demands, and had even provoked feelings of rejection among some of the persons who were supporting the protest. Lastly, [the applicant] has not explained what objective was being pursued when he used those terms and what possible relationship those statements had with the labour claims that he alleged he had been defending.

Consequently, it is not even possible to discern an excess in the exercise of freedom of expression, since his conduct, for the reasons stated, cannot be protected by this right, as it does not contribute to the formation of a public opinion that can be characterised as free.

...

Against this background we have to reach the conclusion that the punitive response applied to the [applicant] was proportionate to the seriousness of the criminal conduct that was assessed. The fine ... was imposed at the minimum rate; the daily amount ... was appropriate to his financial capacity ... and subsidiary personal liability did not come into play."

RELEVANT LEGAL FRAMEWORK

17. The relevant provisions of the Spanish Constitution read as follows:

Article 16

"1. Freedom of ideology, religion and worship shall be guaranteed to individuals and communities, with no other restriction on their expression than may be necessary to maintain public order as protected by law."

Article 20

"1. The following rights shall be recognised and protected:

(a) the right to freely express and disseminate thoughts, ideas and opinions through words, in writing or by any other means of communication.

...

4. These freedoms shall be limited by respect for the rights recognised in this Part, by the legal provisions implementing it, and especially by the right to honour, to privacy, to personal reputation and to the protection of youth and childhood."

Article 28

"1. Everyone has the right to freely join a trade union. The law may limit the exercise of this right or make an exception to it in the case of the armed forces or armed services or other bodies subject to military discipline and shall regulate the special conditions of its exercise by civil servants. Trade union freedom includes the right to set up trade unions and to join the union of one's choice, as well as the right of trade unions to form confederations and to found international trade-union organisations, or to become members thereof. No one may be compelled to join a trade union."

18. The relevant provision of the Spanish Criminal Code (Institutional Law no. 10/1995 of 23 November 1995) reads as follows:

Article 543

"Offence or insults conveyed publicly, by means of utterances, writing or actions, against Spain, its Autonomous Communities or the symbols or emblems thereof shall be punished by a day-fine payable for between seven and twelve months."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

19. The applicant complained that the criminal sanction imposed on him was in violation of 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 shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

20. In the present case, while some of the findings of the Constitutional Court may be understood as putting into question the applicability of Article 10 of the Convention (see paragraphs 16 above and 27 below), the Court observes that the Government have not contested its applicability and, like the parties, considers that that provision undoubtedly applied. The Court further notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

21. The applicant submitted that even if the language he had used was aggressive, the domestic courts should have taken into account the context in which the expressions had been uttered. He emphasised that his statements had been directed at a symbol and had not incited violence or provoked public disorder. The applicant argued that the interference had not pursued a "legitimate aim" within the meaning of Article 10 § 2 of the Convention. Lastly, he stated that the statements had to be considered the symbolic expression of a feeling of disappointment.

22. The Government accepted that the criminal sanction imposed on the applicant had amounted to an interference with his right to freedom of expression. They submitted that the interference had been "prescribed by law" and had pursued a legitimate aim, that is, "to protect a symbol common to all members of the nation, namely its flag or national sign, notwithstanding

the coexistence of many other flags of nations or regions within that State". They alleged that the domestic courts had duly considered the circumstances of the case and had concluded that the interference had been proportionate and thus "necessary in a democratic society". They submitted a report on the existence of similar offences in the domestic legal systems of the Council of Europe member States. Furthermore, they observed that the possibility of having the fine replaced by deprivation of liberty had been highly unlikely.

2. The Court's assessment

23. The Court notes that it is not in dispute between the parties that the criminal sanction imposed on the applicant amounted to an interference with his right to freedom of expression. Such interference will constitute a breach of Article 10 unless it was "prescribed by law", pursued one or more legitimate aims set out by this Article, and was "necessary in a democratic society" for the achievement of those aims (see *NIT S.R.L. v. the Republic of Moldova* [GC], no. 28470/12, § 151, 5 April 2022).

