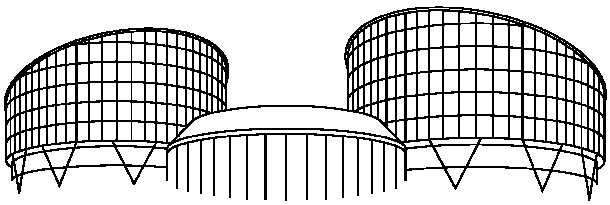

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no.24931/07
Jacinto JAURRIETA ORTIGALA
against Spain

The European Court of Human Rights (Third Section), sitting on 22 January 2013 as a Chamber composed of:
JosepCasadevall, *President,*
AlvinaGyulumyan,
CorneliuBîrsan,
JánŠikuta,
LuisLópez Guerra,
NonaTsotsoria,
ValeriuGriţco, *judges,*
and Santiago Quesada, *Section Registrar,*
Having regard to the above application lodged on 8 June 2007,
Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Jacinto JaurrietaOrtigala, is a Spanish national, who was born in 1957 and lives in Tuleda (Navarra). He was represented before the Court by Ms A. GuelbenzuUralde, a lawyer practising in Pamplona.
2. The Spanish Government ("the Government") were initially represented by their Agent, Mr F. IrurzunMontoro, and later by their Agent, Mr F. SanzGandasegui.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. When the applicant brought his application before the Court, he was in prison serving a sentence of four years and one month imposed on him by the *AudienciaNacional* and a sentence of fifteen months imposed on him by criminal judge no. 4 of San Sebastián for crimes against public health and threatening behaviour.

5. On 19 January 2006 he was refused ordinary leave from prison by the Prison Board.

6. The applicant brought an application for judicial review before the central judge in charge of prisons in Madrid ("the central prison judge"). He argued, *inter alia*, that he had used the leave that he had been granted in the past to stay with his family and that that was the purpose of his most recent request for leave.

7. On 7 March 2006 the central prison judge upheld the administration's refusal on the grounds that the applicant might breach the conditions of leave (25% risk), the applicant was the subject of further criminal proceedings pending before the courts, and there was no guarantee that the leave, if granted, would be used for a proper purpose.

8. On 31 March 2006 the decision to refuse leave was again upheld by the central prison judge following a *reforma* appeal lodged by the applicant.

9. The applicant requested legal aid in order to lodge an appeal against that decision with the *AudienciaNacional*.

10. On 12 November 2006, having not yet received a reply to his request for legal aid in the instant proceedings, the applicant received and acknowledged receipt of a notification from the central prison judge that he had been granted legal aid in other proceedings concerning leave of absence from prison. The applicant asked whether he had been granted legal aid for his request for ordinary prison leave in the instant case.

11. On 18 December 2006 the applicant was served with a notification signed by the court clerk(*diligencia de ordenación*) informing him that a decision had been delivered by the *AudienciaNacional* on 23 June 2006 regarding the instant case and that it had been faxed to Pamplona Prison on 5 July 2006. The *AudienciaNacional* had upheld the decision to refuse prison leave. The applicant acknowledged official receipt of the notification on 19 December 2006.

12. On 21 December 2006 the applicant wrote to the central prison judge acknowledging receipt of the notification of 18 December 2006 and complaining that he had not been informed that he had been granted legal aid, that he had accordingly been assigned legal counsel and a legal representative in those proceedings and that he had never been served with the *AudienciaNacional*'s decision.

13. On 18 January 2007 the central prison judge replied to the applicant, reiterating the content of the notification of 18 December 2006.

14. On 25 January 2007 the applicant lodged an *amparo* appeal with the Constitutional Court. He contended that he had not been informed that he had been granted legal aid in those particular proceedings and that therefore a legal counsel and legal representative had been assigned to him for his defence. He further contended that he could not provide the Constitutional Court with the *AudienciaNacional*'s decision of 23 June 2006, which had purportedly been faxed to his prison on 5 July 2006, because he had never been served with it. He further contended that although in those circumstances he could not challenge the merits of the *AudienciaNacional*'s decision, he had nevertheless complied with all the requirements laid down by the legislation to be granted ordinary leave from prison, and that the refusal was therefore not justified.

