DDFF 509/2020

TO THE ADMINISTRATIVE CONTENTIOUS ROOM OF THE COURT SUPERIOR OF JUSTICE OF MADRID

- SIXTH SECTION

Mrs. MARTA SANZ AMARO, Solicitor of Courts No. 670 of Madrid and of **GREENPEACE ESPAÑA,** as I have accredited in the reference actions, acting under the legal direction of Mrs. Laura Díaz Román, ICAM Lawyer no. 27,094, before the Chamber I appear and as best proceeds in Law,

I say

That on September 22, 2021 I have been notified of the sentence issued by this Court on September 15, 2021, in whose operative part the contentious appeal is dismissed administrative procedure followed by the Fundamental Rights procedure 509/2020, filed for my part against the Agreement of September 15, 2020, of the General Director of Policy Commercial of the Ministry of Industry, Commerce and Tourism, by which the right to requested public information, and said resolution is ratified as it is considered in accordance with law.

That considering, said with due respect and in strict terms of defense, that the Said Judgment is contrary to law and is detrimental to the legitimate rights and interests of my client, I have come to PREPARE AN APPEAL, and in order to certify that the requirements of article 89 of the LJCA are met, I state to that effect what Next:

FIRST.- Proof of compliance with the regulated term requirements, legitimacy and appealability of the resolution being challenged.

GREENPEACE ESPAÑA is entitled to file, and thereby prepare, an appeal for cassation, for having been a plaintiff in the contentious-administrative appeal whose Judgment was appeals, as required by article 89.1 LJCA.

This document is presented within a term of thirty days following the notification of the judgment appealed, which took place on September 22, 2021 *(former* article 89.1 LJCA).

The sentence can be appealed in accordance with article 86.1 LJCA, for having been issued in sole instance by the Contentious-Administrative Chamber of the Superior Court of Justice of Madrid, without being affected by any of the cases of exclusion of section 2 of the same precept.

SECOND.- Identification of the norms or jurisprudence that are considered you will break.

In accordance with the provisions of article 86.3 and in compliance with the provisions of the section b) of article 89.2, both of the LJCA, this party considers that the resolution challenged violates the following regulations and jurisprudence related to it, all alleged them both in the filing of the appeal and in the demand:

A) The provisions of articles 20.1.d) and 4 CE, 96 CE, 10.2 CE, 10.1 and 2 of the European Convention on Human Rights -hereinafter ECHR-- and jurisprudence Constitution and the ECHR dictated in interpretation of said precepts.

Article 10.1 ECHR regulates the right to freedom of expression, taking into account its double aspects such as freedom of opinion and freedom to receive or communicate information or ideas. From this dual perspective, my client invoked in her claim that the jurisprudence of the ECHR has evolved to end up recognizing that the right of access to information It is part of the right to freedom of expression. Also that non-governmental organizations, such as GREENPEACE ESPAÑA, should be considered "watchdogs"

of society --*wachdogs* in the words of the ECHR-- by channeling the information that allows hold necessary debates in a democratic society, performing functions similar to those traditionally done by the media.

This interpretation of Article 10.1 of the ECHR was invoked by my principal in his claim, consider that our courts, in accordance with the provisions of article 96 EC and the rule hermeneutics of article 10.2 EC, they had to incorporate this new doctrine of the ECHR to define the content of the right to freedom to freely communicate and receive truthful information, recognized in article 20.1.d) CE, which must guarantee the right of access to information to guarantee its full exercise. On the other hand, it was this invocation (of the violation of a fundamental right), which motivated the contested judgment itself to admit the need to process the appeal of my principal through the special procedure for the protection of fundamental rights, when once admitted the connection between this right and the recognized in article 105.b) CE, stated that the non-delivery of the requested information could affect the right of this part to *"freely communicate or receive truthful information by any means of diffusion" (FJ* 6º).

