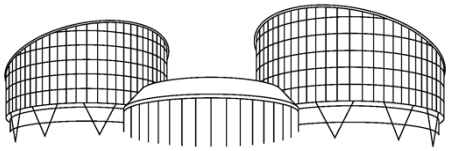

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF M.D. AND OTHERS v. SPAIN

(Application no. 36584/17)

JUDGMENT

Art 8 • Private life • No legal basis justifying police report on group of serving judges who signed a manifesto on the Catalan people's "right to decide", consisting of information partially extracted from police ID database • Failure to fulfil positive obligations through insufficient inquiry into leak of data to the press
Art 10 • Freedom of expression • No reprisals for signing the manifesto or chilling effect • Disciplinary proceedings the result of a complaint by a third party and closed without sanctions issued

STRASBOURG

28 June 2022

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

In the case of M.D. and Others v. Spain,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Darian Pavli,
Peeter Roosma,
Andreas Zünd,
Frédéric Krenc, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 36584/17) 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 20 Spanish nationals ("the applicants") on 3 May 2017;

the decision to give notice to the Spanish Government ("the Government") of the complaints concerning Articles 6, 8, and 10 of the Convention and to declare inadmissible the remainder of the application;

the decision not to have the applicants' names disclosed;

the parties' observations;

Having deliberated in private on 29 March and 31 May 2022,

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

INTRODUCTION

1. The application concerns the applicants' right to privacy and to protection of their own respective image (Article 8 of the Convention) as well as their right to freedom of expression (Article 10 of the Convention).

THE FACTS

2. The applicants were represented by Mr A. Van Den Eynde Adroer, a lawyer practising in Barcelona.

3. The Government were represented by their Agent, Mr. A. Brezmes Martinez de Villareal, State Counsel.

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

I. CRIMINAL PROCEEDINGS INITIATED BY THE APPLICANTS

5. The applicants, 20 serving judges and magistrates who worked in Catalonia, signed a manifesto in February 2014 in which they set out their

legal opinion in favour of the possibility of exercising the Catalan people's so-called "right to decide", within the framework of the Spanish Constitution and international law.

6. On 3 March 2014, the national newspaper *La Razón* published an article under the headline "The conspiracy of the thirty-three separatist judges" in which photographs and personal details of all the applicants appeared (such as their names and surnames, the respective courts in which they were working, and comments on their political beliefs). Those photographs and details, in the applicants' opinion, had been extracted from their respective entries in the database of the Spanish police ("the police ID database"), which contained the identification data of all Spanish citizens necessary for the issuance and management of Spanish identity documents ("IDs").

7. The applicants lodged a complaint, which led to the initiation on 3 March 2014 of criminal proceedings before Barcelona Investigating Judge no. 22. They did not waive the exercise of their right to civil action in the context of the same criminal proceedings. In terms of Spanish law, their criminal complaint implied also a claim for compensation for damage (see paragraphs 23-24 below). Subsequently, for reasons of territorial jurisdiction, the case was transferred to Madrid Investigating Judge no. 15 (under pre-trial proceedings no. 2273/2014). In the applicants' view, the events in question could have given rise to several offences, including the discovery and disclosure of secrets (Article 197 of the Criminal Code), disloyalty when exercising custody of documents (*Infidelidad en la custodia de documentos*), and the violation of secrets by a public official (Articles 413, 415 and 417 of the Criminal Code).

8**.** Madrid Investigating Judge no. 15 dismissed for the first time the complaint by a decision of 8 September 2014, on the grounds that:

> "... the facts under investigation constitute a criminal offence, although there are no sufficient grounds for attributing them to a particular person."

9. The applicants appealed against that decision, and the appeal was declared admissible by the *Audiencia Provincial* of Madrid (hereinafter "the *Audiencia Provincial*") by a decision of 18 February 2015, which stated:

> "... in the "Facts" section of the same decision [order of 8 September 2014], it was found that after the examination of the actions carried out by the Barcelona Investigating Judge, ... all the necessary diligence had been exercised [in order to gain] knowledge of the [relevant] facts.
>
> This court does not agree with the assessment of the investigating judge because, despite the fact that the Barcelona Investigating Judge, by a decision of 8 April 2014 (page 128), decided to interview, as witnesses, two police officers (with the respective identification numbers 18,971 and 18,512), they did not testify.
>
> Subsequently, by a decision of 23 April 2014, it was also decided to take a statement from the head of the Information Brigade [*Brigada de Información*] and from [two police officers] – identification nos. 61,796 and 115,665, respectively – but the

latter did not give a statement because he was on leave, and although the other policeman (no. 61,796) did give a statement (page 264 of the case file), this court did not take account of what he might have said because nothing [from him] is included in the records of the witness statements (page 264 of the case file), and no recordings [of his statement] were [included in the case file], either ...

With regard to the Senior Chief of Police, the *Audiencia Provincial* of Barcelona, in its order of 27 June 2014 (page 420 of the case file), has already noted that if the existence of the report were to be confirmed – as it [subsequently] was – it would be [useful] to take a statement from him, given that he was the direct recipient of [that report].

Consequently, there are some items of evidence, some of which were admitted but have not been examined, and others of which were proposed by the parties but were rejected by the judge ...

In any event, given the circumstances described, this court disagrees with the Investigating Judge's opinion that all necessary efforts have been undertaken to clarify the facts."

