

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

1959 • 50 • 2009



CASE OF MUÑOZ DÍAZ v. SPAIN

(Application no. 49151/07)



This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Muñoz Díaz v. Spain,


 President,





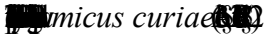





 Judges,
 Section Registrar,






PROCEDURE



For the Government
 Agent,

For the applicant
 Counsel,
 Counsel,

For the third party




marriage is not covered by Spanish legislation, in spite of that ethnic minority's social and cultural roots in our country. However, as noted above, marriages solemnised according to certain religious rites and customs that were, until quite recently, foreign to our society, [do] have a legal framework. These are therefore similar cases, albeit that it is not a religion that is concerned here. They have a similar object (community of cultures and customs present within the Spanish State). The refusal by the INSS to grant the applicant a survivor's pension, the sole obstacle being that the marriage between the widow and the deceased is not recognised, reveals discriminatory treatment on grounds of ethnic affiliation in breach of Article 14 of the Spanish Constitution and Directive 2000/43/EC.”



“... It should be noted that the principle of equality and non-discrimination is based on the idea that equal situations should be treated equally and on [the idea] that equal treatment applied to situations which are not equal constitutes injustice. This also means that the law applicable to all should not be departed from in such a manner [as to enable] the creation of more exceptions than those that are expressly contemplated in that law.

... A distinction must be made between the legislation that is in force and is applicable at all times and what may be considered desirable by a given sector of society.

... Under the provisions of Article 49 of the Civil Code, every Spanish national (such as the applicant and the deceased) may opt for a civil marriage before a magistrate, a mayor or a public official designated [by that Code], or for a religious marriage as provided for by law.

... In accordance with the foregoing, if a civil marriage is to be solemnised through regulated formalities, that must also be the case for a religious marriage, whose formalities will be those of the religious denomination – such formalities being laid down by the State, or otherwise accepted by its legislation. [It will be in such circumstances] that the marriage produces civil effects.

... A marriage solemnised solely and exclusively according to Roma rites is not covered by any of the above-mentioned cases, as even though an ethnic group is concerned, the norms or formalities of that group do not produce any legal effect outside its own environment and are not enshrined in the law that provides for the impugned pension. [Such a marriage], which is certainly meaningful and enjoys social recognition in the environment concerned, does not exclude, and currently does not supersede, the law that is in force and is applicable to the present case, in so far as it concerns a marriage between Spanish nationals that took place in Spain. An ethnic group, moreover, is merely a group which is differentiated on grounds of race ... and a rite is merely a custom or ceremony.

... As far as customs are concerned, under Article 1 § 3 of the Civil Code they only apply in the absence of an applicable law. ... The morality of the rite or its conformity with public order are not called into question, but only its capacity to produce *erga omnes* obligations, whereas in Spain there are statutory norms governing marriage. The answer, clearly, can only be in the negative.

...

A marriage, in order to produce civil effects, can only be one that is solemnised civilly or religiously according to the terms set out above. Roma marriage does not correspond, in the current framework of our law, to the nature of the marriages referred to above. Section 174 of the LGSS requires that a person be the spouse of the deceased in order to benefit from the survivor's pension, and the notion of spouse has been interpreted strictly according to an established constitutional and ordinary case-law (in spite of dissenting views), according to which a couple living together *de facto* as husband and wife and many others who, in reality, are not married under the applicable law, are excluded from the benefit of that pension.”

Imparato

“... The court, in a plenary sitting, reiterated ... the reasons for concluding that to limit the survivor's pension to cases of institutionalised cohabitation as husband and wife, excluding other forms of partnership or cohabitation, did not constitute discrimination on social grounds. In this connection, it was submitted that the legislature retained a significant degree of discretion in determining the configuration of the social-security system and in assessing the socio-economic circumstances in a context of the administration of limited resources with a view to addressing a large number of social needs, bearing in mind that an entitlement to a survivor's pension was not strictly conditional, in a contribution-related system, on an actual situation of necessity or economic dependence, or even unfitness for work, in the case of the surviving spouse. In any event, the plenary court also commented on the fact that the extension, by the legislature, of the survivor's pension to other forms of partnership was not prohibited by Article 14 of the Spanish Constitution either.

...

A supposed discrimination on social grounds must be rejected for the reasons given above. ... No violation of Article 14 arises from the fact of limiting the survivor's pension in practice to married couples.

Similarly, no discriminatory treatment, whether direct or indirect, for racial or ethnic reasons, arises from the fact that the applicant's partnership, in accordance with the rites and customs of the Roma community, has not been assimilated with marriage for the purposes of the said pension, and that the same legal rules as those applying to “*more uxorio*” cohabitation have been applied to it.

Firstly, ... the court reiterated that “discrimination by absence of differentiation” did not arise from Article 14 of the Spanish Constitution, as the principle of equality did not afford a right to [differentiated] treatment, nor did it protect the lack of distinction between different cases. There was thus no individual right to differentiated normative treatment. ...