But the Court of Instance also recognizes that, in accordance with section 4 of the same precept constitutional, *"these freedoms have their limit in the respect for the rights recognized in this Title, in the precepts of the laws that develop it and, especially, in the right to honor, to intimacy, to one's own image and to the protection of youth and childhood".* And adds that in our case, *"finds its limits precisely in the security and defense of the State and in the economic and commercial interests included in article 14 of Law 19/2013 and Law 9/1968, on official secrets".* With this, he proceeds to dismiss the appeal filed by me. principal and to declare that the contested resolution was in accordance with the law.

This party considers that the aforementioned interpretation of the regulations invoked by the judgment *to quo,* violates the provisions of Articles 96 EC, 10.2 EC, 20.1.d) and 20.4 EC, and Art and 2 ECHR, as well as the jurisprudence that interprets them. Although the contested Judgment only mentions article 20.1.d) and section 4 CE, the other precepts were widely invoked by my client in her lawsuit, understanding that, in accordance with the provisions of

Article 96 CE and the hermeneutical rule of Article 10.2 CE, the Court *a quo* would have to having interpreted article 20.1.d) according to the content of article 10.1 and 2 ECHR, according to the most recent interpretation that the ECHR has made of it.

The contested ruling -as well as the opposition briefs from the State Attorney's Office, the Public Prosecutor and the co-defendant- validates the claim of the Administration that the special powers granted by the Official Secrets Act serve to protect the interests of the arms exporting companies, or the economic interests of the State, against the exercise of the fundamental right to freedom of expression and information of my principal.

It also validates the generic invocation by the Administration of the need to preserve the security and defense of the State, as a justification to prevent the delivery of the documentation requested by GREENPEACE ESPAÑA, on the sale of a certain weapons material that could be violating national and international legislation in arms trade. But in the judgment of instance any justification is omitted rigorous that the affectation to the security and defense of the State is real and contrasted.

The contested sentence does not make a judgment of proportionality for the imposition of limits to the affected fundamental rights, as established by the ECHR in its jurisprudence. According to the doctrine of the European High Court, it is necessary to carry out a weighting of the legal rights in conflict to determine which of them should be protected first, if the right to freedom of expression of GREENPEACE ESPAÑA, and the right to life of citizens whose lives are being annihilated with Spanish weapons, with manifest violation of international legality; or the alleged affectation of security and defense of the State (which has not been accredited in the ruling *a quo),* and the interests economics of the company NTGS. The imposition of a limit on the exercise of a right fundamental, without making any judgment of proportionality in accordance with the criteria established by the ECHR, violates the right to freedom of expression of the appellant here.

Both in filing the appeal and in the claim, this party extensively invoked the judgments of the Constitutional Court and the European Court of Human Rights that

contained the doctrine that, in accordance with the hermeneutic rule of article 10.2 CE, the Court of instance should have been incorporated into our ordering. Among the jurisprudence of the ECHR, the judgment of November 28, 2013, Österreichische Vereinigunz case was cited zur Erhaltung and others c. Austria; the February 17, 2015, matter Guseva c. Bulgaria; and the of November 8, 2016, matter Magyar Helsinki Bizottsag c. Hungary. Of the latter se Paragraphs 156 and 172 were especially highlighted, in which the Grand Chamber unequivocally declared the violation of the right recognized in Article 10.1 of the ECHR, after declaring that *"The Court you are convinced that the requesting NGO wanted to exercise the right to disseminate information on a matter of public interest and sought information for that purpose."*

The jurisprudence of the Constitutional Court cited in the lawsuit, which applying this regulation, it granted protection to the appellants, considering that their right had been violated. to freedom of expression for infringement of the provisions of Article 20.1.d) CE, interpreted in accordance with the provisions of article 10 of the ECHR. Among others, the STC 6/2020, of January 27, 2020, also cited in the lawsuit.