10. As confirmed by the *Audiencia Provincial*, a police report regarding the applicants' identities and personal and professional details, together with the applicants' photographs (taken from the police ID database), was joined to the file under the heading "internal note" (*nota interna*). The report, dated 18 February 2014, begins by referring to a previous information note dated 7 February 2014 that read, in respect of the leaking of the applicants' data to the *La Razón* newspaper: "[A]t the beginning of February, a group of some twenty-five serving judges in Catalonia will publish a manifesto in defence of the legality of the sovereignty consultation, which is scheduled to be held on 9 November [2014]". The report then identifies the alleged "main promoter and most active drafter". The content of the report refers to "thirty-four judges and magistrates who exercise their functions in Catalonia", and includes a photograph of each of them, their addresses, their job titles and, in some cases, observations on such matters as their membership of professional associations and their participation in professional courses.

11. Following the *Audiencia Provincial*'s 18 February 2015 decision, on 16 October 2015 Investigating Judge no. 15 of Madrid took witness statements from certain officials. The judge decided not to take a statement from the Senior Chief of Police of Barcelona which, in the opinion of the *Audiencia Provincial*, would have been "relevant" to the investigation. The Madrid Investigating Judge decided, again, to close the proceedings, since he was not able to identify the person responsible for the criminal acts in question.

12. The applicants lodged appeal against the above decision. The *Audiencia Provincial*, by a decision of 21 April 2016, dismissed that appeal, deeming that no information had been submitted that would allow the crime under investigation to be imputed to the persons whose statements had been taken. As regards the Senior Chief of Police of Barcelona, the decision stated:

> "[T]here is no information in the case to indicate ... that he was the leaker or that he facilitated the dissemination of the photographs of the complainants contained in the police ID database, which had been attached to the internal report ordered by him, in order to check whether the identities and professions of the people who had signed a manifesto in defence of the legality of the sovereignty consultation in Catalonia were true."

The decision continued stating that:

> "Article 11 of the Criminal Code establishes in which cases the failure to take the appropriate action could itself be a crime, the present case not being one of them. If the contents of the case file (namely, pages 439 and following) were indeed leaked, then this could give rise to disciplinary proceedings against Mr. C.A., the Senior Chief of Police of Barcelona, but does not constitute a criminal offence."

13. The applicants brought an action for the annulment of the above decision, which was rejected on 30 May 2016.

14. Lastly, the applicants lodged an *amparo* appeal against that decision with the Constitutional Court. The *amparo* appeal was declared inadmissible on 22 November 2017 on the ground that the applicants had not properly justified its special constitutional relevance.

II. OTHER PROCEEDINGS RELATED TO THE APPLICANTS

A. Complaint with the Data Protection Agency

15. On 11 April 2014 the applicants lodged a complaint with the Spanish Data Protection Agency ("the Agency") against the Ministry of Internal Affairs and the newspaper *La Razón* in respect of the publication, on 3 March 2014, of an article entitled "The conspiracy of the thirty-three separatist judges", which addressed the above-mentioned manifesto signed by the applicants.

16. The Agency opened preliminary proceedings. On 21 December 2018 two of its inspectors went to the general logistics sub-directorate of the national Police Directorate, where they drew up a written report on the leak of the applicants' data; they then formally closed the investigation. The applicants appealed against the decision to close the investigation. That appeal was dismissed by the Director of the Agency.

17. The applicants lodged an appeal with the *Audiencia Nacional*. On 30 May 2018, the *Audiencia Nacional* declared the challenged decision null and void. The Agency was to carry out a full investigation into the reported facts and to determine the case on that basis.

18. Having completed the investigation, the Agency concluded:

> "It is clear from the statements made by the police officers in court that they do not know how the photographs of the applicants could have reached the newspaper and that they did not carry out an investigation but rather [drew up] an intelligence report in which they checked the identity of the persons (that is to say the signatories of the

manifesto) ... ; the information [used in the compilation of] that report was obtained from open sources. (...)

It has been verified that the ADDNIFIL [*Sistema de informacion del Documento Nacional de identidad* – National Identity Card Information System] database was consulted on 13 and/or 14 February 2014 by officials of the Barcelona Information Brigade [a division of the police], the ID details of at least six of [the persons concerned] are identical to those of the complainants. The officials of the Police Directorate who carried out the consultations were authorised to do so [by the ADDNIFIL authentication protocol] on the basis of their functions within the service. It was also found that for each query made to the ADDNIFIL database it is necessary to provide the system with the reason for that query.

Following the actions carried out by the general sub-directorate for data inspection of the Agency, it was found that the [Directorate] of the Police had complied with the security measures established by the data protection regulations applicable both at the time of the reported events and at present, as it has been updating the security document, issuing instructions aimed at ensuring personnel's compliance with and knowledge of security measures, and carrying out audits to verify compliance with the measures. Therefore, in the light of the above, the Director of the Spanish Data Protection Agency, AGREES to CLOSE THE FILE ... ."

19. On 20 March 2019 the applicants asked the *Audiencia Nacional* to enforce its judgment of 30 May 2018. There is no record in the documents provided by the parties of any decision of the *Audiencia Nacional* in that regard.

B. Disciplinary proceedings

20. On 14 February 2014 the civil servants' trade union "Clean Hands" (*Manos Limpias*) lodged a complaint against the thirty-three judges who had signed the above-mentioned manifesto with the General Council of the Judiciary (a body with the power to exercise disciplinary measures against judges and magistrates), requesting the suspension of the judges who had signed the manifesto. The General Council of the Judiciary initiated a number of disciplinary proceedings, but no sanction was imposed on any of the applicants. The proceedings were closed on 4 December 2014.