15. On 9 February 2007 the applicant was served with notification that the Constitutional Court had asked the *AudienciaNacional* for a certified copy of its decision of 23 June 2006, stamped with the date on which it had been served.

16. On 28 March 2007 the Constitutional Court declared the applicant's *amparo* appeal inadmissible as having being lodged out of time. The court further stated that since the *AudienciaNacional'*s decision had been served on the applicant's legal representative on 29 June 2006, the twenty-day time-limit provided under section 44 (2) of the Constitutional Court Act had expired on 27 July 2006. That decision was served on the applicant on 11 April 2007**.**

17. On 13 April 2007 the applicant lodged a *súplica* appeal with the Constitutional Court. He insisted that he had not been informed that he had been granted legal aid in those particular proceedings and that therefore he had never been informed of the name of the legal counsel and the legal representative assigned to him. In any case, they had not contacted him during or after the proceedings. He also insisted that the prison authorities had never served him with the fax of 5 July 2006.

18. On 23 May 2007 the Constitutional Court declared the applicant's *súplica* appeal inadmissible on the grounds that, pursuant to section 50 (1) of the Constitutional Court Act, the Constitutional Court's decisions of inadmissibility could be appealed against only by the public prosecutor, which he had failed to do in the present case.

B. Relevant domestic law and practice

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

Article 24

"1. Everyone has the right to the effective protection of judges and the courts in the exercise of his or her legitimate rights and interests, and in no event may he or she go undefended.

..."

Article 25

"...

2. Punishments entailing imprisonment and security measures shall be aimed at rehabilitation and social reintegration and may not consist of forced labour. A person sentenced to prison shall enjoy during his imprisonment the fundamental rights contained in this Chapter, except those expressly limited by the terms of the sentence, the purpose of the punishment and the criminal law. In any event, he shall be entitled to paid employment and to the appropriate social security benefits, as well as access to cultural opportunities and overall personal development." ...

Article 106

"1. The courts shall review the power to issue regulations and the legality of administrative action, and whether it is consistent with the aims which justify it.

..."

20. Section 47 of the General Prison Act defines ordinary prison leave as follows:

"The technical board shall prepare a preliminary report to determine whether an inmate in the second or third categories may be granted prison leave of up to seven days as preparation for release.Leave may be granted for a maximum of thirty-six or forty-eight days' per year respectively, provided that the inmate has served a quarter of his or her sentence and has not engaged in misconduct."

21. The relevant provision of the Prison Regulations reads as follows:

Regulation 154 Ordinary Prison Leave

"1. Following a mandatory preliminary report prepared by the technical board, prison leave of up to seven days may be granted to inmates in the second and third categories as preparation for release. Leave may be granted for a maximum of thirty-six or forty-eight days of leave per year respectively, provided that the inmate has served a quarter of his or her sentence and has not engaged in misconduct.

..."

Regulation 160 Initiation and processing

"1. A request by a prisoner for ordinary or special prison leave shall be submitted for opinion to the [prison] Technical Team, which shall verify that the objective requirements for granting the leave have been met, assess the particular purpose of the request and establish, if appropriate, the conditions and monitoring measures to which Regulation 156 refers.

2. In the light of that mandatory report, the Treatment Board shall grant or deny the leave requested by the prisoner."

Regulation 161 Granting

"1. If the Treatment Board decides to grant the leave requested by the prisoner, it shall pass on that decision, together with the report issued by the Technical Team, to the prison-affairs judge or to the Directorate Board – depending on whether the prisoner is in the second or third category, respectively – for authorisation.

2. Ordinary prison leave up to two days shall be authorised by the Directorate Board.

..."

Regulation 162 Refusal

"Should the Treatment Board decide to refuse the leave requested by the prisoner, it shall serve the prisoner with a reasoned decision informing him of his right to lodge a *queja* appeal with the prison affairs judge."

22. The Spanish Constitutional Court has had the opportunity to rule on prison leave on many occasions. As far as relevant for the present case, in its judgment 81/1997, the Constitutional Court held as follows:

"3...