Secondly, the statutory requirement of a marital relationship as a condition for the enjoyment of a survivor's pension, and the interpretation arising from the impugned decision, taking into account the marital relationship that stems from the legally recognised forms of access to marriage, and not any other forms of cohabitation, in particular partnerships according to Roma habits and customs – such requirement not being in any way related to racial or ethnic considerations, but to the fact [for the interested parties] of having freely chosen not to formalise marriage by recognised statutory, civil or religious procedures – never takes into consideration a person's race

or the customs of a given ethnic group to the detriment of others. As a result, there is no form of covert discrimination here against the Roma ethnic group. ...

Lastly, the court must reject the idea that the recognition of the civil effects of a marital relationship created by certain specific religious rites, but not one that has been solemnised according to Roma rites and customs, and the refusal of the judicial body to accept the latter *mutatis mutandis* [...], may entail directly or indirectly, the alleged ethnic discrimination. ...

To sum up, in view of the fact that the law establishes a general possibility – neutral from a racial and ethnic point of view – of marrying in the civil form, and that the legislature, in deciding to attach statutory effects to other forms of accession to a marital relationship, did so exclusively on the basis of religious considerations and thus without reference to any ethnic grounds, no discriminatory treatment with an ethnic connotation, as alleged, may be found.”

██████████

██████████

██████████

██████████ *imparato* ██████████

“It is disproportionate for the Spanish State, which took into consideration the applicant and her Roma family by issuing them with a family record book, granting them large-family status, affording health-care assistance to her and her six children and collecting the corresponding contributions from her Roma husband for nineteen years, three months and eight days, now to refuse to recognise the Roma marriage when it comes to the survivor's pension.”

██████████

██████████

██████████

Article 14

“Spaniards shall be equal before the law; they may not be discriminated against in any way on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.”

Article 16

“1. Freedom of ideas, religion and worship shall be guaranteed to individuals and communities without any restrictions on its expression other than those necessary for the maintenance of public order as protected by law.

2. No one shall be required to declare his ideological, religious or other beliefs.

...”

Article 32 § 2

“1. Men and women shall have the right to enter into a marriage with full legal equality.

2. The law shall determine the forms of marriage, the requisite age and capacity for marriage, the rights and duties of the spouses, the grounds for separation and dissolution and the effects thereof.”

**Article 42**

“The law recognises two forms of marriage: the canonical form and the civil form.

Marriage shall be solemnised in the canonical form when at least one of the participants identifies with the Catholic faith.

Civil marriage shall be authorised where it is established that neither of the parties identifies with the Catholic faith.”

**Article 245**

“Persons who have renounced the Catholic faith shall, as soon as possible, provide proof that they have given notice of such renunciation to the priest of their home parish.”

Article 246

“...

2. In cases not provided for by the previous provision, proof of non-affiliation to the Catholic faith may be produced, either by a certificate of affiliation to another religious denomination, delivered by the competent minister or the authorised representative of the religious association in question, or in the form of an express declaration by the person concerned before the registrar.”

**Article 44**

“A man and a woman shall have the right to enter into marriage in accordance with the provisions of the present Code.”

Article 49

“Any Spanish national is entitled to marry in Spain or abroad:

1. Before a magistrate, a mayor or a public servant designated by the present Code.
2. In the religious form provided for by law.

[Any Spanish national] may also marry abroad in accordance with the formalities required by the law in the place where the marriage is solemnised.”

**Tenth amendment**

“...

2. [As regards persons] who have not been able to marry on account of the legislation currently in force but who have lived as [a married couple], when the death of one of the partners has occurred before the entry into force of the present law, the survivor will be entitled to the benefits provided for in the first paragraph of the present provision and to the corresponding pension in accordance with the following paragraph.”

**Article 2**

“1. A family shall be classified as large when, in addition to fulfilling the other conditions laid down herein, it is made up of:

- a) the head of the household, his spouse and four or more children ...”.

**Section 174**

“1. The surviving spouse ... shall be entitled to a survivor's pension.

2. ... In the event of nullity of a marriage, the surviving spouse's entitlement to the survivor's pension shall be recognised in proportion to the period of his or her cohabitation with the insured person, provided he or she has not acted in bad faith and has not remarried ...”

Section 174

“1. A survivor's pension shall be granted for life ... to the surviving spouse when, on the death of his or her spouse the latter had been working ... and had paid contributions for the statutory period ...

2. In the event of judicial separation or divorce, a survivor's pension shall be granted to a person who is or was a lawful spouse, provided in the case of divorce that he or she has not remarried, in proportion to the period of cohabitation with the deceased spouse and regardless of the causes of the judicial separation or divorce.

In the event of nullity of a marriage, a survivor's pension shall be granted to the surviving spouse provided that he or she has not acted in bad faith and has not remarried, in proportion to the period of his or her cohabitation with the insured person. ...”