21. On 22 December 2014 the trade union lodged an appeal with the standing committee (*Comisión Permanente*) of the General Council of the Judiciary. This appeal was dismissed on 18 June 2015. The General Council of the Judiciary upheld the view that the ideas put forward by the applicants in the manifesto constituted the exercise of their freedom of expression and that, without prejudice to other assessments, it should not imply the exercise of disciplinary powers against the signatories.

RELEVANT LEGAL FRAMEWORK

22. The relevant Articles of the Spanish Constitution read as follows:

Article 18

"1. The right to [defend one's] honour, to personal and family privacy and to one's own image is guaranteed.

2. The home is inviolable. No entry or search may be made without the consent of the occupant or a legal warrant, except in cases of *flagrante delicto*.

3. Secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary.

4. The law shall limit the [extent] of data processing in order to guarantee the honour and the personal and family privacy of citizens and the full exercise of their rights."

Article 20

"1. The following rights are recognized and protected:

a) the right to freely express and disseminate thoughts, ideas and opinions through words, in writing or by any other means of communication;

b) the right to [engage in] literary, artistic, scientific and technical production and creation;

c) the right to academic freedom;

d) the right to freely communicate or to receive accurate information by any means of dissemination whatsoever. The law shall regulate the right to cite personal conscience and professional secrecy in the exercise of these freedoms.

2. The exercise of these rights may not be restricted by any form of prior censorship.

3. The law shall regulate the organisation and parliamentary oversight of social media under the control of the State or any public agency and shall guarantee access to such media to the main social and political groups, respecting the pluralism of society and the various languages of Spain.

4. These freedoms are limited by respect for the rights recognised in this Title (*título*), by the legal provisions implementing it, and especially by the right to [defend one's] honour, to privacy, to personal reputation and to the protection of youth and childhood.

5. The confiscation of publications and recordings and other information media may only be carried out by means of a court order."

Article 24

"1. Every person has the right to obtain 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 go undefended.

2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defense services and assistance of a lawyer; to be informed of charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent. The law shall

determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences."

23. The relevant sections of the Criminal Code (Organic Law no. 10/1995 of 23 November 1995, as in force at the material time), read:

Section 197

"1. Whoever, in order to discover the secrets or to breach the privacy of another, without his consent, seizes his papers, letters, electronic mail messages or any other documents or personal belongings, or intercepts his telecommunications or uses technical devices for listening, transmitting, recording or to play sound or image, or any other communication signal, shall be punished with a prison sentence of between one and four years and a fine [under the day-fine system] amounting to between twelve and twenty-four months.

2. The same penalties shall be imposed upon any person who, without being authorised, seizes, uses or amends, to the detriment of a third party, confidential data of a personal or family nature of another person that are stored on computer, electronic or telematic files or media, or in any other kind of file or public or private record. The same penalties shall be imposed on whoever, without authorisation, accesses [such data] by any means, and whoever alters or uses them to the detriment of the data subject or a third party.

3. A prison sentence of two to five years shall be imposed if data or facts discovered, or such captured images as are referred to by the preceding sub-paragraphs, are broadcast, disclosed or ceded to third parties. Whoever, being aware of the unlawful origin thereof (even without having taken part in their discovery), engages in the conduct described in the preceding paragraph shall be punished by a prison sentence of between one and three years and a fine [under the day-fine system] amounting to between twelve and twenty-four months.

4. Deeds described in paragraphs 1 and 2 of this section shall be punished by a prison sentence of between three and five years if: a) they are perpetrated by supervisors or persons responsible for files, computer, electronic or telematic media, archives or records, or; b) they are committed *via* the non-authorised use of the victim's personal data. If [such] confidential data are disclosed, communicated or revealed to third parties, penalties in the upper half of the sentencing range shall be imposed.

5. Likewise, if deeds described in the preceding sections concern personal data that reveal the [political] ideology, religion, beliefs, health, racial origin or sexual preference [of the victim], or if the victim is a minor or a person with disabilities requiring special protection, penalties in the upper half of the sentencing range shall be imposed.

6. If the deeds [in question] are perpetrated for the purposes of making a profit, then penalties shall be imposed, as provided in paragraphs 1 to 4 of this section, in the upper half [of the sentencing range]. If they also affect the data mentioned in the preceding section, the punishment to be imposed shall be a prison sentence of four to seven years.

7. Whoever, without the authorisation of the affected party, discloses, communicates or reveals to third parties images or audiovisual recordings obtained with the affected party's consent in a private residence or at any other location out of the sight of third parties – if said disclosure seriously breaches the personal privacy of the individual [in question] – shall be punished by a prison sentence of three months to one year or a fine [under the day-fine system] amounting to between six and twelve months. The penalty shall be imposed in the upper half of the sentencing range if the deeds were committed

by the [victim's] spouse or by a person who is or has been bound to [the victim] by a similar emotional relationship (even in the absence of cohabitation), [or if] the victim was a minor or a person with disabilities requiring special protection, or [if] the deeds [in question] were committed for profit."

