

# **Council of Europe: European Court of Human Rights and the Parot Doctrine**

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# Council of Europe: European Court of Human Rights and the Parot Doctrine

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**SUMMARY** In 2006, the Supreme Court of Spain (SCS) adopted the so-called “Parot Doctrine” in which it established that sentence reductions for prison benefits, including remission for work performed, was to apply to each sentence individually and not to the maximum term. The doctrine was challenged before the European Court of Human Rights (ECHR) in the case of *Del Rio Prada v. Spain*, involving a former member of the ETA sentenced to eight sentences, whose prison term was extended by nine years after being recalculated based on this Doctrine.

The European Court of Human Rights, in its judgment of July 2012, unanimously concluded that the Spanish Supreme Court’s application of the new caselaw had not been foreseeable at the time of the applicant’s conviction and had amounted to retroactive application, which was to the applicant’s detriment. Consequently, the ECHR ordered that the applicant be released. Spain challenged the ECHR’s decision and requested that the case be referred to the seventeen-member Grand Chamber of the ECHR. The referral was accepted and a hearing occurred on March 20, 2013.

In an October 2013 judgment, the Grand Chamber of the European Court of Human Rights upheld the 2012 decision of the Chamber and ordered Spain to release the applicant at the earliest possible date and pay just satisfaction along with costs and expenses for a violation of her rights, based on its determination that Spain had violated two key provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. Spain immediately complied with the decision and released the applicant, generating much public controversy.

## I. Introduction

In 2006, the Spanish Supreme Court, departing from its earlier caselaw, which had held that a sentence combining several sentences by imposing the maximum term of imprisonment of thirty years provided by the Spanish Criminal Code was a new sentence subject to prison benefits, including remission for work performed, established the so-called “Parot Doctrine,” named after Unai Parot, a convicted member of the armed Basque separatist group ETA, whose prison term was extended based on the doctrine.<sup>1</sup> This doctrine introduced a new method of calculating prison benefits to each sentence individually, rather than to the maximum prison term of thirty years. The doctrine was challenged before the European Court of Human Rights (ECHR) in the case of *Del Rio Prada v. Spain* on the grounds of the nonretroactivity of criminal law, right to

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<sup>1</sup> *Spain Challenges Human Rights Court over “Parot Doctrine” Ruling*, EITB.COM (July 11, 2012), <http://www.eitb.com/en/news/politics/detail/922240/parot-doctrine--spain-challenges-echr-parot-doctrine/>.

liberty, security of a person, and nondiscrimination, since, as the applicant alleged, it applied discriminatorily to individuals accused of terrorist offenses.<sup>2</sup>

## II. *Del Rio Prada* Case Before the Spanish Courts

The facts of the case involve an applicant, a citizen of Spain, who in eight criminal proceedings was found guilty of terrorist attacks and was sentenced to eight prison terms. If served successively, the applicant would be in prison for more than three thousand years. In November 2000, the Audiencia Nacional (a special high court established in 1977 whose criminal chamber deals with such crimes as terrorism offenses, money laundering, genocide, and others, including international crimes) combined all the sentences for a maximum of thirty years allowed by the Spanish Criminal Code. The prison authorities set the date of release of the applicant for July 2008, after applying remission for work done in prison. The original date of release was June 27, 2017, which was reduced because of work in prison to July 2, 2008.

The Supreme Court of Spain, from March 1994 onwards, had consistently applied its caselaw to hold that the maximum term of thirty years provided for in article 70, para. 2 of the 1973 Criminal Code acted as a “new and autonomous sentence, to which the prison benefit provided for by law should be applied.”<sup>3</sup> These benefits include a reduction of the sentence.<sup>4</sup> However, the Supreme Court changed its position in a judgment dated February 28, 2006, and introduced the Parot Doctrine, which, as noted above, applied remission to each sentence individually and not to the maximum thirty-year term.<sup>5</sup> In its reasoning, the Supreme Court stated that the 1994 decision did not create a precedent, since it had not been applied continuously, as required; but even if it created a precedent, the Court continued, the constitutional principle of equality before law did not prevent the Court from amending its previous judgment, provided that its decision to do so was well substantiated.<sup>6</sup>

In May 2008, the Audiencia Nacional asked the prison authorities to recalculate the release date based on this new caselaw established by the Supreme Court, under which remission was to apply to each sentence individually, and not to the limit of thirty-years imprisonment, as provided for by the Criminal Code. Based on the new caselaw, the release date of the applicant was recalculated for June 27, 2017. The applicant appealed the case with no success.<sup>7</sup>

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<sup>2</sup> Case of *Del Rio Prada v. Spain*, App. No. 42750/09, Judgment of the ECHR (Third Section), paras. 3 & 76, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112108>.