The cited jurisprudence gives priority to the fact that the application of the limits established in article 10.2 of the ECHR --in parallel to that established in article 14.2 LTAIBG, as we shall see later- must be made after a judgment of proportionality that responds to the question of whether the interference implied by the application of a limit to the exercise of a right is necessary in a democratic society. Far from understanding it that way, the appealed judgment dismisses the appeal and validates the administrative decision, without in any case having the judgment of proportionality required in the cited jurisprudence.

B) The contested Judgment has also violated articles 2 and 4 of Law 9/1968, of 5 of April on Official Secrets -hereinafter LSO- and the Agreement of the Council of Ministers of March 18, 1987.

The contested Judgment violates articles 2 and 4 of the LSO, which were invoked in the demand –page 10- when assuming that such precepts prevent the delivery of the documentation requested by my client, when the reality is that they only indicate the possibility that the

Council of Ministers can declare "classified matters" in certain cases, to some documents.

The Agreement of the Council of Ministers of March 18, 1987, qualified as a classified matter, with the category of secret, the minutes of the Interministerial Trade Regulatory Board Exterior of Weapons and Explosives. This Board was the body that, in accordance with the regulations then in force, was responsible for granting authorizations to export weapons.

Currently, the body in charge of verifying that arms export permits they comply with what is established in the Arms Trade Treaty, and in Law 53/2007, of 28 December, on the control of foreign trade in defense and dual-use material, is not the Board referred to by the Council of Ministers in 1987, but the Interministerial Board Regulator of Foreign Trade of Defense Material and Dual Use -hereinafter the JIMDDU-. My client requested the administrative files referring to the licenses granted for exports to Saudi Arabia of Alakran 120 mm mortar carriers, specifying that such file should have in any case the minutes of the *"meeting of the Interministerial Regulatory Board for Foreign Trade in Defense and Dual Use Materials –JIMDDU--",* request that was denied by the resolution of September 15, 2020, which gave origin of this procedure.

The appealed Judgment, ignoring the arguments put forward by me, uncritically assumed those of the resolution of September 15, 2020, without even noticing the clear errors of that, which this party duly accredited. In this way, in the FJ 6º he limited himself to pointing out:

> *"Regarding the minutes of the Interministerial Regulatory Board of Foreign Trade of Material of Defense and Dual Use, it must be taken into account that by Agreement of the Council of Ministers of March 13, In 1987, a classified matter was declared with the qualification of secret to said acts and as such they constitute documentation classified according to article 4 of Law 9/1968, of April 5, on Secrets Officers"*

Which leads the Court of Instance to conclude, a little later on the same basis:

> *"Then, in the present case, the Administration has not violated the right invoked by the appellant (article 20.1.d) since it is information that contains data from third parties unrelated to it, in addition to being*

reserved matter in accordance with Law 19/2013 and Law 9/1968 on official secrets, so it is appropriate in this case the dismissal of the appeal".

The contested judgment did not take into account that this party proved that the alleged Agreement of the Council of Ministers, of March 13, 1987 –to which the resolution also referred administrative - was actually dated March 18, 1987, and that the minutes that were declared matter classified as secret, it was not the minutes of the JIMDDU, but of the body that in 1987 was entrusted with the powers in matters of authorization of the arms trade. This party provided as document number 1 of the lawsuit, the copy of the Agreement of the Council of Ministers where both aspects were recorded. As also claimed in demand, they were different organisms, in a very different social reality. Reality back then was marked by a serious problem of terrorism, and today's is marked by the international commitments assumed by Spain in relation to the arms trade (incorporated into Spanish domestic law), which establish special obligations to control arms exports so that they are not used to commit serious violations of the law international humanitarian and human rights.

In the current regulatory paradigm, it is not possible to deny the files requested by my principal without having proven that the declassification of the requested information could affect State security, national defense, foreign peace or constitutional order.
Nor can it be that the mere thaumaturgical invocation of an Agreement of the Council of Ministers, of which neither the date nor the body whose minutes were declared secret was known, may be enough to deny access to the requested documentation, when what is put at risk is the appellant's exercise of the right to freedom of expression. You can still less accept, that within this new order established by the TCA of which Spain is a signatory, the economic and commercial interests of arms exporting companies may be protected through the powers that the Official Secrets Law places in the hands of the Administration, so that it protects the security of the State or national defense.