Section 413

"An authority or public official who knowingly steals, destroys, fully or partially cancels, or conceals documents whose custody has been entrusted to him owing to [the nature of] his office, shall incur a prison sentence of between one and four years or a fine [under the day-fine system] of between seven and twenty-four months, and be barred from public employment and office for a period of between three and six years."

Section 414

"1. An authority or public official to whom, owing to [the nature of] his office, is entrusted the custody of documents to which the relevant authority has restricted access, and who knowingly destroys or deactivates the means put in place to prevent such access or who consents to the destruction or deactivation thereof, shall incur a sentence of imprisonment of six months to one year or a fine [under the day-fine system] of between six and twenty-four months and, in all cases, be barred from public employment and office for a term of between one and three years.

2. An individual who destroys or deactivates the means referred to in the preceding paragraph shall be punished by [the imposition of a] fine [under the day-fine system] of between six and eighteen months."

Section 415

"An authority or public official not listed in the preceding section who, knowingly and without due authorisation, gains or permits access to secret documents whose custody has been entrusted to [that authority or public official] owing to [the nature of] his office, shall incur a fine [under the day-fine system] of between six and twelve months and be barred from public employment and office for a term of between one and three years."

Section 416

"Punishment by imprisonment or a fine [in an amount] below the ones respectively stated in the preceding three sections shall be imposed on private individuals entrusted on a one-off basis with the dispatch or custody of documents ordered by the Government, or on authorities or civil servants to whom they have been entrusted owing to [the nature of] their office, but who have behaved as described ..."

Section 417

"1. An authority or public official who reveals secrets or information which come to his attention owing to his position or office and which should not be revealed, shall incur a fine [under the day-fine system] of between twelve and eighteen months and be barred from public employment and office for a term of between one and three years."

24. Concerning the civil-party complaints in the criminal procedure, the following provisions of the Code of Criminal Procedure are relevant in the present case:

Section 100

"Any crime or minor offence gives rise to criminal proceedings for the punishment of the responsible party and may also give rise to civil proceedings for the restitution of the thing, the reparation of the damage and the compensation for the harm caused by the punishable act."

Section 112

"When only the criminal action is brought, the civil action shall also be deemed to be brought, unless the victim or offended person waives it or expressly reserves it for exercise after the conclusion of the criminal procedure, if applicable.

..."

25. Royal Decree 389/2021 of 1 June 2021, which approved the founding statute of the Spanish Data Protection Agency, reads, in its relevant parts:

Section 5

"1. The Spanish Data Protection Agency is responsible for supervising the application of the regulations in force regarding [i] the protection of personal data for the purpose of protecting the rights and freedoms of natural persons with regard to the processing and, in particular, the exercising of the functions established by Article 57, and [ii] the powers provided in Article 58 of Regulation (EU) 2016/679 of the European Parliament and of the Council ... and in Organic Law 3/2018 ... (and in the implementing provisions thereof)."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

26. The applicants complained that Article 8 of the Convention had been violated, firstly given that the police, without any legal justification, had created a report on each applicant (as signatories to the above-mentioned manifesto) using photographs taken from the police ID database, and secondly, since that report had been leaked to the press; lastly, they complained about the publication of their photographs in the newspaper. Article 8 reads as follows:

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 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."

A. Admissibility

27. The Government argued that the applicants had not properly exhausted the available domestic remedies, since they should have resorted to civil proceedings in defence of their honour and reputation, rather than resorting to criminal proceedings.

28. The applicants considered that through the criminal proceedings initiated to find out who leaked the police report to the press, they used the appropriate national remedy to seek redress for the violation of their right to privacy.

29. The Court notes that the applicants used the administrative remedy available. In particular, they lodged the above-mentioned complaint to the Agency in respect of the alleged violation of their right to privacy and of their right to protection of their data. Those proceedings were eventually concluded (see paragraphs 15-19 above). In addition, the applicants also initiated criminal proceedings in an effort to find out who had leaked their personal data and photographs to the press and how those data and photographs had been leaked.

30. The Court reiterates that if domestic law provides for several parallel remedies in different fields of law, an applicant who has sought to obtain redress for an alleged breach of the Convention through one of these remedies is not necessarily required to use others that have essentially the same objective (see *Jasinskis v. Latvia*, no. 45744/08, §§ 50, 52 and 53, 21 December 2010). In view of the above, in relation to these Article 8 complaints the Government's objection must be dismissed.

31. The Court notes that these two complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. Therefore, these complaints must be declared admissible.

32. With regard to the alleged violation of Article 8 by virtue of the publication of the applicants' photographs in the newspaper *La Razón*, the Court notes that the publication of the photographs and the news item about the applicants was the sole responsibility of the newspaper, which had obtained the photographs and had decided, on the basis of assessment of their newsworthiness, to publish them and to produce an article about the public manifesto signed by the applicants.

33. However, there is no record that the applicants have taken any civil legal action against the newspaper and in the course thereof argued that the publication of their photographs had infringed their right to the protection of their own image. In the criminal proceedings initiated against, among others, the newspaper director, the main object was to find out who had leaked the

photographs of the applicants. Those criminal proceedings were eventually closed (see paragraphs 7-12 above).

34. In this respect, as the Government pointed out, it was open to the applicants to bring a civil action against the owner of the newspaper seeking redress for the possible infringement of their right to the protection of their own image. Having failed to do so, they lodged a complaint with the Court which has not first been examined by any national judicial body.