<sup>3</sup> *Id.* para. 41.

<sup>4</sup> *Id.* para. 23 (citing article 78 of the Spanish Criminal Code of 1995).

<sup>5</sup> *Id.* para. 27.

<sup>6</sup> *Id.* para. 28.

<sup>7</sup> *Id.* paras. 14–17.

### III. Case of *Del Rio Prada v. Spain* – European Court of Human Rights

#### A. Chamber's Judgment

The applicant complained before the European Court of Human Rights (ECHR) that the retroactive application of the Supreme Court's caselaw to her case violated article 7, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF), which provides as follows:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.<sup>8</sup>

In addition, the applicant complained that her continued detention infringed article 5 dealing with the right to liberty and security. Lastly, the applicant claimed that the new caselaw of the Spanish Supreme Court violates the prohibition on discrimination, enshrined in article 14 of the CPHRFF, since it is applied by the Spanish courts for political expediency to delay the release of prisoners convicted of acts of terrorism.<sup>9</sup>

The government argued that article 7 applied to crime and punishment but not to the calculation of prison sentences and reduction thereof<sup>10</sup> and stated accordingly that the calculation of benefits to the prison sentence was outside the scope of article 7.

In examining the merits of the case, the ECHR recalled that article 7 has a preeminent place in the Convention and no derogation is allowed even in times of war or other emergency, and that article 7 is not limited to prohibiting retroactivity of the law but also embodies the principle that the criminal law must not be extensively construed to an accused's detriment.<sup>11</sup>

The ECHR also stated that the notion of a "penalty" in article 7 is an autonomous Convention concept, and thus, in order to render the protection offered by article 7 effective, the Court must assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision.<sup>12</sup> The ECHR also noted that its case law has distinguished between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty." In consequence, where the nature and purpose of a measure

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<sup>8</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, para. 1, Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222, *as amended by* Protocols No. 11 and 14, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>.

<sup>9</sup> Case of *Del Rio Prada v. Spain*, App. No. 42750/09, Judgment of the ECHR (Third Section), paras. 3 & 76, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112108>.

<sup>10</sup> *Id.* para. 36.

<sup>11</sup> *Id.* paras. 45–46.

<sup>12</sup> *Id.* para. 48.

relate to the remission of a sentence or a change in a regime for early release, this does not form part of the “penalty” within the meaning of article 7.<sup>13</sup>

In applying the above principles to the *Del Rio* case, the Court stated that the issue that the Court needed to determine in the present case is what the “penalty” imposed on the applicant actually entailed under the domestic law. It stated that it must, in particular, ascertain whether the text of the law, read in the light of the accompanying interpretative case law, satisfied the requirements of accessibility and foreseeability. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time. The ECHR noted that the applicant had, indeed, committed the offenses and that the relevant article of the Spanish Criminal Code of 1973 referred to a limit of thirty years’ imprisonment as the maximum term or sentence to be served in the event of multiple sentences. Thus, the ECHR noted a distinction between the concept of “sentence to be served” and the sentences actually “pronounced” or “imposed,” that is to say the individual sentences pronounced in the different judgments convicting the applicant.<sup>14</sup>

In examining the origins of the Parot Doctrine and subsequent practice followed by the Spanish court, the ECHR also took into consideration the domestic caselaw and practice regarding the interpretation of the relevant provisions of the Criminal Code of 1973. Thus, it noted that in Spain, common practice entailed that when a person was convicted and sentenced to more than one term of imprisonment, the prison authorities and the judicial authorities deemed that the thirty-year limit provided for in the Criminal Code of 1973 became a new sentence eligible for prison benefits, including reduction of sentence for work done.<sup>15</sup> The ECHR noted that this practice originated in the Spanish Supreme Court’s judgment in 1994 and subsequently the courts of Spain applied this ruling to similar cases.<sup>16</sup> In 2006, the Supreme Court introduced a new method of calculating remission to each sentence individually and reasoned that this approach was more consistent with the language of the Spanish Criminal Code of 1973, which differentiated between “penalties imposed” and “penalties to be served.”<sup>17</sup> However, the ECHR acknowledged that this new ruling took effect long after the applicant’s prison term was calculated and resulted in extending the applicant’s prison term by nine years.<sup>18</sup> The ECHR also observed that the new precedent established by the Supreme Court was adopted after the Criminal Code of Spain was amended in 1995 to introduce stricter rules in the calculation of remission. In this respect, the ECHR noted that States are free to change their criminal codes; however,

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* para. 52.