C) Violation of article 14.2 and 16 Law 19/2013, of December 9, on transparency, access to public information and good governance (LTAIBG).

The last set of regulations violated by the ruling *a quo* is that of the LTAIBG. Article 14.2 LTAIBG requires that the limits that apply to the right of access to public information are justified and proportionate to their object and purpose of protection, and that meet the the circumstances of the specific case, especially the concurrence of a public interest or higher private that justifies access. This issue is also closely linked to the vulnerability of Article 10.2 ECHR and the case law interpreting it, in the terms already indicated in the first paragraphs of this section.

As for article 16 LTAIBG, it imposes the obligation to grant partial access to the information, prior omission of the information affected by the limit that is applicable in each case. The unjustified manner in which the administrative decision was issued, validated by the judgment *a quo,* without having analyzed the specific documents requested to know which could be subject to partial access and which could give rise to some type of affecting the interests invoked, constitutes a clear violation of this legal precept. Me sponsored already indicated in the initial application of August 20, 2020, that according to the criteria interpretations of the CTBG the information had to be delivered to him in a partial way, to operate some limit of those provided for in the transparency law.

THIRD.- Justification that the imputed infractions have been determinants of the decision adopted in the resolution to be appealed (89.2 d).

This party considers, with all due respect and in strict terms of defense, that the Court of instance has violated the precepts invoked in the previous section, assuming uncritically the administrative decision challenged in the appeal of my client. paragraphs transcripts of the sentence, which contain the reason for deciding the Chamber, prove that only an incorrect interpretation of the provisions of articles 20.1.d) and 4, 10.2 CE and 10.1 and 2 ECHR, as well as the constitutional jurisprudence and the ECHR that interprets them; and of the Articles 2 and 4 of the LSO, as well as the Agreement of the Council of Ministers of March 18, 1987, can justify the dismissal of the appeal filed by my client.

Considering that the freedom of expression of my client finds its limit in an alleged affectation of *"the security and defense of the State and of the economic and commercial interests*

collected in article 14 of Law 19/2013 and in Law 9/1968 on official secrets", without having previously made the judgment of proportionality that the jurisprudence of the ECHR invoked requires in order to apply any limit to the exercise of a fundamental right, such as freedom of expression, allows affirming that the infringement of the regulations and jurisprudence invoked, have been decisive and relevant to adopt the desestimatoria decision of the claims of my principal, which includes the contested judgment.

Finally, it affirms the ruling *a quo* by determining that there is no violation of art. 20.1.d) CE, that "the *right of article 20.d) EC has its limit provided for in section 4 of that same precept: respect for the rights recognized in this Title and the laws that develop them. In this case finds its limits in the security and defense of the State, and in the interests economic and commercial matters included in article 14 of the Transparency Law, as well as in the LSO".* However, neither the security and defense of the State, nor the economic and commercials of the company NTGS are part of the rights recognized in Title I CE. As established in art. 20.4, only *"respect for the rights recognized in this Title"* can constitute a limit to the exercise of the right to freely communicate and receive truthful information, and not other legal assets, such as the economic interests of a company, which, due to legitimate they are, do not constitute any of the exceptions provided for in paragraph 4 of article 20 EC to limit the exercise of the fundamental right to freedom of expression.

FOURTH.- Justification that the norms invoked as violated form part of the State law, as the judgment under appeal was issued by the Contentious Chamber administrative of the High Court of Justice of Madrid. (89.2.e)

The norms that are invoked here as infringed are precepts that are part of the Spanish Constitution, the ECHR, the regulations governing official secrets, and the Law 19/2013 on Transparency, access to public information and good governance, all of them state level. Likewise, the aforementioned constitutional and ECHR jurisprudence interpret this state regulations.

