CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (CHAMBER)

CASE OF LÓPEZ OSTRA v. SPAIN

(Application no. 16798/90)

JUDGMENT

STRASBOURG

09 December 1994

PROCEDURE [….]

AS TO THE FACTS

6. Mrs Gregoria López Ostra, a Spanish national, lives in Lorca (Murcia).

At the material time she and her husband and their two daughters had their home in the district of "Diputación del Rio, el Lugarico", a few hundred metres from the town centre.

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

7. The town of Lorca has a heavy concentration of leather industries. Several tanneries there, all belonging to a limited company called SACURSA, had a plant for the treatment of liquid and solid waste built with a State subsidy on municipal land twelve metres away from the applicant's home.

8. The plant began to operate in July 1988 without the licence (licencia) from the municipal authorities required by Regulation 6 of the 1961 regulations on activities classified as causing nuisance and being unhealthy, noxious and dangerous ("the 1961 regulations"), and without having followed the procedure for obtaining such a licence (see paragraph 28 below).

Owing to a malfunction, its start-up released gas fumes, pestilential smells and contamination, which immediately caused health problems and nuisance to many Lorca people, particularly those living in the applicant's district. The town council evacuated the local residents and rehoused them free of charge in the town centre for the months of July, August and September 1988. In October the applicant and her family returned to their flat and lived there until February 1992 (see paragraph 21 below).

9. On 9 September 1988, following numerous complaints and in the light of reports from the health authorities and the Environment and Nature Agency (Agencia para el Medio Ambiente y la Naturaleza) for the Murcia region, the town council ordered cessation of one of the plant's activities - the settling of chemical and organic residues in water tanks (lagunaje) - while permitting the treatment of waste water contaminated with chromium to continue.

There is disagreement as to what the effects were of this partial shutdown, but it can be seen from the expert opinions and written evidence of 1991, 1992 and 1993, produced before the Commission by the Government and the applicant (see paragraphs 18-20 below), that certain nuisances continue and may endanger the health of those living nearby.

B. The application for protection of fundamental rights

1. Proceedings in the Murcia Audiencia Territorial

10. Having attempted in vain to get the municipal authority to find a solution, Mrs López Ostra lodged an application on 13 October 1988 with the Administrative Division of the Murcia Audiencia Territorial, seeking protection of her fundamental rights (section 1 of Law 62/1978 of 26

December 1978 on the protection of fundamental rights ("Law 62/1978") - see paragraphs 24-25 below). She complained, inter alia, of an unlawful interference with her home and her peaceful enjoyment of it, a violation of her right to choose freely her place of residence, attacks on her physical and psychological integrity, and infringements of her liberty and her safety (Articles 15, 17 para. 1, 18 para. 2 and 19 of the Constitution - see paragraph 23 below) on account of the municipal authorities' passive attitude to the nuisance and risks caused by the waste-treatment plant. She requested the court to order temporary or permanent cessation of its activities.

11. The court took evidence from several witnesses offered by the applicant and instructed the regional Environment and Nature Agency to give an opinion on the plant's operating conditions and location. In a report of 19 January 1989 the agency noted that at the time of its expert's visit on 17 January the plant's sole activity was the treatment of waste water contaminated with chromium, but that the remaining waste also flowed through its tanks before being discharged into the river, generating foul smells. It therefore concluded that the plant had not been built in the most suitable location.

Crown Counsel endorsed Mrs López Ostra's application. However, the Audiencia Territorial found against her on 31 January 1989. It held that although the plant's operation could unquestionably cause nuisance because of the smells, fumes and noise, it did not constitute a serious risk to the health of the families living in its vicinity but, rather, impaired their quality of life, though not enough to infringe the fundamental rights claimed. In any case, the municipal authorities, who had taken measures in respect of the plant, could not be held liable. The non-possession of a licence was not an issue to be examined in the special proceedings instituted in this instance, because it concerned a breach of the ordinary law.