In fact, the existence of a subjective right to be awarded [prison] leave, and the requirements and conditions for its enjoyment, depend mainly on the terms in which such leave is regulated in ordinary legislation. In this connection, although both the General Prison Act and the Prison Regulations in force at the material time (like those currently in force) refrain from expressly calling it a subjective right, it seems clear that, given its inclusion in legislation, prisoners enjoy at least a legitimate interest in obtaining leave, provided that they meet the requirements and conditions upon which it is granted. Nonetheless, it is also irrefutable, as we stated in judgment 112/1999 (legal reasoning §4), that prison leave may 'constitute an easy way to avoid imprisonment', and therefore 'its awarding is not automatic once the statutory objective requirements have been fulfilled. It does not suffice that those requirements are fulfilled, but there must be no other circumstances advising against its granting, having regard to the problems that prison leave might cause in the light of the aims already mentioned.It falls to the prison authorities and, ultimately, to the courts in charge of reviewing those decisions to make that assessment."

This case-law was later clarified by the Constitutional Court, among others, in its judgment 137/2000 of 29 May 2000, which, in so far as relevant, reads as follows:

"3. Lastly, with regard to the possible violation of Article 25 of the Constitution, it suffices to reiterate what this Court has already stated in its judgment 81/1997, § 3 (b), which upheld the previous case-law set out in judgments 112/1996 and 2/1997 of 13 January, and which was later taken up in judgments 88/1998 of 21 April and 204/1999 of 8 November. Even though prison leave is linked with one of the fundamental aims of imprisonment, namely re-education and social re-integration (Article 25 § 2 of the Constitution), in so far as all prison leave potentially contributes to the prisoner's preparation for release, this straightforward connection of prison leave with the constitutional mandate encompassed in Article 25 § 2 of the Constitution is not enough to make prison leave a subjective right – still less, a fundamental right.

Accordingly, we must conclude, in connection with our statement in the aforementioned judgment 81/1997, that all issues in relation to prison leave fall mainly within the scope of an ordinary statutory interpretation. Thus the awarding of leave from prison is not automatic once the statutory objective requirements have been fulfilled. Not only must those requirements be fulfilled, but there must be no other circumstances advising against its granting, having regard to the problems that prison leave might cause in the light of the aims already mentioned. . It falls to the prison authorities and, ultimately, to the courts in charge of reviewing those decisions to make that assessment".

The Constitutional Court has interpreted Article 24 § 1 of the Spanish Constitution (see paragraph 19 above) as requiring prison-affairs judges and appellate courts to expand their reasoning in view of the close relationship between prison leave and liberty as one of the principal values of the Spanish legal system. Thus, in its judgment 204/1999 of 8 November 1999, the Constitutional Court stated:

"4....

Given the relationship between prison leave and liberty as one of the principal values of the legal system, it is not enough that the legal criteria underlying the decision to refuse a prison leave accord with the general standards of legal reasoning required by the right to a due process of law to consider that this right has been respected (see, for all, judgment 14/1991). It is vital that [those decisions] are based on guidelines that are consistent with the constitutional and legal aims of prison leave.

..."

23. The Fifth Supplementary Provision to the Judiciary Act provides, as far as relevant, as follows:

"...

6. If a decision appealed against has been delivered by a central prison judge in connection with the enforcement of a sentence, the prison regime or some other issue, the Criminal Chamber of the *AudienciaNacional* shall have jurisdiction to decide the appeal or the *queja* appeal, provided that the decision appealed against was not delivered against an administrative decision.

...

9. The appeal shall be decided following abridged proceedings, as established in the Code of Criminal Procedure. It can be introduced either by a public prosecutor, a prisoner or a prisoner released on remand. To introduce an appeal the appointment of a lawyer is required. Should the appellant fail to appoint a legal representative, the lawyer shall be authorised to act also in that capacity on behalf of his client. In any case, the prisoner's right to defend his judicial claims shall always be guaranteed".

C. Relevant international law

Recommendation No. R (82) 16 of the Committee of Ministers to member states on prison leave (adopted on 24 September 1982)

24. The Recommendation states, *inter alia*, as follows:

"The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

...