<sup>15</sup> *Id.* para. 53.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* para. 56.

<sup>18</sup> *Id.* paras. 58–59.

the domestic courts must not, retroactively and to the detriment of the individual concerned, apply the spirit of legislative changes brought in after the offense was committed. The retroactive application of later criminal laws is permitted only when the change of law is more favorable to the accused.<sup>19</sup>

Consequently, the ECHR found that there was a violation of article 7 of the CPHRFF.

The ECHR also found that the applicant's detention after July 2008 was not lawful and consequently found a violation of article 5.<sup>20</sup> The ECHR rejected the applicant's argument that the new calculation of prison benefits was applied discriminatorily because it mainly applied to perpetrators of terrorist offenses such as ETA members and not to other prisoners, stating that the precedent established by the Supreme Court was general and was equally applicable to all detainees.<sup>21</sup>

The ECHR ordered that the applicant be released at the earliest possible date and be awarded €30,000 (approximately US\$40,000) for nonpecuniary damages, plus costs and expenses.<sup>22</sup>

## **B. Spain Appeals the ECHR Judgment**

Pursuant to article 43 of the CPHRFF, any party to the case may within three months from the date of a Chamber judgment request that the case be referred to the seventeen-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final.<sup>23</sup>

In July 2012, Spain announced that it would appeal the case. Spain's interior minister also announced that Spain did not intend to release Prada, a convicted member of ETA.<sup>24</sup> In October 2012, following the Spanish government's request, the Grand Chamber of five judges referred the case of *Del-Rio Prada v. Spain* to the seventeen-member Grand Chamber of the ECHR. The issue before the Grand Chamber was the legality of the postponement of the date of the applicant's release, due to the application of new caselaw adopted by the Supreme Court after the

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<sup>19</sup> *Id.* para. 62 (citations in original omitted).

<sup>20</sup> *Id.* para. 75.

<sup>21</sup> *Id.* paras. 76–79.

<sup>22</sup> *Id.* para. 91(5), (6).

<sup>23</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 8, art. 43

<sup>24</sup> EITB.COM, *supra* note 1.

applicant had been sentenced.<sup>25</sup> A hearing took place before the Grand Chamber on March 20, 2013.<sup>26</sup>

### C. Final Judgment of the Grand Chamber and its Implementation

On October 21, 2013, the much-anticipated final judgment of the Grand Chamber (GC) of the European Court of Human Rights (ECHR) in the case of *Del-Rio Prada v. Spain* was issued.<sup>27</sup> The GC, composed of seventeen judges, had to ascertain whether Spanish judicial and prison authorities violated two provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms: (1) article 7, which provides that no punishment may be imposed without a law; and (2) article 5, on the right to liberty and security of a person.<sup>28</sup>

All judgments of the Grand Chamber are final.<sup>29</sup> Spain is required to abide by the final judgment of the Grand Chamber.<sup>30</sup> Once a judgment is final, the ECHR forwards the judgment to the Council of Ministers, which is in charge of supervising its implementation by the national authorities.<sup>31</sup>

Spain has now complied with the GC's final judgment (see discussion below). If Spain had refused to do so, the Committee of Ministers, after serving formal notice on Spain and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, could have referred to the Court the question of whether Spain had failed to fulfill its obligation to abide by the judgment.<sup>32</sup> If the Court had found that Spain failed to fulfill its obligation, it then could have referred the case to the Committee of Ministers for consideration of the measures to be taken. When the Court finds that no violation has occurred, it must refer the case to the Committee of Ministers, which must close its examination of the case.<sup>33</sup>

### IV. Parties' Submissions to the GC

The applicant argued before the GC that the Parot Doctrine, as applied to her case to increase the length of her incarceration, amounted to retroactive imposition of an additional penalty, as the Doctrine was formulated in a 2006 judgment after her original sentence was imposed. She also

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<sup>25</sup> Press Release, ECHR 389, Case Referred to the Grand Chamber (Oct. 23, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4127837-4862363>.

<sup>26</sup> Press Release, ECHR 086, Grand Chamber Hearing Concerning the Date of a Convicted Terrorist's Release (Mar. 20, 2013), <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4298564-5137753>.

<sup>27</sup> Case of *Del Rio Prada v. Spain*, Grand Chamber of the ECHR, Oct. 21, 2013, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127697>.

<sup>28</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 8, arts. 5 & 7.

<sup>29</sup> *Id.* art. 44, para. 1.

<sup>30</sup> *Id.* art. 46, para. 1.

<sup>31</sup> *Id.* para. 3.

<sup>32</sup> *Id.* para. 4.