2. Proceedings in the Supreme Court

12. On 10 February 1989 Mrs López Ostra lodged an appeal with the Supreme Court (Tribunal Supremo - see paragraph 25 below in fine). She maintained that a number of witnesses and experts had indicated that the plant was a source of polluting fumes, pestilential and irritant smells and repetitive noise that had caused both her daughter and herself health problems. As regards the municipal authorities' liability, the decision of the Audiencia Territorial appeared to be incompatible with the general supervisory powers conferred on mayors by the 1961 regulations, especially where the activity in question was carried on without a licence (see paragraph 28 below). Regard being had to Article 8 para. 1 (art. 8-1) of the Convention, inter alia, the town council's attitude amounted to unlawful interference with her right to respect for her home and was also an attack on

her physical integrity. Lastly, the applicant sought an order suspending the plant's operations.

13. On 23 February 1989 Crown Counsel at the Supreme Court filed pleadings to the effect that the situation complained of amounted to arbitrary and unlawful interference by the public authorities with the applicant's private and family life (Article 18 of the Constitution taken together with Articles 15 and 19 - see paragraph 23 below). The court should accordingly grant her application in view of the nuisance to which she was subjected and the deterioration in the quality of her life, both of which had moreover been acknowledged in the judgment of 31 January. On 13 March Crown Counsel supported the suspension application (see paragraph 12 above and paragraph 25 below).

14. In a judgment of 27 July 1989 the Supreme Court dismissed the appeal. The impugned decision had been consistent with the constitutional provisions relied on, as no public official had entered the applicant's home or attacked her physical integrity. She was in any case free to move elsewhere. The failure to obtain a licence could only be considered in ordinary-law proceedings.

3. Proceedings in the Constitutional Court

15. On 20 October 1989 Mrs López Ostra lodged an appeal (recurso de amparo) with the Constitutional Court, alleging violations of Article 15 (right to physical integrity), Article 18 (right to private life and to inviolability of the family home) and Article 19 (right to choose freely a place of residence) of the Constitution (see paragraph 23 below).

On 26 February 1990 the court ruled that the appeal was inadmissible on the ground that it was manifestly ill-founded. It observed that the complaint based on a violation of the right to respect for private life had not been raised in the ordinary courts as it should have been. For the rest, it held that the presence of fumes, smells and noise did not itself amount to a breach of the right to inviolability of the home; that the refusal to order closure of the plant could not be regarded as degrading treatment, since the applicant's life and physical integrity had not been endangered; and that her right to choose her place of residence had not been infringed as she had not been expelled from her home by any authority.

C. Other proceedings concerning the Lorca waste-treatment plant

1. The proceedings relating to non-possession of a licence

16. In 1990 two sisters-in-law of Mrs López Ostra, who lived in the same building as her, brought proceedings against the municipality of Lorca and SACURSA in the Administrative Division of the Murcia High Court

(Tribunal Superior de Justicia), alleging that the plant was operating unlawfully. On 18 September 1991 the court, noting that the nuisance had continued after 9 September 1988 and that the plant did not have the licences required by law, ordered that it should be closed until they were obtained (see paragraph 28 below). However, enforcement of this order was stayed following an appeal by the town council and SACURSA. The case is still pending in the Supreme Court.

2. Complaint of an environmental health offence

17. On 13 November 1991 the applicant's two sisters-in-law lodged a complaint, as a result of which Lorca investigating judge no. 2 instituted criminal proceedings against SACURSA for an environmental health offence (Article 347 bis of the Criminal Code - see paragraph 29 below). The two complainants joined the proceedings as civil parties.

Only two days later, the judge decided to close the plant, but on 25 November the measure was suspended because of an appeal lodged by Crown Counsel on 19 November.

18. The judge ordered a number of expert opinions as to the seriousness of the nuisance caused by the waste-treatment plant and its effects on the health of those living nearby.

An initial report of 13 October 1992 by a scientist from the University of Murcia who had a doctorate in chemistry stated that hydrogen sulphide (a colourless gas, soluble in water, with a characteristic rotten-egg smell) had been detected on the site in concentrations exceeding the permitted levels. The discharge of effluent containing sulphur into a river was said to be unacceptable. These findings were confirmed in a supplementary report of 25 January 1993.

