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Private Life and the Protection of the Environment

European Court of Human Rights 9 December 1994, Series A, vol. 303-C, *López-Ostra v. Spain*

In December 1994 the European Court of Human Rights (hereafter: the Court) handed down an important decision, finding a violation of Article 8 of the European Convention of Human Rights (ECHR) because of the pollution caused by a waste-treatment plant and the ensuing effects upon the applicant's health and housing conditions. The implications of this judgment are potentially far reaching in particular as regards those countries with less developed legislation and rules against all kinds of environmental problems, and with huge pollution problems caused by out-dated and ill equipped factories, which lack sophisticated techniques to prevent pollution of the air, water and the soil, and which thereby directly affect people's health and living conditions.

The facts of the *López-Ostra* case were relatively simple.

A waste-treatment plant was built next to the apartment of the applicant; the plant started to operate (without a licence) in July 1988. As a result of many disturbances, causing fumes, smell and contamination, the people living in the vicinity of the plant were evacuated by the municipality and temporarily housed elsewhere. After some months the applicant and her family returned to their apartment and lived there until February 1992.

In September 1988 the local council ordered the cessation of some activities at the plant. The Court deduced from a report written by experts and submitted to the Court by the Spanish Government and the applicant, that a nuisance remained and could endanger the health of the people living in the vicinity.

The applicant urged the municipality to find a solution to the nuisance in vain. She then filed an appeal with the competent administrative court, invoking constitutional rights

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such as the inviolability of her home, the right to physical and psychological integrity and the right to security. The Crown Counsel supported the applicant's request. The administrative court, however, dismissed the case because in its opinion there was no serious danger posed to the health of the people living in the vicinity.

On appeal the Crown Counsel again pleaded that the situation complained of by the applicant was an arbitrary and illegal interference by the public authorities with the applicant's private and family life. Again, however, the appeal was dismissed by the administrative appeal court.

Subsequently the applicant resorted to the remedy of '*amparo*' before the Constitutional Court. The Constitutional Court declared this petition inadmissible, because of its being manifestly ill-founded.

In 1989 the applicant's two sisters-in-law, who lived in the same building as the applicant, started an administrative law procedure against the municipality; the court in this case ordered a closure of the plant. Since the municipality appealed against this judgment, the order was suspended. This procedure was still pending before the Spanish courts when the applicant's case was dealt with by the European Court of Human Rights.

The two sisters-in-law filed a criminal complaint in 1991, leading to the start of a criminal procedure against the waste-treatment plant. Both sisters-in-law became civil parties in this criminal proceeding. The investigating judge ordered a closure of the plant; however, this order was also suspended because of an appeal being lodged against it.

The investigating judge ordered the drawing up of reports by experts. These reports showed an unacceptable emission of toxic fumes and damage to the health of the people living in the immediate vicinity. It also became apparent from statements by physicians that the health of the applicant's daughter had been seriously damaged. They consequently recommended that she move.

In 1992 the applicant and her family were rehoused in an apartment in the centre of the city, of which the municipality paid the rent. In 1993 the applicant bought another house and consequently moved. In the same year the plant was temporarily closed following a court order.

The observations of the European Court of Human Rights with regard to the applicability of and alleged interference with Article 8 ECHR (protection of private life and family life) were the following:

II. *Alleged violation of Article 8 of the Convention*

44. Mrs López Ostra first contended that there had been a violation of Article 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 was not the same as the one that the Spanish court 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*. 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, §28, and p. 38, §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.

49. On the basis of medical reports and expert opinions produced by the Government or the applicant, 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 casual 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. 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.

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 -, 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, 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, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (see, in particular, the Rees v. United Kingdom judgment of 17 October 1986, Series A no. 106, p. 15, §37, and the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, p. 18, §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.

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.

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. However, the council's members could not be unaware that the environmental problems continued after this partial shutdown. 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.

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.

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. 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, §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*, it need only establish whether the national authorities took the measures necessary for protecting the applicant's rights to respect for her home and for her private and family life under Article 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, §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.

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, with the result that the order was not enforced until 27 October 1993.

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

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. 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.

Comment

This is the first judgment of the Strasbourg Court in which an environmental issue has given rise to a violation of Article 8 ECHR (quoted in observation 44 of the Court's judgment, *supra*). The Court had already made clear in a previous judgment that Article 8 ECHR could be of relevance in this context. That is, that causing nuisance, noise or the emission of toxic fumes etc. can be considered as an interference with the rights protected in Article 8 ECHR [1]. In 1990 the Court observed, when confronted with a case concerning nuisance (noise) caused by planes landing at and taking-off from an important airport:

> the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport (...). Article 8 is therefore a material provision in relation to both Mr Powell and Mr Rayner [2].

The Court did not reach the conclusion that Article 8 was violated in that specific case because:

> the United Kingdom cannot arguably be said to have exceeded the margin of appreciation afforded to them or upset the fair balance required to be struck under Article 8 (between the conflicting interests of the individual and the society as a whole).

In that respect the Court referred to the importance of Heathrow Airport, to the measures that had been taken by the public authorities in order to reduce the noise generated by the aircrafts and to the compliance of these measures with international standards which had been laid down in international rules.

1. This implies a further reduction of the differences between 'social' rights and the classic freedom rights, by incorporating social elements into the protection offered by the enforceable freedom rights. In Heringa, *Sociale grondrechten* (Kluwer, 1989), 294, I have signalled this development which is of particular interest for the development of social rights.
2. *Powell and Rayner v. the United Kingdom*, Judgment of 21st February 1990, ECHR Series A, vol. 172, no. 40.