35. The Court reiterates that the rationale for the exhaustion rule is to afford the national authorities, primarily the courts, the opportunity to prevent or put right alleged violations of the Convention (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 221, ECHR 2014 (extracts)). It is based on the assumption that the domestic legal order will provide an effective remedy for violations of Convention rights. This is an important aspect of the subsidiary nature of the Convention machinery (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

36. Therefore, the complaint about the publication of the applicants' photographs in a newspaper must be declared inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention, as the applicants failed to exhaust the available domestic remedies.

B. Merits

1. The parties' submissions

(a) The applicants

37. Firstly, the applicants alleged a violation of Article 8 given that the police, without any legal justification, had produced a report on them as signatories to the above-mentioned manifesto, which had included photographs taken from the police ID database, and which had also presented their personal information and political beliefs.

38. They alleged that the gathering of all their personal information including data relating to their personal political views and data pertaining to their relatives by the police and the use of that data to create a police report had warranted a high level of protection that had been intentionally breached by the leaking of that information to the press.

39. The authorities had not explained the creation of the police report without any legal justification given that it had not been aimed at the prevention or investigation of a crime. In the compilation of that report, the applicants' facial images had been illegally extracted from the police ID database, and the report had contained comments and information gathered by the police in respect of the ideological beliefs and personal circumstances of the applicants.

40. The applicants considered that the breach of their right to respect for their private life was obvious and acknowledged in the Government's

observations, which referred to the impossibility of holding anyone criminally responsible for the State's inaction.

41. The interference could not be justified in terms of the second paragraph of Article 8. According to the applicants, it had been clearly demonstrated that in the course of the criminal and administrative proceedings there had been a failure to investigate all the relevant facts.

42. Secondly, the applicants argued that the report had been sent and thereby leaked to the press; photographs of their faces had subsequently been included in a double-page article in the *La Razón* newspaper in a manner clearly designed to resemble "wanted" posters. The applicants acknowledged having signed a document in their respective capacities as legal professionals regarding a legal controversy but argued that the subsequent retaliation had taken a form that had exceeded any proportionate or legal response on the part of the State authorities.

43. The accessing, collection and dissemination of the applicants' personal data and photographs had been carried out by public officials responsible for the custody of such data, and the leak of such data to the press had constituted a criminal offence. The applicants complained that the relevant domestic courts had not properly investigated this assertion. In particular, they considered that the investigation had not been sufficient, given that no statement had been taken from the Senior Chief of Police of Barcelona, a key person in ascertaining who was responsible for actions that the applicants considered to constitute a crime, considering that he had been the direct addressee of the report.

44. They reiterated that the *Audiencia Provincial*, in its decision ordering the investigating court to reopen the investigation, had referred to the testimony of the aforementioned official as relevant for the clarification of the facts of the case. Yet the investigating judge had not heard that evidence, and subsequently the *Audiencia Provincial* had deemed the actions undertaken by the investigating court to have been sufficient, despite the fact that it had not taken a statement from the Senior Chief of Police of Barcelona.

45. The applicants asserted that there was enormous uncertainty, which remained unresolved, regarding the link between the manifesto that they had signed while exercising their freedom of speech and the leaking of their images and personal data to a newspaper.

(b) The Government

46. The Government stated that the conduct of the proceedings by the domestic judges had in no way violated the applicants' private or family life. On the one hand, the judges had signed a public document, thus placing themselves voluntarily outside the sphere of their respective private and family lives. On the other hand, the right to private and family life had not been violated by the domestic authorities, in view of the fact that the criminal court judges had acknowledged that the handing over of the personal data of

the judges and magistrates who had signed the manifesto had indeed been a criminal act and therefore worthy of examination in criminal proceedings. The domestic authorities had failed to find sufficient evidence capable of identifying and incriminating the particular police officer who had – in violation of his or her professional duty – leaked the data. Thus, the failure to secure a conviction had resulted from the fact that, given the circumstances in question, it had not been possible to reliably identify the person responsible for the leak.

47. The judicial authorities had exerted sufficient efforts within the margin of discretion allowed them to gather the necessary evidence. Nevertheless – and even if it could be concluded that the personal data published by the *La Razón* newspaper had been unlawfully provided to it – there had never been any doubt that a violation had been committed of the applicants' right to private or family life, since the domestic courts had acknowledged that disclosing the applicants' data had constituted an offence. Nevertheless, the examination of the evidence – in respect of which the Contracting Parties enjoyed a margin of discretion that this Court should respect, at risk of turning itself into a fourth-instance court – had not made it possible to find the person responsible for the criminal conduct in question.

48. The Government argued that the applicants had initiated criminal proceedings and that they had obtained reasoned judicial decisions, and that they had had the opportunity to appeal against the decisions of the judicial body concerned and had received a reasoned response from the *Audiencia Provincial*.

49. In respect of the assertion of the applicants regarding the evidence adduced during the judicial proceedings, the Government noted that the *Audiencia Provincial* had found that the examination of the evidence sought by the applicants – namely, the statement given by the Senior Chief of Police of Barcelona – was irrelevant, since in the case under investigation, there was no evidence to suggest that that person had been the perpetrator of the offence in question; in any case, if that person had had any kind of responsibility, it would not have been of any criminal relevance but rather of disciplinary nature falling outside the scope of the criminal courts' jurisdiction.

50. Neither the Convention nor domestic legislation provided for the right to accept and examine any and all evidence proposed by a plaintiff, especially in criminal cases where investigative proceedings were initiated *ex officio* by the investigating judge. Moreover, neither was there any right to seek the criminal conviction of a third party.

