

In the case of *Moreno Gómez v. Spain*,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:
Sir Nicolas Bratza, *President*,

Mr M. PELLONPÄÄ,

Mr J. Casadevall,

Mr S. Pavlovschi,

Mr J. Borrego Borrego,

Mrs E. Fura-Sandström,

Ms L. Mijovic, *judges*,

and Mr M. O'Boyle, *Section Registrar*,

Having deliberated in private on 29 June and 26 October 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 4143/02) 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, Ms Pilar **Moreno Gómez** ("the applicant"), on 22 November 2001.

2. The applicant was represented by Mr Andrés Morey Navarro, of the Valencia Bar. The Spanish Government ("the Government") were represented by Mr Ignacio Blasco Lozano, Agent of the Government and Head of the Legal Department of the Human-Rights Office at the Ministry of Justice.

3. The applicant alleged a breach of her right to respect for her home, contrary to Article 8 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

5. By a decision of 29 June 2004 the Chamber declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 14 September 2004 the applicant lodged a written reply to the Government's observations and her claim for just satisfaction. The Government did not lodge any comments on her claim.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1948 and lives in Valencia.

A. Background to the case

9. The applicant has lived in a flat in a residential quarter of Valencia since 1970.

10. Since 1974 the Valencia City Council has allowed licensed premises such as bars, pubs and discotheques to open in the vicinity of her home, making it impossible for people living in the area to sleep.

11. Local residents first complained about vandalism and noise in the locality before 1980.

12. In view of the problems caused by the noise, the Valencia City Council resolved on 22 December 1983 not to permit any more night clubs to open in the area. However, the resolution was never implemented and new licences were granted.

13. In 1993 the City Council commissioned a report by an expert. The expert found that the noise levels were unacceptable and exceeded permitted levels. At 3.35 a.m. on Saturdays they were in excess of 100 dBA Leq (decibels), ranging from 101 to 115.9 dBA Leq.

14. In a report of 31 January 1995 the police informed the Valencia City Council that nightclubs and discotheques in the sector in which the applicant lived did not systematically close on time. They said that they were able to confirm that the local residents' complaints were founded.

15. On 28 June 1996 the City Council approved a new bylaw on noise and vibrations, which was published on 23 July 1996 in the Official Gazette of Valencia province. Article 8 of the bylaw lays down that in a family residential area (such as the one in which the applicant lives) external noise levels were not to exceed 45 dBA Leq between 10 p.m. and 8 a.m. Article 30 of the bylaw defines "acoustically saturated zones" as areas in which the large number of establishments, activity of the people frequenting them and passing traffic expose local residents to high noise levels and cause them serious disturbance.

16. Lastly, the bylaw specified the conditions that had to be satisfied for an area to be designated an "acoustically saturated zone" (*zona acústicamente saturada*) and the consequences of designation, which included a ban on new activities (such as nightclubs and discotheques) that led to acoustic saturation.

17. Following a resolution of the Valencia City Council sitting in plenary session on 27 December 1996, which was published in the Official Gazette of the Valencia province on 27 January 1997, the area in which the applicant lived was designated an acoustically saturated zone.

18. Nevertheless, on 30 January 1997 the City Council granted a licence for a discotheque to be opened in the building she lived in. The licence was subsequently declared invalid by a judgment of the Supreme Court of 17 October 2001.

19. In order to determine whether the area should be designated an acoustically saturated zone, the City Council took various sound-level readings to monitor acoustic pollution there. In each of its reports the City Council laboratory indicated that the noise levels exceeded those permitted by the bylaw.

B. Court proceedings

20. The applicant was exasperated by the situation, which prevented her from sleeping and resting and caused her insomnia and serious health problems. On 21 August 1997 she lodged a preliminary claim with the Valencia City Council in which she relied on Article 15 (right to life and to physical integrity) and Article 18 § 2 (right to the privacy and inviolability of the home). She sought 3,907 euros (650,000 pesetas) for the damage she had sustained and the cost of installing double glazing.

21. Having received no reply from the authorities and in accordance with the Fundamental Rights (Protection) Act (Law no. 62/1978), the applicant lodged an application for judicial review with the Valencia High Court of Justice on 25 November 1997, alleging a violation of Articles 15 and 18 § 2 of the Constitution.