24. The Court is satisfied that the interference complained of was "prescribed by law", namely by Article 543 of the Spanish Criminal Code, which provides, by virtue of a choice made by the Spanish Parliament, for the criminalisation of certain kinds of conduct that are capable of insulting the symbols of Spain and are considered damaging to the sentiments of Spanish society. As to the legitimate aim, the Government referred to the protection of "a symbol common to all members of the nation". Given the importance of promoting social cohesion, the Court accepts that this corresponds to the legitimate aim of protecting the "rights of others", to which the second paragraph of Article 10 refers (compare *Murat Vural v. Turkey*, no. 9540/07, § 60, 21 October 2014; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 78, ECHR 2013; and *NIT S.R.L.*, cited above, § 175).

25. The Court's analysis will thus focus on determining whether the criminal sanction imposed on the applicant was "necessary in a democratic society". The relevant general principles are well established in the Court's case-law (for a recent summary, see *NIT S.R.L.*, cited above, § 177).

26. Turning to the circumstances of the present case, the Court observes that the applicant, a trade unionist who had made two utterances using expletives through a megaphone at a peaceful protest against unpaid wages, was found guilty of having insulted the Spanish flag and received a criminal sanction on that account. The Court emphasises that the impugned statements were not directed at a person but at a symbol (contrast *Otegi Mondragon v. Spain*, no. 2034/07, ECHR 2011, and *Stern Taulats and Roura Capellera v. Spain*, nos. 51168/15 and 51186/15, 13 March 2018, where the applicants had been subjected to criminal penalties for having insulted the King of Spain, in the first case, and for having set fire to a photograph of the royal couple, in the second case).

27. The Spanish Constitutional Court considered that the applicant's utterances did not enjoy the protection of the right to freedom of expression under Article 20 of the Spanish Constitution, because they were objectively offensive to a national symbol, showed hostility and disrespect towards that symbol in a context entirely unrelated to the values it represented, and were unnecessary and unconnected with the unpaid wages claims (see paragraph 16 above). The Court reiterates in this connection that it is mindful of its fundamentally subsidiary role in the mechanism established by the Convention, according to which the Contracting Parties have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto (see *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 175, 15 November 2016). In principle, the national authorities are better placed than the international judge to assess the significance and impact of offensive words, in particular where they are directed at a national symbol. It also notes, however, 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 the domestic law in a manner that gives full effect to the Convention (see *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 250, 1 December 2020). It therefore follows that while it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, it falls ultimately to the Court to determine whether the way in which that law is interpreted and applied produces consequences that are compatible with the Convention (ibid.).

28. In the circumstances of the present case the Court refers to its long-established position that freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Handzhiyski v. Bulgaria*, no. 10783/14, § 58, 6 April 2021). The Court has stated, however, that 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 punishment would not, in principle, constitute a violation of Article 10 § 2 of the Convention (see *Skałka v. Poland*, no. 43425/98, § 34, 27 May 2003). Nevertheless, even in cases of that kind, the Court, in exercising its supervisory jurisdiction, must look at the disputed interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which they were made, and determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" (ibid., § 35).

29. The Court accepts that the language used by the applicant could have been considered provocative and the use of expletives gratuitous. However, it observes that there were no indications of disorder or disturbances following the applicant's statements. Neither the *Audiencia Provincial* nor the Government sought to justify the applicant's conviction by reference to incitement to violence or hate speech. Although the Constitutional Court referred to a "feeling of intolerance" transmitted by the applicant, it did not examine whether there were sufficient grounds to find that his statements amounted to hate speech, such as the existence of a tense political or social background or the capacity of the statements to lead to harmful consequences (see *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 204-07, ECHR 2015, and *Erkizia Almandoz v. Spain*, no. 5869/17, § 40, 22 June 2021). The Court further takes account of the fact that the remarks were made orally during a protest, so that the applicant had no possibility of reformulating, refining or retracting them (see *Otegi Mondragon*, cited above, § 54, and *Fuentes Bobo v. Spain*, no. 39293/98, § 48, 29 February 2000), and observes that it has not been argued by the Government that the statements had any broad public impact.