In the *López Ostra* case the structure of the Court's reasoning is similar, as can be seen in para. 51.

A distinction which should be noted however, is that the Court does not decide whether the issue involved is to be characterized as a 'positive duty' (to be inferred from Article 8) or as an 'interference'. The reason given by the Court for not pronouncing itself explicitly on this is that the criteria which are to be used to judge whether Article 8 has been violated are 'broadly similar'. Whether a State fulfilled its obligations flowing from a positive duty, or whether a State unlawfully interfered with the right protected in Article 8 is to be judged upon conformity with the Convention according to similar principles. These are the following:

It has to be ascertained whether a fair balance exists between individual interests and the interests of the society as a whole, in which respect the State is to be afforded a margin of appreciation. The interests summed up in the second paragraph of Article 8 (national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others) play a role in this context. In the present case of *López Ostra* the relevant interest involved was the economic well-being of the city, which had an interest at stake in providing for a waste treatment plant servicing the many tanneries in the city.

The Court found that serious risks to health existed (it is interesting to note that the protection of health is also one of the restriction clauses in the second paragraph), and that these risks had not sufficiently been limited by the public authorities. In that respect the Court referred to some specific circumstances in particular. The Court did not concern itself with the question whether the public authorities had exercised its duties well, but only whether they had taken sufficient and necessary measures in order to protect the applicant's right to private and family life.

By what specific actions and omissions did the public authorities not fulfil this duty to effectively protect Article 8?

1. The municipality had resisted the court decisions that the plant be closed; it had even filed appeals against these judgments;

2. The Crown Counsel had appealed against the decision of the investigating judge that the plant be closed, with the outcome that the effectuation of the closure was postponed;

3. The applicant's family had to endure the inconveniences of living close to the waste-treatment plant for a period of three years.

Therefore, taking into account the seriousness of the nuisance, the negligence of the State to offer an effective protection, and even worse, the State's resistance to closing the plant, the Court ruled that there was no fair balance between the interests of the individual applicant and the interests of the State. As a result the Court found a violation of Article 8.

The obligation to take the necessary and effective measures in order to guarantee the enjoyment of a right protected in the Convention ('positive duty' or 'positive obligation' as contrasted to the obligation to abstain from interferences with the Convention rights) has become a firmly established part of the Strasbourg case-law. The States for instance do have the obligation to guarantee effective access to a court (Article 6); [3] or to take measures and adopt policies aimed at reuniting families that for one reason or another have been split up, e.g. because the children have been put into care [4].

The doctrine of the positive duty also implies that the public authorities are occasionally under an obligation to redress interferences with a human right, committed by another private citizen; the State can be held responsible for not acting effectively when rights are being infringed by third-parties. An important precedent in that respect is *X and Y v. The Netherlands* [5].

The present decision in the *López Ostra* case fully confirms the established case-law concerning positive obligations and the occasional duty to take measures in order to guarantee the effective exercise of a Convention right; what makes this judgment, however, an important next step in this developing case-law, is that the Court, unanimously, found a violation. Despite the margin of appreciation afforded to the State the Court still considered that the State had not taken sufficient steps and measures. The Court did not pronounce on what exactly it considered to have been an effective protection; or, in other words, the Court was not very explicit in saying exactly which factors (actions or omissions) led the Court to conclude that Article 8 had been violated. The situation taken as a whole made it reach this conclusion. In that respect the decision is not very clear. New cases will therefore have to be brought before the Court in order to obtain clarification as to exactly when (what level of environmental nuisance) and

3. See for instance *Airey v. Ireland* 9th October 1979, Series A, vol. 32.
4. See in this respect the most recent precedent *Keegan v. Ireland* 26th May 1994, Series A, vol. 290: 'According to the principles set out by the Court in its case-law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family'.
5. Judgment of 26th May 1985, ECHR Series A vol.91. In this case the Court ruled (with respect to the rape of a mentally handicapped girl) that Article 8 obliged the State to afford effective remedies to the victim, which could only mean an adequate regulation in the Criminal Code. The Court therefore prescribed a specific course of action; it explicitly considered civil law remedies not sufficient to fulfil the requirements of Article 8.

how (what activities and omissions by the State) an environmental issue will lead to a violation of Article 8.

It does not seem too far fetched to conclude that the Court would have accepted as an effective protection only those measures which would have substantially reduced the toxic fumes. The fact that the applicant moved does not as such set aside the infringement of Article 8, because the fact that it was necessary for her to move still made her a victim in the opinion of the Court.

What is relatively new in this decision, as well as in the *Keegan* case referred to *supra*, is the fact that the Court did not distinguish strictly between 'interferences' (actions by the State which touch upon a right guaranteed in the Convention) on the one hand, and omissions to take positive measures, on the other. Both kinds of State (non)activity are to be judged according to a similar test: looking for a fair balance, taking into account the interests laid down in the second paragraph.

To summarize: it is not so much the reasoning of the Court or its method of interpretation which make the present judgment an important one: far more relevant is the fact that the Court followed its previous case-law to the logical end, by concluding that serious environmental issues can lead to a question under Article 8 and even to a violation. That approach will certainly give rise to many more petitions and judgments finding against a State. It is also important to note that the approach by the Court will lead to a further fusion of freedom rights and social rights. It will be more and more relevant to distinguish between various components and implications of rights, than to distinguish instead according to the 'old-fashioned' categories of freedom rights and social rights. In the near future this ought to have implications for the codification of human rights as well, such as the distinction (in two treaties) between the European Convention on Human Rights and the European Social Charter.