51. The domestic authorities, applying the relevant case-law, had considered that the behaviour at issue did not warrant criminal prosecution, and had therefore dismissed the complaint, in accordance not only with Spanish law but also with the case-law of the Court.

2. The Court's assessment

(a) General principles

(i) Negative obligations under Article 8

52. The primary purpose of Article 8 is to protect against arbitrary interference by a public authority with a person's private and family life, home, and correspondence. This negative obligation is described by the Court as the essential object of Article 8 (see *Kroon and Others v. the Netherlands*, 27 October 1994, § 31, Series A no. 297-C). Where the case concerns a negative obligation, the Court must assess whether the interference was consistent with the requirements of paragraph 2 of Article 8 – that is to say in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society (see *Libert v. France*, no. 588/13, §§ 40 and 42, 22 February 2018).

53. A finding that the measure in question was not "in accordance with the law" suffices for the Court to hold that there has been a violation of Article 8 of the Convention. It is not therefore necessary to examine whether the interference in question pursued a "legitimate aim" or was "necessary in a democratic society" (see *M.M. v. the Netherlands*, no. 39339/98, § 46, 8 April 2003).

54. In determining whether the personal information retained by the authorities involves any "private life" aspects, the Court must have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which those records are used and processed and the results that may be obtained (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 67, ECHR 2008).

55. The Court has held that the mere fact of storing data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116). The subsequent use of the stored information has no bearing on that finding (see *Amann v. Switzerland* [GC], no. 27798/95, § 69, ECHR 2000-II). The Court reiterates that it is important to limit the use of the data to the purpose for which they were recorded (see *S. and Marper*, cited above, § 103). Data revealing political opinion falls among the special categories of sensitive data attracting a heightened level of protection (see *Catt v. the United Kingdom*, no. 43514/15, § 112, 24 January 2019).

(ii) Positive obligations under Article 8

56. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in the need to ensure

effective respect for private life (see *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, p. 422, § 33).

57. The Court therefore needs to ascertain whether the national authorities took the necessary steps to ensure the effective protection of the applicant's right to respect for his private life and correspondence (see *Craxi v. Italy* (no. 2), no. 25337/94, §§ 73 and 74, 17 July 2003).

58. Concerning serious acts, the State's positive obligation under Article 8 to safeguard individuals' physical or moral integrity may also extend to questions relating to the effectiveness of a criminal investigation (see *Khadija Ismayilova v. Azerbaijan*, nos. 65286/13 and 57270/14, § 115, 10 January 2019).

59. For an investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means (see *Alković v. Montenegro*, no. 66895/10, § 65, 5 December 2017).

60. In examining the effectiveness of criminal investigations within the context of the positive obligations under, *inter alia*, Article 8 of the Convention, the Court has previously used the "significant flaw" test. The Court's task under that test is to determine whether the alleged shortcomings in an investigation had such significant flaws as to amount to a breach of the respondent State's positive obligations under Article 8 of the Convention (see *Söderman v. Sweden* [GC], no. 5786/08, § 90, ECHR 2013).

(b) Application to the present case

(i) As regards the existence of a police report

61. The Court notes that there is no domestic legal provision that would justify the drawing by police of a report on citizens when there were no indications that they could have committed a crime or were involved in the preparatory steps necessary for the commission of a crime.

62. The report, dated 18 February 2014, referred to a group of some twenty-five serving judges in Catalonia who were going to publish a manifesto in defence of the legality of the sovereignty consultation, which was scheduled for 9 November 2014. The report identifies the alleged "main promoter and most active drafter". The content of the report refers to "thirty-four judges and magistrates who exercise their functions in Catalonia", and includes a photograph of each of them, their addresses, their job titles and, in some cases, observations on such matters as their membership of professional associations and their participation in professional courses.

63. According to the domestic courts, the data included in the report consist of personal data, photographs and certain professional information (partially extracted from the police ID database). Moreover, data pertaining to some of the applicants concern their political views.

64. In view of the circumstances mentioned above, since the interference with the applicants' private life was not in accordance with any domestic law, and the public authorities have used the personal data for a purpose other than that which justified their collection, the Court concludes that the mere existence of the police report in issue, which was drafted in respect of individuals whose behaviour did not imply any criminal activity, amounts to a violation of Article 8.

(ii) As regards the leak to the press and ensuing investigation

65. It is uncontested that the photographs of the applicants that were published in the newspaper originated in the police database, to which only the authorities had access. Even though the way in which those photographs were leaked was not determined by the domestic investigation, there is no explanation other than that the authorities permitted such a leak to be possible, thus engaging the responsibility of the respondent State. When such an unlawful disclosure had taken place, the positive obligation inherent in the effective respect for private life implied an obligation to carry out effective inquiries in order to rectify the matter to the extent possible (see *Craxi,* cited above § 74).

66. In an initial investigation of the case, the Investigating Judge closed the proceedings because, in his opinion, although the alleged facts had constituted a crime, it was not possible to identify the perpetrator or perpetrators. In this initial process, following the appeal lodged by the applicants, the *Audiencia Provincial* ruled that not all the necessary steps had been taken for it to be acceptable to close the proceedings on the grounds that it was not possible to identify the person who had committed the crime. Therefore, the *Audiencia Provincial* considered it "relevant" to carry out further investigative measures, such as hearing the Senior Chief of Police of Barcelona, who had ordered the above-mentioned report on the applicants and who had been the addressee of the report, the contents of which were later leaked to the press.