30. On the other hand, the Court considers that the present case is distinguishable from those where the right to freedom of expression has been weighed against the right to respect for a person's private life (see, among many other authorities, *Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012; and *Mesić v. Croatia*, no. 19362/18, 5 May 2022). While the Court is prepared to accept that provocative statements directed against a national symbol may hurt people's feelings, the damage thus caused, if any, is of a different nature compared with that caused by attacking the reputation of a named individual. In the present case, while the *Audiencia Provincial* stated that the military personnel had experienced "an intense feeling of humiliation" (see paragraph 10 above), the fact remains that the applicant's statements were not directed at any person or group of persons. The Court further observes that the applicant's statements did not result in any personal or material damage, that criminal proceedings were brought solely on the initiative of the public prosecutor – an institution which, in the proceedings before the Constitutional Court, asked for the *amparo* appeal to be granted – and that no civil claims were lodged in relation to the applicant's statements (see *Fuentes Bobo*, cited above, § 48).

31. The Court cannot accept the assertion of the Government and the Constitutional Court that the applicant's statements were entirely unrelated to the protests. It notes that the military authorities had 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) could also be considered to be connected to that request, as noted in the judgment of the criminal court, and to constitute an

expression of frustration against the request. The Court considers that it cannot second guess the applicant's intentions but notes that his statements could reasonably be regarded not as a mere insult but as criticism and an expression of protest and dissatisfaction towards the military staff as the employers of the cleaning company employees (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, 30 November 2021).

32. The Court further observes that the applicant was a trade-union representative who made the statements during a protest against unpaid wages. It can therefore be accepted that there was a debate on a matter of general interest for the employees of the cleaning company (see, *mutatis mutandis*, *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 72, ECHR 2011). The Court reiterates in this connection that the members of a trade union must be able to express to their employer the demands by which they seek to improve the situation of workers in their company (ibid., § 56, and see also, *mutatis mutandis*, *Straume v. Latvia*, no. 59402/14, § 103, 2 June 2022). Furthermore, while any individual who takes part in a public debate of general concern – like the applicant in the instant case – must not overstep certain limits, particularly with regard to respect for the reputation and rights of others, a degree of exaggeration, or even provocation, is permitted; in other words, a degree of immoderation is allowed (see *Otegi Mondragon,* cited above, § 54).

33. Lastly, the Court observes that the applicant was sentenced to a fine of 1,260 euros, which could be replaced by deprivation of liberty in the event of non-payment. In the Court's view, the amount of the fine imposed on the applicant was significant and the fact that deprivation of liberty could be imposed as an alternative penalty is particularly relevant (see *Benitez Moriana and Iñigo Fernandez v. Spain*, nos. 36537/15 and 36539/15, §§ 49 and 59, 9 March 2021, and *Rodriguez Ravelo v. Spain*, no. 48074/10, § 44, 12 January 2016). Even if it is in principle for the national courts to set the sentence, in view of the circumstances of the particular case there are common standards which the Court has to ensure in accordance with the principle of proportionality. These standards are the degree of guilt of the person concerned, the seriousness of the offence and whether it was repeated (see *Skałka*, cited above, § 41). The Court observes in this connection that the statements in issue in the present case were made orally by a trade-union representative on only one occasion, before a limited audience, in the context of a protest that lasted several months relating to unpaid wages and that they did not result in any disturbances or disorder. In these circumstances, the Court considers that the severity of the punishment imposed exceeded the seriousness of the offence (compare *Skałka*, cited above, § 42). The foregoing considerations are sufficient to enable the Court to conclude that the criminal

sanction imposed on the applicant, in the particular circumstances of the case, was disproportionate to the aim pursued.

34. Taking into account the circumstances of the case, the Court is not persuaded that the domestic authorities struck a fair balance between the relevant interests at stake when convicting the applicant and imposing such an excessive sanction on him. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

36. The applicant claimed 19,260 euros (EUR) in respect of pecuniary and non-pecuniary damage. He did not claim the reimbursement of his costs.

37. The Government asked the Court to dismiss the just satisfaction claim. They submitted that, in the event of a declaration of a violation of the Convention, the applicant could resort to the domestic authorities for the reimbursement of the amount paid as a fine, and that the amount claimed in respect of non-pecuniary damage was excessive.

38. The Court observes a causal link between the violation found and the pecuniary damage alleged, as the applicant was sentenced to pay a fine amounting to EUR 1,260. It therefore awards the applicant this amount. In addition, the Court notes that the criminal conviction of the applicant might have had a chilling effect on the exercise of his freedom of expression. Taking into account the specific circumstances of the case, namely the context of labour conflict and the applicant's position as a trade-union representative, the Court awards him EUR 6,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 1,260 (one thousand two hundred and sixty euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Georges Ravarani President