22. On 2 October 1997 the Valencia City Council lodged its written observations. It submitted that the application was premature and should be declared inadmissible, as the Council could still find a solution. This preliminary objection was dismissed in a decision of 27 October 1997.

23. On 11 December 1997 the representative of state council's office argued that the court should find in favour of the applicant. He considered that there had been a violation of Articles 15 and 18 § 2 of the Constitution and that the applicant's claim for damages was justified.

24. In a judgment of 21 July 1998, delivered after an adversarial hearing in public, the Valencia High Court of Justice dismissed the application for judicial review. It found that the readings had been taken in the entrance hall to the building, not in the applicant's flat, and could not entail a violation of Articles 15 and 18 § 2 of the Constitution; it also noted that the medical expert's report stated only that the applicant had been receiving treatment for insomnia for several years, without indicating the length of or reason for such treatment.

25. On 9 October 1998 the applicant lodged an *amparo* appeal with the Constitutional Court. Relying on Articles 14 (equality) and 24 (right to a fair hearing) of the Constitution, she complained that the High Court of Justice had not given sufficient reasons in its judgment or assessed the evidence. She also complained under Articles 15 and 18 § 2 of the Constitution of a violation of her rights to life, physical and mental integrity, privacy and the inviolability of the home.

26. In a decision of 29 May 2000, the Constitutional Court declared the *amparo* appeal admissible and invited the applicant, the representative of state council's office and the Valencia City Council to submit their observations. On the same day, it summoned the parties to a hearing on the merits on 16 May 2001.

27. At the hearing on 16 May 2001, which was attended by all the parties, the applicant repeated her factual and legal submissions, stressing that there had been a violation of her fundamental rights.

28. The Valencia City Council raised a number of preliminary objections. It further submitted that the appeal was confined to the decision of the Valencia High Court of Justice. With regard to the alleged violation of Articles 15 and 18 § 2 of the Constitution, it stated that there was no evidence of noise levels inside the applicant's home and that the authority concerned should not bear sole responsibility for the noise to which the applicant had allegedly been exposed, as it had very limited means at its disposal to combat it.

29. The representative of state council's office agreed with the applicant that there had been a violation of Articles 15 and 18 § 2 of the Constitution. He argued that the *amparo* appeal should be regarded as hybrid, since it both accused the Valencia City Council of failing to defend the fundamental rights set out in Articles 15 and 18 of the Constitution and challenged the Valencia High Court of Justice's decision, alleging a violation of Articles 14 and 24 of the Constitution also.

30. As regards the violation of Articles 15 and 18 § 2 of the Constitution, the representative of state council's office said that, in the light of the judgments of the European Court of Human Rights, in particular in the case of *López Ostra v. Spain*, there had been a violation of the applicant's right to the inviolability of her home, as her home environment had been rendered unfit for ordinary everyday living. On the basis of the Court's case-law, he sought a broader definition of the constitutional concept of the "home".

31. As regards noise levels inside the applicant's home, the representative of state council's office considered that the burden of proof had been reversed, as it was clear in the instant case that officials from the City Council had confirmed on a number of occasions that the maximum permitted noise levels were being exceeded. Consequently, he did not consider it necessary to require such proof from the applicant.

32. In a judgment of 29 May 2001, which was served on 31 May 2001, the Constitutional Court dismissed the appeal after also dismissing the Valencia City Council's preliminary objections. It ruled that the *amparo* appeal was hybrid in nature, that is to say that it alleged a violation of Articles 15 and 18 § 2 of the Constitution by the Valencia City Council and a breach of Articles 14 and 24 of the Constitution by the Valencia High Court of Justice.

33. As regards the alleged violation of Articles 14 and 24 of the Constitution, the Constitutional Court began by noting that it was not entitled to substitute the High Court's assessment of the evidence with its own. As to the applicant's allegation that the judgment did

not contain sufficient reasons, it noted that the High Court's decision could not be regarded as arbitrary or unreasonable. It further observed that the applicant had not identified the decisions on which she relied in alleging discrimination. Thus, there was no evidence of any violation of Articles 14 and 24 of the Constitution.