67. The Investigating Judge reopened the investigation and took statements from more witnesses but did not consider it appropriate to call the Senior Chief of Police of Barcelona to testify, and he closed the proceedings on the same grounds as previously. After the applicants appealed, the *Audiencia Provincial* upheld the decision of the investigating body and ruled that the testimony of the Senior Chief of Police could not have been relevant as there was no evidence of his having participated in the criminal acts under investigation and that his conduct, in any event, would have at the most constituted only an administrative offence.

68. The data protection Agency, at the request of the applicants, carried out a technical investigation into the use of their data after the criminal proceedings had ended (see paragraphs 15 to 19 above). However, from the documents provided to the Court it does not appear that the Investigating

Judge, during the criminal investigation, availed himself of the possibility of seeking the Agency to establish the relevant facts. The Court notes that the Senior Chief of Police of Barcelona was, as stated in the judicial decisions, the direct addressee of the report drawn up on the applicants, certain contents of which (mainly the applicants' photographs) were subsequently leaked to the *La Razón* newspaper. The *Audiencia Provincial* itself, when ruling on the applicants' first appeal against the dismissal of the case, stated that "it would be relevant to hear [the Senior Chief of Police of Barcelona] in his capacity as the direct addressee" of the report.

69. In view of the circumstances of the case, the Court considers that for a sufficient investigation to be carried out, it was necessary for the investigators to have obtained a statement from the person who had been the direct addressee of the report and who had been responsible for the persons who had accessed the police ID database and collected the data and photographs of the applicants since, regardless of his criminal or disciplinary responsibility, his testimony would have aided the identification of those responsible for the criminal acts in question.

70. In view of the above, the Court is not satisfied that an effective inquiry was carried out in order to determine the circumstances in which the journalists gained access to the photographs of the applicants and, if necessary, to sanction the persons responsible for the shortcomings that had occurred.

71. Therefore, the failure of the judicial bodies involved to carry out certain investigative measures which would most likely have been useful for the investigation into the facts of the case and which were susceptible of remedying the interference with the applicants' rights must be considered to constitute a failure by the respondent State to comply with its positive obligations under Article 8 of the Convention (see *Alković*, cited above, § 65).

72. The Court holds, therefore, that there has been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

73. The applicants complained that Article 10 of the Convention had been violated, because by signing the manifesto they had expressed their views regarding a legal controversy and, following the publication of the newspaper article, they had been subjected to disciplinary action (see paragraphs 20-21 above). Article 10 reads as follows:

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Admissibility

1. The parties' submissions

(a) The Government

74. The Government deemed that the applicants had had a right to enjoy absolute freedom of expression, since they had not only signed a manifesto in favour of the right of the Catalan people to decide their future as a nation but had been entitled to do so despite their positions as judges, that is to say public officials subject to a special duty of loyalty to the Constitution. However, by signing a public manifesto (*via* the media), they had voluntarily left the private sphere and placed themselves in the public arena, exercising the right to freedom of information that was enjoyed by all citizens. It was this freedom of information that protected the dissemination of information by the press.

75. The Government recalled that not a single authority with the power to impose sanctions on or exercise disciplinary powers against the judges who had signed the manifesto had ended up taking any decision detrimental to their interests; on the contrary, many of them had later received career promotions, which demonstrated that signing the manifesto had not had any impact on them whatsoever.

76. The group of public officials known as "*Manos Limpias*" had lodged a complaint against the thirty-three judges who had signed the manifesto with the General Council of the Judiciary, a body with disciplinary powers over judges and magistrates, requesting the suspension of the judges who had signed the manifesto. In the light of that complaint, the General Council of the Judiciary had opened a number of disciplinary proceedings in respect of each of the judges concerned, in accordance with the rules governing disciplinary proceedings. No sanction had ever been imposed on any of the applicants.

(b) The applicants

77. The applicants noted that all of them had been subjected to official disciplinary action: they had had to defend themselves during personal disciplinary proceedings. All sets of those proceedings had ended with no sanction being imposed, as it had not been possible to punish them for expressing the kind of ideas that were covered by the rights under Article 10

of the Convention. Despite this, the decisions of the disciplinary proceedings had expressed a strong criticism of their opinions that could have had a chilling effect on the exercise of freedom of expression.

78. Furthermore, they alleged that because they had expressed their views about a legal controversy by signing a manifesto, the police had created a file containing personal data and images which had then been leaked to the press by way of public retaliation.

2. The Court's assessment

(a) General principles

79. The Court recalls that interference with the right to freedom of expression may entail a wide variety of measures, generally a "formality, condition, restriction or penalty" (see *Wille v. Liechtenstein* [GC], no. 28396/95, § 43, ECHR 1999-VII).

80. In establishing whether or not there has been interference with the right to freedom of expression, there is no need to dwell on the characterisation given by the domestic courts (see *Yılmaz and Kılıç v. Turkey*, no. 68514/01, § 58, 17 July 2008).

81. In cases concerning disciplinary proceedings or the removal or appointment of judges, when ascertaining whether the measure complained of amounted to an interference with the exercise of the applicant's freedom of expression, the Court has first determined the scope of the measure by viewing it within the context of the facts of the case in question and of the relevant legislation (see *Baka v. Hungary* [GC], no. 20261/12, § 140, 23 June 2016).