<sup>33</sup> *Id.* para. 5.

claimed that the Supreme Court's (SC's) departure from its earlier case law in the 2006 decision could not have been reasonably foreseen based on its previous practice and case law.<sup>34</sup> In addition, the applicant raised the argument that the Spanish government failed to justify the reasons the Parot Doctrine was applied retroactively or, additionally, that it was applied as a response to "new social realities."<sup>35</sup>

For its part, the Spanish government reiterated that the applicant was an ETA member who had committed a number of terrorist acts from 1982 until 1987, when she was detained. The government supplied information to the GC that the Parot Doctrine had been applied to ninety-three convicted members of ETA and thirty-seven other people who were convicted of particularly serious crimes (drug traffickers, rapists, and murderers).<sup>36</sup>

The government conceded that the Spanish courts and prison authorities applied remissions of sentences for work performed during detention to the thirty-year maximum term of imprisonment. However, the government argued that this practice was related to the execution of that penalty. The government also cited a number of judgments of the Constitutional Court that followed the distinction between a "penalty" and its "execution." The government argued that the Chamber of the ECHR erred in its decision on the issue of predictability—that is, whether a person in detention should be able to predict the exact term of imprisonment they will be subject to. Furthermore, it argued that since prison authorities were in charge of remissions, the Supreme Court of Spain should be immune from criticism for departing from its earlier practice on application of remissions and that the 2006 departure from its case law did not violate article 7 of the European Convention on Human Rights and Fundamental Freedoms.<sup>37</sup>

## **V. Grand Chamber's Review**

### **A. Article 7 (No Punishment Without a Law)**

Under article 7, the GC examined the scope of the penalty imposed on the applicant on the basis of the applicable Spanish law and the practice of the Spanish courts.

The GC noted that, prior to the SC's establishment of the Parot Doctrine in its 2006 judgment, the Spanish prison authorities and the Spanish courts consistently applied any remissions of sentences to the thirty-year maximum sentence and not to individual sentences imposed by judgments on the applicant. The GC also took note that the SC itself endorsed this approach in a 1994 judgment.<sup>38</sup>

Furthermore, the GC noted that this approach was applied to a large number of convicted individuals like the applicant, until the Supreme Court took a different approach in 2006 in a

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<sup>34</sup> Case of Del Rio Prada v. Spain, Grand Chamber of the ECHR, paras. 62 & 63.

<sup>35</sup> *Id.* para. 69.

<sup>36</sup> *Id.* para. 44.

<sup>37</sup> *Id.* para. 73.

<sup>38</sup> *Id.* paras. 35–39.

case involving a member of the ETA group, named Parot. In the Parot case, the SC held that remissions of sentence granted to prisoners were to be applied to each of the sentences imposed and not to the maximum term of thirty years provided for in article 70.2 of Spain's Criminal Code of 1973. The GC thoroughly reviewed the reasoning and arguments used by the SC on which it based its decision and also reviewed the opinion of the three dissenting judges. In addition, it noted that the Supreme Court upheld the Parot Doctrine in subsequent decisions.<sup>39</sup>

The GC also reviewed the judgment of the Chamber of the Court of Human Rights, which was adopted on July 10, 2012.<sup>40</sup>

The GC examined the issue of whether the application of the Parot Doctrine to the applicant had affected the manner of execution or enforcement of her sentence, or affected its scope.<sup>41</sup> It reiterated the distinction between measures that constitute a "penalty" and measures that relate to the manner of its "execution." The GC stated that the concept of a "penalty" under article 7, section 1 of the European Convention on Human Rights and Fundamental Freedoms is an autonomous Convention concept and that the GC had to assess for itself whether a particular measure amounted to a penalty.<sup>42</sup> The Court noted that only penalties fell within the scope of article 7.<sup>43</sup>

The GC held that at the time the applicant was convicted for the crimes committed, and when the decision to combine the sentences and fix a maximum prison term was made, the applicable Spanish law and relevant caselaw were stated sufficiently enough to raise reasonable expectations on the applicant's part as to the scope of the penalty imposed on her.<sup>44</sup>

The GC went on to examine whether application of the Parot Doctrine to the applicant altered only the means of execution of the penalty or its actual scope.<sup>45</sup>

The GC noted that application of the Parot Doctrine to the present case could not be regarded as a measure relating solely to the execution of the penalty imposed on the applicant, as the government argued. The GC stated that the measure taken by the court that convicted the applicant also led to the redefinition of the scope of the penalty imposed, and that, "[a]s a result of the 'Parot doctrine', the maximum term of thirty years' imprisonment ceased to be an independent sentence to which remissions of sentence for work done in detention were applied, and instead became a thirty-year sentence to which no such remissions would effectively be

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<sup>39</sup> *Id.* para. 43.