34. With regard to the alleged violation of Articles 15 (right to life and physical integrity) and 18 § 2 (right to privacy and to the inviolability of the home) of the Constitution, the Constitutional Court referred to the decisions in which the European Court of Human Rights had held that, in cases of exceptional gravity, repeated damage to the environment could infringe the right to respect for private and family life under Article 8 § 1 of the Convention, even if it did not endanger health. The Constitutional Court held, however:

“... there may only be a violation of Article 15 of the Constitution if the level of acoustic saturation to which a person is exposed as a result of an act or omission of a public authority causes serious and immediate damage to his or her health.”

35. The Constitutional Court found that that test had not been satisfied in the case before it and pointed out:

“... even though the appellant maintains that the noise levels to which she was exposed turned her into an insomniac, the only evidence she has adduced is a certificate stating that she was admitted to hospital and saw a doctor, without any indication of the period for which she had been suffering from lack of sleep or the cause thereof. ...”

36. The Constitutional Court found that the applicant had not established a direct link between the noise and the damage she had sustained.

37. As to the allegation of a violation of Article 18 of the Constitution, the Constitutional Court further found that she had not established the existence of a nuisance in her home that amounted to a violation of the constitutional provision. It stated:

“... the appellant has confined herself to making a general complaint by stating that the origin of the noise was diffuse and not restricted to a single source of production, and that the acoustic saturation resulted from a combination of noises. ... On the contrary, her entire case is based on a few sound-level readings taken inside her home which gave disparate results ... and do not establish that there has been a violation of the right relied on. ...”

38. By way of conclusion, the Constitutional Court dismissed the *amparo* appeal on the following ground:

“Consequently, as regards the alleged violation of the rights relied on the *amparo* appeal must be dismissed, as the appellant has failed to prove the existence of a genuine effective breach of fundamental rights attributable to the Valencia City Council.”

39. That judgment was delivered by the Constitutional Court sitting as a full court. However, two judges expressed concurring opinions. The first said that the judgment restricted the free development of the personality at home. He considered that the conditions that had to be satisfied for there to be a violation of fundamental rights in the case under consideration were unreasonable and he defended the need to speak of a triple layer of constitutional protection, ranging from the right to physical and moral integrity (Article 15 of the Constitution) to an environment that was suitable for personal development (Article 45 § 1 of the Constitution), via the right to privacy in the home (Article 18 § 2 of the Constitution).

40. The second judge pointed out in his concurring opinion that there was a preliminary problem that had not been adequately dealt with, namely the degree to which the relevant authority was required to provide the requested protection. Determining the extent of that obligation was a prerequisite to establishing whether or not there existed a causal link between the authority's failure to act and the alleged violation. The authorities were obliged to exercise their power when the breach of the fundamental rights attained a certain level of gravity.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

41. The relevant provisions of the Constitution are as follows:

Article 10 § 2

“The provisions relating to the fundamental rights and freedoms recognised under the Constitution shall be construed in accordance with the Universal Declaration of Human Rights and the international treaties and agreements which Spain has ratified in that sphere.”

Article 15

“Everyone shall have the right to life and to physical and mental integrity. ...”

Article 18 § 2

“The home shall be inviolable. ...”

Article 45 § 1

“Everyone shall have the right to enjoy an environment suitable for personal development and the duty to preserve it.

...”

Article 53 § 2

“Every citizen shall be entitled to seek protection of the freedoms and rights recognised in Article 14 and in the first section of Chapter II by bringing an action in the ordinary courts under a procedure designed to ensure priority and expedition and, in appropriate cases, by an appeal (*recurso de amparo*) to the Constitutional Court...”

B. The Fundamental Rights (Protection) Act (Law no. 62/1978)

42. Section 6, which was repealed by the Administrative Courts Act of 13 July 1998 (Law no. 29/1998), read as follows:

“... [a]n application for judicial review may be brought in accordance with the procedural rules set out in this section in respect of decisions of the public authorities that are subject to administrative law and liable to affect the exercise of the fundamental rights of the person...”

C. The Constitutional Court Act

43. The relevant parts of Article 44 of the Constitutional Court Act reads:

“1. An *amparo* appeal for violations of rights and guarantees amenable to constitutional protection ... will lie only if:

...

(c) the party relying on the alleged violation formally pleads it in the relevant proceedings after becoming aware of its occurrence.”

D. The bylaw on noise and vibrations issued by the Valencia City Council on 28 June 1986

44. The relevant provisions of the bylaw provide:

Article 8 § 1

“Permitted external noise-reception levels shall be determined by reference to the main user of each of the areas marked on the city development plan and shall not exceed:

Maximum reception levels:

...