Third transitional amendment

“Exceptionally, a survivor's pension shall be granted where the death of the insured person occurred before the entry into force of the present Act, subject to fulfilment of the following conditions:

(a) at the time of the death of the insured person, who was working and paying social security contributions as provided for by section 174 of the simplified text of the General Social Security Act, [the survivor] was unable to claim an entitlement to the survivor's pension;

(b) the beneficiary and the insured person lived together continuously as unmarried partners ... for at least six years prior to the death;

(c) the insured person and the beneficiary had children together;

(d) the beneficiary has no recognised entitlement to receive a contributory pension from the social security;

(e) to have access to the pension [hereunder], the claim must be filed within a non-extendable period of twelve months following the entry into force of the present Act. The recognition of the pension entitlement will take effect from 1 January 2007, subject to the fulfilment of all the conditions provided for in the present provision.”



Article 1

“The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.

...”

Article 4

“1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.

2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.”

Article 5

“1. The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

2. Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.”



LAW

█

█

Article 14 of the Convention

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 1 of Protocol No. 1

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. ...”

A. Admissibility

█

B. Merits

1. The parties' submissions

(a) The applicant

█ *more uxorio* █

█

(b) The Government

█ *more uxorio* █

█

(c) Third party

█

2. *The applicability of Article 14 of the Convention taken together with Article 1 of Protocol No. 1*

Surden v. the United Kingdom, *Gaygusuz v. Austria*, Reports of Judgments and Decisions, *Thlimmenos v. Greece*, *Koua Poirrez v. France*, *Andrejeva v. Latvia*, *Stec and Others v. the United Kingdom*

Andrejeva v. Latvia, *Kopecký v. Slovakia*, *Domalewski v. Poland*, *Janković v. Croatia*, *Stec and Others*

Stec and Others

3. *Compliance with Article 14 of the Convention taken together with Article 1 of Protocol No. 1*

(a) **The Court's case-law**

D.H. and Others v. the Czech Republic, *Gaygusuz*, *Thlimmenos*, *Thlimmenos*, *Stec and Others v. the United Kingdom*, *D.H. and Others*

National & Provincial Building Society and Others v. the United Kingdom, Reports *Stec and Others*

D.H. and Others

(b) **Application of the case-law to the present case**

more uxorio, *de facto*, *de facto*

Chapman v. the United Kingdom

Buckley, *Buckley v. the United Kingdom*, Reports *Chapman*, *Connors v. the United Kingdom*

de facto

mutatis mutandis, *Buckley v. the United Kingdom*

[REDACTED]

[REDACTED]

[REDACTED] *erga omnes* [REDACTED]

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 12

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *erga omnes* [REDACTED]

[REDACTED]

[REDACTED] v. Switzerland, Christine Goodwin v. the United Kingdom, [REDACTED] v. the United Kingdom [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

“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.”

A. Damage

[REDACTED] *de facto* [REDACTED]

[REDACTED]

mutatis mutandis, *Kingsley v. the United Kingdom*, *Nikolova v. Bulgaria*, *Kadiķis v. Latvia (no. 2)*, *mutatis mutandis, Koua Poirrez*

B. Costs and expenses

The applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In regard being had to the documents in its possession and the above criteria,

C. Default interest

FOR THESE REASONS, THE COURT

Declares

Declares

Holds

Holds

Dismisses

§ 1

Q
B

§ 1

F
R

M
Q

DISSENTING OPINION OF JUDGE MYJER

“*Maria Luisa Muñoz pide en Estrasburgo una reparación histórica para los gitanos*” (Levipens Romani) (Catorce millones de gitanos podrían verse beneficiados de la decisión del Tribunal de Derechos Humanos)

Deweere v. Belgium, *Minelli v. Switzerland*, *abstracto v. Switzerland*

Marckx v. Belgium, *Opuz v. Turkey*, *Christine Goodwin v. the United Kingdom*, *Christine Goodwin*,

v. Switzerland

“Article 12 secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. It is 'subject to the national laws of the Contracting States', but 'the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired'

In all the Council of Europe's member States, these 'limitations' appear as conditions and are embodied in procedural or substantive rules. The former relate mainly to publicity and the solemnisation of marriage, while the latter relate primarily to capacity, consent and certain impediments.”

v. Switzerland, *B. and L. v. the United Kingdom*

Goudswaard-van der Lans v. the Netherlands

“... although the Convention, supplemented by its Protocols, binds Contracting Parties to respect lifestyle choices to the extent that it does not specifically admit of restrictions, it does not place Contracting Parties under a positive obligation to support a given individual's chosen lifestyle out of funds which are entrusted to them as agents of the public weal.”

Marckx v. Belgium, *Kroon and Others v. the Netherlands*, *Marckx*

“The fact that, in law, the parents of an 'illegitimate' child do not have the same rights as a married couple also constitutes a breach of Article 12 in the opinion of the applicants; they thus appear to construe Article 12 as requiring that all the legal effects attaching to marriage should apply equally to situations that are in certain respects comparable to marriage. The Court cannot accept this reasoning; in company with the Commission, the Court finds that the issue under consideration falls outside the scope of Article 12”

[REDACTED] *biter dictum.*
[REDACTED]