In a report of 27 October 1992 the National Toxicology Institute stated that the levels of the gas probably exceeded the permitted limits but did not pose any danger to the health of people living close to the plant. In a second report of 10 February 1993 the institute stated that it could not be ruled out that being in neighbouring houses twenty-four hours a day constituted a health risk as calculations had been based only on a period of eight hours a day for five days.

Lastly, the regional Environment and Nature Agency, which had been asked to submit an expert opinion by the Lorca municipal authorities, concluded in a report of 29 March 1993 that the level of noise produced by the plant when in operation did not exceed that measured in other parts of the town.

19. The investigation file contains several medical certificates and expert opinions concerning the effects on the health of those living near the plant. In a certificate dated 12 December 1991 Dr de Ayala Sánchez, a paediatrician, stated that Mrs López Ostra's daughter, Cristina, presented a clinical picture of nausea, vomiting, allergic reactions, anorexia, etc., which

could only be explained by the fact that she was living in a highly polluted area. He recommended that the child should be moved from the area.

In an expert report of 16 April 1993 the Ministry of Justice's Institute of Forensic Medicine in Cartagena indicated that gas concentrations in houses near the plant exceeded the permitted limit. It noted that the applicant's daughter and her nephew, Fernando López Gómez, presented typical symptoms of chronic absorption of the gas in question, periodically manifested in the form of acute bronchopulmonary infections. It considered that there was a relationship of cause and effect between this clinical picture and the levels of gas.

20. In addition, it is apparent from the statements of three police officers called to the neighbourhood of the plant by one of the applicant's sisters-in-law on 9 January 1992 that the smells given off were, at the time of their arrival, very strong and induced nausea.

21. On 1 February 1992 Mrs López Ostra and her family were rehoused in a flat in the centre of Lorca, for which the municipality paid the rent.

The inconvenience resulting from this move and from the precariousness of their housing situation prompted the applicant and her husband to purchase a house in a different part of town on 23 February 1993.

22. On 27 October 1993 the judge confirmed the order of 15 November 1991 and the plant was temporarily closed.

II. RELEVANT DOMESTIC LAW

[…]

AS TO THE LAW

34. The applicant alleged that there had been a violation of Articles 8 and 3 (art. 8, art. 3) of the Convention on account of the smells, noise and polluting fumes caused by a plant for the treatment of liquid and solid waste sited a few metres away from her home. She held the Spanish authorities responsible, alleging that they had adopted a passive attitude.

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

[…]

II. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

44. Mrs López Ostra first contended that there had been a violation of Article 8 (art. 8) of the Convention, which provides:

> "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 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 economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Commission subscribed to this view, while the Government contested it.

45. The Government said that the complaint made to the Commission and declared admissible by it (see paragraphs 30 and 31 above) was not the same as the one that the Spanish courts had considered in the application for protection of fundamental rights since it appeared to be based on statements, medical reports and technical experts' opinions of later date than that application and wholly unconnected with it.

46. This argument does not persuade the Court. The applicant had complained of a situation which had been prolonged by the municipality's and the relevant authorities' failure to act. This inaction was one of the fundamental points both in the complaints made to the Commission and in the application to the Murcia Audiencia Territorial (see paragraph 10 above). The fact that it continued after the application to the Commission and the decision on admissibility cannot be held against the applicant. Where a situation under consideration is a persisting one, the Court may take into account facts occurring after the application has been lodged and even after the decision on admissibility has been adopted (see, as the earliest authority, the Neumeister v. Austria judgment of 27 June 1968, Series A no. 8, p. 21, para. 28, and p. 38, para. 7).

47. Mrs López Ostra maintained that, despite its partial shutdown on 9 September 1988, the plant continued to emit fumes, repetitive noise and strong smells, which made her family's living conditions unbearable and caused both her and them serious health problems. She alleged in this connection that her right to respect for her home had been infringed.

48. The Government disputed that the situation was really as described and as serious (see paragraph 40 above).

49. On the basis of medical reports and expert opinions produced by the Government or the applicant (see paragraphs 18-19 above), the Commission noted, inter alia, that hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby and

that there could be a causal link between those emissions and the applicant's daughter's ailments.