Multiple family residence:

Daytime (from 8 a.m. to 10 p.m.): 55 dB (A)

Night-time (from 10 p.m. to 8 a.m.): 45 dB (A)

...”

Article 30

“1. Zones that are acoustically saturated by additional causes are areas or places in which the large number of establishments, activity of the people frequenting them and passing traffic expose local residents to high noise levels and cause them serious disturbance.

2. An area may be designated an acoustically saturated zone (ASZ) if, though individual activities are compliant with the levels set out in this bylaw, the level of disturbance due to external noise as referred to in Article 8 is exceeded twice-weekly in consecutive weeks, or three times intermittently over a period of 35 days, and exceeds 20 dB (A).”

E. The expert report

45. The relevant parts of the report drawn up by Mr X, a professor of applied physics, on the sound-level readings taken in the district in which the applicant lived in Valencia read as follows:

“The results obtained from measurements taken by the Valencia University acoustic laboratory over a period of several years in the said area and measurements taken by other bodies showed that ambient noise levels in this area, in particular at nights and weekends (especially between 1 a.m. and 3 a.m.) are extremely high. At these periods in the area concerned the hourly equivalent sound levels (Leq) frequently exceed 70 dB (A) and the maximum corresponding levels exceed 80 dB (A).

As a result, we can say that noise levels in dwellings in this urban area are intolerably high at night-time and, consequently, detrimental to the health and well-being of the residents.

This conclusion is based on the fact that, even with the windows closed (including in the height of summer), indoor noise levels are very high. It should be noted that under the current regulations (building norm NBE-CA-88) the minimum insulation requirement for the frontage of buildings is 30 dB (A). In practice, that figure is never attained and is generally in the region of 15 to 20 dB (A).

Consequently, in these circumstances, night-time noise levels inside the dwellings, for example in bedrooms overlooking the street, can be estimated at in the region of 50 dB (A), with maximum levels reaching approximately 60 dB (A). We would point out that this is a general estimate and is made without the need for specific measurements to be taken inside the dwellings concerned.

We should explain here that the difference between 50 or 60 dB (A) and 30 dB (A) is enormous. Thus, an increase from 30 to 33 dB (A) does not represent a slight increase in noise (as a layman might think) but the doubling in intensity of the corresponding noise. An informed reading of this report is only possible if the meaning of the “decibel” unit used here is correctly understood.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

46. The applicant complained of noise and of being disturbed at night by nightclubs near her home. She alleged that the Spanish authorities were responsible and that the resulting onslaught of sound constituted a violation of her right to respect for her home, as guaranteed by Article 8, which provides:

Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except as such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Submissions of the parties

1. *The applicant*

47. The applicant complained of inaction on the part of the local authorities in Valencia, in particular the City Council, which had failed to put a stop to the night-time disturbances. She said that the Government had not put forward any explanation for the failure to act.

48. Firstly, although the Valencia City Council was not the direct source of the noise pollution, it had, in the applicant’s submission, caused the acoustic saturation by issuing an unlimited number of licences, without taking measures to comply with the law. The applicant referred to the principles that had been established in the case of *Lopez Ostra v. Spain* (judgment of 9 December 1994, Series A no. 303-C, § 51), which concerned the effects of pollution outside the home but also the frame of reference for fundamental rights, in particular the home. She added that the municipal bylaw required measurements of noise emissions from external sources to be taken at the front of the building in which the dwelling was located.

49. In her additional observations of 14 September 2004, the applicant observed that the level of the night-time disturbance (from 10 p.m. to 6.30 p.m.) caused by more than 127 nightclubs infringed the right to health, as indeed was confirmed by the World Health Organisation’s guidelines. Unlike the position in the case of *Hatton and Others v. the United Kingdom* [GC] (no. 36022/97, ECHR 2003-VIII), her home was neither within nor adjacent to an area of vital importance, such as an area relevant to a strategic transport or communications infrastructure. She stressed that her home was in an urban area, specifically, a residential one.

2. *The Government*

50. The Government submitted that the noise to which the applicant referred came from private activities and that, consequently, there had not been direct interference by the authorities in the right to the intimacy of the home and to respect for private and family life. They added that the Valencia City Council had taken various measures in order to solve the problem of acoustic pollution in the area in which the applicant lived. These included preparing and approving a comprehensive and stringent municipal bylaw, designating acoustically saturated zones and a policy of imposing penalties, withdrawing licences and prosecuting offenders.