Considering that prison leave is one of the means of facilitating the social reintegration of the prisoner;

Having regard to experience in this field,

Recommends the governments of member states:

1. to grant prison leave to the greatest extent possible on medical, educational, occupational, family and other social grounds;

2. to take into consideration for the granting of leave:

- the nature and seriousness of the offence, the length of the sentence passed and the period of detention already completed,

- the personality and behaviour of the prisoner and the risk, if any, he may present to society,

- the prisoner's family and social situation, which may have changed during his detention,

- the purpose of leave, its duration and its terms and conditions;

3. to grant prison leave as soon and as frequently as possible having regard to the aforementioned factors;

4. to grant prison leave not only to prisoners in open prisons but also to prisoners in closed prisons, provided that it is not incompatible with public safety;

...

9. to inform the prisoner, to the greatest extent possible, of the reasons for a refusal of prison leave;

10. to provide the means by which a refusal can be reviewed; ..."

COMPLAINTS

25. The applicant complained under Articles 5 § 4, 6 §§ 1 and 2 and 13 of the Convention that his right of access to court had been breached. He argued that his *amparo* appeal had been declared inadmissible for having been lodged out of time despite the fact that he had not been informed until at least 19 December 2006 of the *AudienciaNacional*'s decision of 23 June 2006 refusing him ordinary leave from prison. He also maintained that at no stage during the proceedings had he been informed that he had been granted legal aid, nor had he been given the name of the legal counsel and legal representative assigned to him.He had had no contact with them and they had not informed him that his appeal before the *AudienciaNacional*had been dismissed. Lastly, he contested the merits of the decision to refuse his request for ordinary leave of absence from prison.

THE LAW

26. Invoking Articles 5 § 4, 6 §§ 2 and 3 and 13 of the Convention, the applicant complained that he had been denied access to a court by the Constitutional Court's decision rejecting his *amparo* appeal as having been lodged out of time. He claimed that he had not been informed by the prison authorities or by his legal-aid lawyer –the appointment of whom he was allegedly unaware – of the *AudienciaNacional*'s decision of 23 June 2006 until 19 December 2006. He also contested the merits of that decision.

27. The Court, being master of the characterisation to be given in law to the facts of the case (see, among other authorities, *Dolhamre v. Sweden*, no. 67/04, §§ 80-81, 8 June 2010), deems it appropriate to examine all the applicant's complaints in the context of Article 6 § 1 of the Convention which, in sofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal."

28. The Government contested the applicability of Article 6 § 1 of the Convention to the present case. They argued that according to the Court's case-law, issues relating to temporary release or to the manner in which custodial sentences are executed do not, in principle, fall within the scope of Article 6 § 1. In order for Article 6 § 1 to apply in those contexts, the Court had found that a "civil" right within the terms of the Convention had to be at stake. The Government submitted that proceedings concerning ordinary leave from prison did not constitute a dispute over a "civil right". As the applicant had failed to argue in his application to the Court that the administrative refusal to grant him ordinary prison leave had interfered with any of his "civil rights" under the terms of the Convention, the application should be declared incompatible *rationemateriae*.

29. The applicant contended that Article 6 was applicable to his case in so far as his "civil" right to private and family life was at stake. He argued that he had been previously granted six periods of ordinary prison leave, which he had used to visit his partner and his then three-year-old son, born in September 2003, and that he had requested the prison leave in question for precisely the same purpose. He further argued that the refusal to grant him the ordinary prison leave in the instant case had hindered his prospects of obtaining partial release and consequently his possibilities of enjoying, in a shorter term, a meaningful family life.

30. The Court considers that it has first to determine whether the applicant's complaint is compatible *rationemateriae* with Article 6 § 1 of the Convention.

31. The Court notes from the outset that the case concerns prison leave.According to the recent case-law of the Court set out in *Bouloisv. Luxembourg* ([GC], no. 37575/04, ECHR 2012) in order to ascertain whether the civil limb of Article 6 § 1 of the Convention is applicable to the proceedings concerning a request for prison leave, it should be first determined whether the prisoner possessed a "right" within the meaning of that provision (ibid. § 89).

32. The Court has affirmed that neither the Convention nor the Protocols thereto expressly provide for a right to prison leave (see *Boulois*, cited above, § 102). Accordingly, the Court's first task will be to determine whether such a right exists in Spanish law.

33. The Court recalls that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 74, ECHR 2009, and *Boulois*, cited above, § 90).