50. In the Court's opinion, these findings merely confirm the first expert report submitted to the Audiencia Territorial on 19 January 1989 by the regional Environment and Nature Agency in connection with Mrs López Ostra's application for protection of fundamental rights. Crown Counsel supported this application both at first instance and on appeal (see paragraphs 11 and 13 above). The Audiencia Territorial itself accepted that, without constituting a grave health risk, the nuisances in issue impaired the quality of life of those living in the plant's vicinity, but it held that this impairment was not serious enough to infringe the fundamental rights recognised in the Constitution (see paragraph 11 above).

51. Naturally, 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.

Whether the question is analysed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 (art. 8-1) -, as the applicant wishes in her case, or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2 (art. 8-2), 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, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8 (art. 8-1), in striking the required balance the aims mentioned in the second paragraph (art. 8-2) may be of a certain relevance (see, in particular, the Rees v. the United Kingdom judgment of 17 October 1986, Series A no. 106, p. 15, para. 37, and the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 18, para. 41).

52. It appears from the evidence that the waste-treatment plant in issue was built by SACURSA in July 1988 to solve a serious pollution problem in Lorca due to the concentration of tanneries. Yet as soon as it started up, the plant caused nuisance and health problems to many local people (see paragraphs 7 and 8 above).

Admittedly, the Spanish authorities, and in particular the Lorca municipality, were theoretically not directly responsible for the emissions in question. However, as the Commission pointed out, the town allowed the plant to be built on its land and the State subsidised the plant's construction (see paragraph 7 above).

53. The town council reacted promptly by rehousing the residents affected, free of charge, in the town centre for the months of July, August and September 1988 and then by stopping one of the plant's activities from

9 September (see paragraphs 8 and 9 above). However, the council's members could not be unaware that the environmental problems continued after this partial shutdown (see paragraphs 9 and 11 above). This was, moreover, confirmed as early as 19 January 1989 by the regional Environment and Nature Agency's report and then by expert opinions in 1991, 1992 and 1993 (see paragraphs 11 and 18 above).

54. Mrs López Ostra submitted that by virtue of the general supervisory powers conferred on the municipality by the 1961 regulations the municipality had a duty to act. In addition, the plant did not satisfy the legal requirements, in particular as regards its location and the failure to obtain a municipal licence (see paragraphs 8, 27 and 28 above).

55. On this issue the Court points out that the question of the lawfulness of the building and operation of the plant has been pending in the Supreme Court since 1991 (see paragraph 16 above). The Court has consistently held that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, inter alia, the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A, p. 18, para. 43).

At all events, the Court considers that in the present case, even supposing that the municipality did fulfil the functions assigned to it by domestic law (see paragraphs 27 and 28 above), it need only establish whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life under Article 8 (art. 8) (see, among other authorities and mutatis mutandis, the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, para. 23).

56. It has to be noted that the municipality not only failed to take steps to that end after 9 September 1988 but also resisted judicial decisions to that effect. In the ordinary administrative proceedings instituted by Mrs López Ostra's sisters-in-law it appealed against the Murcia High Court's decision of 18 September 1991 ordering temporary closure of the plant, and that measure was suspended as a result (see paragraph 16 above).

Other State authorities also contributed to prolonging the situation. On 19 November 1991 Crown Counsel appealed against the Lorca investigating judge's decision of 15 November temporarily to close the plant in the prosecution for an environmental health offence (see paragraph 17 above), with the result that the order was not enforced until 27 October 1993 (see paragraph 22 above).

57. The Government drew attention to the fact that the town had borne the expense of renting a flat in the centre of Lorca, in which the applicant and her family lived from 1 February 1992 to February 1993 (see paragraph 21 above).

The Court notes, however, that the family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences. They moved only when it became apparent that

the situation could continue indefinitely and when Mrs López Ostra's daughter's paediatrician recommended that they do so (see paragraphs 16, 17 and 19 above). Under these circumstances, the municipality's offer could not afford complete redress for the nuisance and inconveniences to which they had been subjected.

58. Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life.

There has accordingly been a violation of Article 8 (art. 8).

III. ALLEGED VIOLATION OF ARTICLE 3 (art. 3) OF THE CONVENTION

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IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

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