82. The Court carries out a case-by-case examination of situations that may have a restrictive impact on the enjoyment of freedom of expression. It considers that mere allegations that any contested measures had a "chilling effect", without clarifying in which specific situation such an effect occurred, is not sufficient to constitute interference for the purposes of Article 10 of the Convention (see *Schweizerische Radio- und Fernsehgesellschaft and Others v. Switzerland*, (dec.), no. 68995/13, § 72, 12 November 2019).

(b) Application of the general principles to the present case

83. For the reasons set out below the Court cannot accept the argument according to which the applicants suffered reprisals for the signing the manifesto, and their freedom of expression was thereby infringed.

84. The applicants allege that they were subjected to disciplinary proceedings for signing the manifesto. The Court finds that, while it is true that disciplinary proceedings were brought against the applicants, there are two circumstances which show that the applicants' complaint should be rejected.

85. Firstly, it should be emphasised that the proceedings were the result of a complaint by a trade union (known as "*Manos Limpias*"), these proceedings were not opened *ex officio* by any public authority. This means that the General Council of the Judiciary, as the governing body of the judiciary, never considered the signature of the manifesto by the applicants as a relevant fact for any kind of response to be initiated *ex officio* by the Council. Only when a legitimate third party denounced the applicants' actions did the Council, by legal imperative, agree to open disciplinary proceedings.

86. Even more important, in view of the multiple proceedings carried out is their outcome and the reasons given by the General Council of the Judiciary. Once the disciplinary proceedings had been conducted, it was concluded that they should be closed as the applicants had signed the manifesto in the legitimate exercise of their freedom of expression and therefore no sanctions should be imposed.

87. Following this initial decision, the trade union which had sued the applicants lodged an appeal to the standing committee (*Comisión Permanente*) of the General Council of the Judiciary. This appeal was dismissed on the grounds that the General Council of the Judiciary, once more, considered that the ideas put forward by the applicants in the manifesto constituted the exercise of their freedom of expression and that, without prejudice to other assessments, it should not imply the exercise of disciplinary measures against the signatories.

88. The Court finds that there was no reprisal by the public authorities against the applicants and that the action of the judges' governing body was exclusively due to a complaint by a third party.

89. Moreover, as the Government have made clear in their observations, the applicants continued their professional careers and were promoted under usual procedure by the General Council of the Judiciary without any prejudice resulting from their participation in the aforementioned manifesto.

90. Therefore, no type of sanction or chilling effect can be discerned from the mere fact that disciplinary proceedings took place, given their outcome and also the fact that they were not initiated *ex officio* by the General Council of the Judiciary but rather as a consequence of a complaint having been lodged by a third party.

91. The foregoing considerations are sufficient to enable the Court to conclude that the complaint related to Article 10 must be declared inadmissible as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

92. The applicants complained about a breach of their right to a fair trial on the ground that the investigation carried out in respect of the crimes reported by them had not been sufficient. They relied on Article 6 § 1 of the Convention which in its relevant parts reads as follows:

> "1. In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law." ...

93. Having regard to the facts of the case and its findings under Article 8 of the Convention concerning the investigation in issue (see paragraphs 65 to 72 above), the Court considers that it is not necessary to examine the admissibility and merits of this remaining complaint.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

95. Each of the applicants claimed 13,500 euros (EUR) in respect of non-pecuniary damage.

96. The Government considered that no just satisfaction should be awarded.

97. The Court awards each applicant EUR 4,200 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

98. The applicants also claimed EUR 7,332.20 for the costs and expenses incurred before the domestic courts and EUR 2,178 for those incurred before the Court.

99. The Government considered that the applicants' lawyer included the cost of legal assistance although such amount could not be disputed as improper or excessive by the Spanish State in the proceedings.

100. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants jointly the sum of EUR 3,993 covering costs under all heads

for costs and expenses in the domestic proceedings and for the proceedings before the Court, plus any tax that may be chargeable to the applicants.

C. Default interest

101. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning the alleged violation of Article 8 of the Convention related to the publication of the applicants' photographs in a newspaper and the alleged violation of Article 10 of the Convention inadmissible;

2. *Declares* the remaining complaints under Article 8 of the Convention admissible;

3. *Holds* that there has been a violation of Article 8 of the Convention on account of both the drawing of the police report containing the applicants' personal data and the leak of their photographs contained therein;

4. *Holds* that there is no need to examine the admissibility and merits of the complaint under Article 6 § 1 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts at the rate applicable at the date of settlement:
      (i) EUR 4,200 (four thousand two hundred euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,993 (three thousand nine hundred and ninety-three euros) jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

Done in English, and notified in writing on 28 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar	Georges Ravarani President

APPENDIX

List of applicants

No.	Applicant's Name	Year of birth
1.	M.D.	1973
2.	J.A.	1945
3.	J.A.	1955
4.	A.A.	1948
5.	R.A.	1954
6.	M.A.	1954
7.	L.C.	1946
8.	F.G.	1957
9.	E.H.	1956
10.	R.L.	1956
11.	D.M.	1971
12.	M.M.	1958
13.	J.N.	1952
14.	M.P.	1962
15.	M.R.	1971
16.	F.R.	1951
17.	J.R.	1962
18.	M.S.	1953
19.	J.U.	1955
20.	S.V.	1953