<sup>40</sup> *Id.* paras. 57–60.

<sup>41</sup> *Id.* para. 83.

<sup>42</sup> *Id.* para. 81.

<sup>43</sup> *Id.* paras. 81–90.

<sup>44</sup> *Id.* para. 103.

<sup>45</sup> *Id.* paras. 104–110.

applied.”<sup>46</sup> Therefore, the GC concluded that the measure fell within the scope of article 7, paragraph 1 of the Convention.<sup>47</sup>

As to the issue of whether the Parot Doctrine was reasonably foreseeable, the GC held that, based on the circumstances of this case, at the time when the applicant was convicted and at the time she was notified of the decision to combine her sentences and set a maximum term of imprisonment, the applicant had no indications that the Supreme Court might depart from its previous caselaw. Furthermore, the applicant could not foresee that the Audiencia Nacional, as a result, would apply the remissions of sentence granted to her not in relation to the maximum thirty-year term of imprisonment to be served, but individually to each of the sentences she had received. The GC held that the SC’s departure from the caselaw had the effect of modifying the scope of the penalty imposed, to the applicant’s detriment.<sup>48</sup> Consequently, the GC concluded that there was a violation of article 7 of the Convention.<sup>49</sup>

### **B. Article 5, Paragraph 1 (Right to Liberty and Security of the Person)**

The Court noted that, while article 7 applied to the penalty imposed by the Spanish courts, the scope of article 5 applied to the resulting decision.

In applying article 5, paragraph 1 to this case, the GC stated that it did not question the fact that the applicant was convicted by a competent court in accordance with a procedure prescribed by law, within the meaning of article 5, section 1(a) of the Convention. The GC admitted that the applicant herself “did not dispute that her detention was legal until 2 July 2008—the date initially proposed by the prison authorities for her final release.” The Court was therefore required to establish whether the applicant’s continued detention after that date was “lawful” within the meaning of article 5, section 1 of the Convention.<sup>50</sup>

The GC went on to examine whether the law on whose authority the continuing detention of the applicant beyond July 2, 2008, was based was ‘sufficiently foreseeable’ in its application. It stated that compliance with the foreseeability requirement must be examined with regard to the law in force at the time of the initial conviction and throughout the subsequent period of detention.<sup>51</sup>

The GC opined that, based on the totality of circumstances—in particular, when the applicant was convicted, when she worked during the period of her detention, and when she was notified by prison authorities of the decision to combine the sentences and set a maximum term of imprisonment—the applicant “could not have foreseen to a reasonable degree” that the method used to apply remissions of sentence for work done in detention would be affected because of the

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<sup>46</sup> *Id.* para. 109.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* para. 117.

<sup>49</sup> *Id.* para. 118.

<sup>50</sup> *Id.* para. 128.

<sup>51</sup> *Id.* para. 130.

departure of the SC's case law in 2006. Furthermore, as the GC noted, the applicant also could not reasonably have foreseen that the new method of calculating remissions would be applied to her case.<sup>52</sup>

The GC acknowledged that the new approach of the Supreme Court to the applicant's case in effect prolonged her detention by almost nine years. The GC concluded that the applicant "served a longer term of imprisonment than she should have served under the domestic legislation in force at the time of her conviction, taking into account the remissions of sentence she had already been granted in conformity with the law."<sup>53</sup>

Consequently, the GC found unanimously that there was a violation of article 5, paragraph 1, and that since July 3, 2008, the applicant's detention had not been "lawful."<sup>54</sup>

## **VI. Execution of Judgment and Appeal**

In this particular case, the GC decided that the only appropriate measure to be taken by Spain was to release the applicant at the earliest possible date. It also held that Spain must pay the applicant nonpecuniary damages in the amount of €30,000 (about US\$40,572) within three months, and €1,500 (about US\$2,028) for costs and expenses.<sup>55</sup>

Following the GC's judgment, Spain immediately complied with the ruling and released the applicant.<sup>56</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* para. 131.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* paras. 137–139, 145.

<sup>56</sup> *Spain Releases Eta Convict After European Court Ruling*, BBC NEWS EUROPE (Oct. 22, 2013), <http://www.bbc.co.uk/news/world-europe-24624913>; see also *Thousands Protest in Madrid Against a European Court Ruling that Led to Release of ETA Prisoner*, EURONEWS (Oct. 27, 2013), <http://www.euronews.com/2013/10/27/thousands-protest-in-madrid-against-a-european-court-ruling-that-led-to-release-of-eta-prisoner/>.