51. Even assuming that the applicant had been exposed from time to time to acoustic pollution and had been able to prove the effect of the noise inside her home, the relevant authorities had already taken sufficient measures to remedy the situation.

52. In addition, the courts had noted in their decisions that the applicant had failed to establish that she had been exposed to noise inside her home emanating from night-time

disturbances and that, in any event, Article 8 protection was restricted to the home and could not apply when the subject matter of the complaint was a nuisance outside the home. The Government accordingly maintained that no interference with the applicant's right to respect for her home could be found.

B. The Court's assessment

1. General principles

53. Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home (see *Hatton and Others v. the United Kingdom* cited above, § 96).

54. Thus in the case of *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172, § 40), the Court declared Article 8 applicable because: "In each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home ha[d] been adversely affected by the noise generated by aircraft using Heathrow Airport". In the aforementioned case of *López Ostra v. Spain*, which concerned noise pollution and a waste-treatment plant, the Court said: "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health". In the case of *Guerra and Others v. Italy* (judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, § 57), the Court observed: "The direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable". Lastly, in the case of *Surugiu v. Romania* (no. 48995/99, 20 April 2004), which concerned various acts of harassment by third parties who entered the applicant's yard and dumped several cartloads of manure in front of the door and under the windows of the house, the Court found that the acts constituted repeated interference by third parties with the applicant's right to respect for his home and that Article 8 of the Convention was applicable.

55. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities' adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, among other authorities, *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, pp. 1505, § 62; and *Surugiu v. Romania*, cited above, § 59). Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (see *Hatton and Others v. the United Kingdom*, cited above, § 98).

56. The Court reiterates that the Convention is intended to guarantee rights that are “practical and effective”, not “theoretical or illusory” (see, among other authorities, *Papamichalopoulos and Others v. Greece*, judgment of 24 June 1993, Series A no. 260-B, § 42).

2. Application of the above principles in the instant case

57. The present case does not concern interference by public authorities with the right to respect for the home, but their failure to take action to put a stop to third-party breaches of the right relied on by the applicant.

58. The Court notes that the applicant lives in an area that is indisputably subject to night-time disturbances; this clearly unsettles the applicant as she goes about her daily life, particularly at weekends. The Court must now determine whether the nuisance caused by the noise attained the minimum level of severity required for it to constitute a violation of Article 8.

59. The Government have argued that the domestic courts found that the applicant has failed to establish the noise levels inside her home. The Court considers that it would be unduly formalistic to require such evidence in the instant case, as the City authorities have already designated the area in which the applicant lives an acoustically saturated zone, which, according to the terms of the municipal bylaw of 28 June 1986, means an area in which local residents are exposed to high noise levels which cause them serious disturbance (see paragraph 44 above). In the present case, the fact that the maximum permitted noise levels have been exceeded has been confirmed on a number of occasions by council staff (see paragraphs 14 and 19 above). Consequently, there appears to be no need to require a person from an acoustically saturated zone such as the one in which the applicant lives to adduce evidence of a fact of which the municipal authority is already officially aware. Thus, in the domestic proceedings, the representative of state council’s office did not consider it necessary to require the applicant to adduce such evidence (see paragraph 31 above) and added that there had been a reversal of the burden of proof in the present case.

60. In view of the volume of the noise – at night and beyond the permitted levels – and the fact that it continued over a number of years, the Court finds that there has been a breach of the rights protected by Article 8.

61. Although the Valencia City Council has used its powers in this sphere to adopt measures (such as the bylaw concerning noise and vibrations) which should in principle have been adequate to secure respect for the guaranteed rights, it tolerated, and thus contributed to, the repeated flouting of the rules which it itself had established during the period concerned. Regulations to protect guaranteed rights serve little purpose if they are not duly enforced and the Court must reiterate that the Convention is intended to protect effective rights, not illusory ones. The facts show that the applicant suffered a serious infringement of her right to respect for her home as a result of the authorities’ failure to take action to deal with the night-time disturbances.

62. In these circumstances, the Court finds that the respondent State has failed to discharge its positive obligation to guarantee the applicant’s right to respect for her home and her private life, in breach of Article 8 of the Convention.

63. There has consequently been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION (...)