34. The Court reiterates in this regard that Article 6 § 1 does not guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B, and *Roche v. the United Kingdom*[GC], no. 32555/96, § 119, ECHR 2005-X). The starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A; *Roche*, cited above, § 120; and, most recently, *Boulois*, cited above, § 96-101). The Court would need strong reasons to differ from the conclusions reached by the superior

national courts by finding, contrary to their view, that there was arguably a right recognised by domestic law (ibid.).

35. In carrying out this assessment, it is necessary to look beyond the appearances and the language used and to concentrate on the realities of the situation (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 38, Series A no. 50, and *Roche*, cited above, § 121).

36. Whether or not the authorities enjoyed discretion in deciding whether to grant the measure requested by a particular applicant may be taken into consideration and may even be decisive. Hence, in *Masson and Van Zon*(cited above, § 51), the Court concluded that no right existed, whereas in *Szücs v. Austria* (24 November 1997, § 33, *Reports of Judgments and Decisions* 1997-VII), it recognised the existence of a right. Nevertheless, the Court has had occasion to state that the mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right (see *Camps v. France* (dec.), no. 42401/98, 23 November 1999, and *Ellès and Others v. Switzerland*, no. 12573/06, § 16, 16 December 2010).

37. Other criteria which may be taken into consideration by the Court include the recognition of the alleged right in similar circumstances by the domestic courts or the fact that the latter examined the merits of the applicant's request (see *VilhoEskelinen and Others v. Finland* [GC], no. 63235/00, § 41, ECHR 2007-II).

38. As to the present case, the Court notes first of all that there was a "dispute" concerning the actual existence of the right to prison leave claimed by the applicant.

39. As regards the issue whether such a "right" could be said, at least on arguable grounds, to be recognised in domestic law, attention should first be paid to the terms of the domestic legislation and to the domestic practice concerning prison leave(see *Boulois*, cited above, §§91 and 101).

40. The Court observes in this regard that, contrary to the Luxembourg legislation, in which ordinary prison leave is expressly defined as a "privilege" (see *Boulois*, cited above, §§ 47 and 96), Spanish law makes no mention of the categorisation of such leave. Yet, as in Luxembourg, the legislation uses the phrase "may be granted" (see paragraph 20 above) which, in principle, indicates that prison authorities enjoy a certain degree of discretion in deciding whether to grant prison leave. However, this factor is not conclusive (see paragraph 36 above), and attention should be paid to the interpretation of that provision by the domestic courts.

41. The Court observes that the Spanish Constitutional Court, the highest court in the land in terms of the interpretation of the Constitution, has repeatedly ruled that prison leave does not constitute a subjective or fundamental right. The Constitutional Court has stated that even if a prisoner meets the statutory requirements to be granted prison leave, the prison administration can deny it for reasons that are consistent with the constitutional and legal aims of prison leave (see paragraph 22 above).

42. The Court does not find strong reasons to differ from the conclusions reached by the Spanish Constitutional Court. It is true that in Spain, decisions taken by the prison authorities to refuse to grant ordinary prison leave are subjected to judicial review upon a complaint lodged by the prisoner before the prison-affairs judge (see paragraph 21 above), whose decision may be appealed against. In the Court's view, however, this fact alone does not transform prison leave into a right for the purposes of Article 6 § 1 of the Convention. Even when the objective conditions required by law are met, the awarding of ordinary prison leave is not automatic; the assessment of the circumstances of a prisoner requesting prison leave "falls to the prison authorities and, ultimately, to the courts in charge of reviewing those decisions" (see paragraph 22 above).As it results from the Spanish Constitutional Court's case-law, the judicial review of administrative refusals of ordinary prison leave requests should be understood as a guarantee of the proper application by the prison authorities of the prison legislation in order to prevent abuse and unreasonableness. It also ensures that the prison administration comply with the fundamental aims of rehabilitation and social reintegration of prisoners (see paragraph 19 above). In this connection, and as it also results from the Constitutional Court's case law, the absence of a subjective right to be awarded ordinary prison leave does not exclude the existence of a legitimate interest on the part of prisoners as the potential beneficiaries of prison leave, which explains their legal standing in the judicial proceedings on the matter.

43. In view of the foregoing considerations, the Court cannot consider that the applicant's claims relate to a "right" recognised in Spanish law or in the Convention. Accordingly, it concludes that Article 6 of the Convention is not applicable.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada
Registrar

JosepCasadevall
President