FIFTH.- This appeal has an objective appeal for the formation of jurisprudence.

This resource presents objective appeal for the formation of jurisprudence, for In our case, there may be different circumstances from those provided for in article 88.2, LJCA. In Specifically, those indicated in sections b), d) and i). Interest is also presumed. objective appeal in accordance with the provisions of article 88.3.a) LJCA, as it has been applied norms on which there is no jurisprudence and based on them the reason for deciding of the contested sentence.

1º.- The contested resolution establishes a doctrine that can be seriously harmful to general interests (art. 88.2 b) LJCA).

The contested resolution violates the provisions of Article 96 CE, and the obligation hermeneutics contained in article 10.2 CE, which allows us to understand, according to the regulations and jurisprudence of the ECHR profusely collected in the lawsuit, that within article 20.1 d) CE also resides the active right of access to information, as an integral and essential part of the right to receive truthful information by any means of dissemination. The sentence *a quo,* if either assumes the origin of processing the appeal through the special procedure for the protection of fundamental rights -against the opinion of the counterparts--, for understand that *"the right that was invoked as infringed, if it had been, is susceptible to jurisdictional protection by the special procedure followed by the appellant",* does not extract from such statement the need to interpret the regulations invoked in light of the violation of the right to freedom of expression, in its facet of freely receiving or communicating information truthful. The Chamber *a quo* assumes, uncritically, that the mere invocation of the presence of a matter classified with the qualification of "secret", exempts the Administration -or the body judicial process - to analyze whether we are really dealing with an official secret, the protection of which deserves to completely limit the exercise of the fundamental right to freedom of expression, without carry out the proportionality judgment required by the jurisprudence of the ECHR, and without taking into account account what is established in article 14.2 Law 19/2013. In the present case, the Chamber *a quo* ni not even adequately considered the date and the body referred to in the Agreement of the

Council of Ministers, which in 1987 described the minutes of the Board as secret Interministerial Regulation of Foreign Trade in Arms and Explosives- doc.1 of the demand-.

The contested resolution maintains the *status quo* of 1987, according to which the Government imposed a barrier to access to information through the secret classification of the records of that Interministerial Board. In those times, certainly, the very concept of State security was very different from today. This is confirmed by the jurisprudence established by the different judgments of 1997 on the GAL case -cited on page 62 of the application- that led the Supreme Court to declassify under certain conditions the documents that the Council of Ministers had described as "secret", after carrying out a weighing judgment such as the one that this party has been claiming since the beginning of this proceeding, and consider that the fundamental rights involved deserved greater protection than a “security national” that was not even really at risk with the declassification of the aforementioned documents.

The premises from which the Judgment is based are far from the social reality of the year 2021, in which the real dangers to a democratic society lie in the spread of "fake news" and disinformation, (but also in the abuse of power used by the State secrets to violate current legislation). To combat all of this, the The legal system has provided for a new transparency regulation, in which access to information public fulfills an important function. Here it is enough to recall the Order PCM/1030/2020, of 30 October, which published the Action Procedure against disinformation approved by the National Security Council -BOE November 5, 2020-, which in the section 1.Contexto, says that *"Access to truthful and diverse information is one of the pillars that sustain democratic societies and that institutions and administrations must ensure public, because it is formed as the instrument that allows citizens to form a opinion on various political and social issues.*

2º.- The judgment that is being challenged aims to resolve the debate that has revolved around the constitutional validity of a norm with the rank of law, without the inadmissibility of raising

the pertinent question of unconstitutionality appears sufficiently clarified (88.2 d) LJCA).

The contested resolution clarifies nothing about the express request of my client, raised in the Grounds ninth of the claim, in which it requests the following from the Court: *"However, if the judicial body understood that the origin of the violation of fundamental rights here we denounce, it is not in the 1987 Agreement but in the Official Secrets Act, we request to raise the pertinent question of unconstitutionality to the Constitutional Court, as provided in arts. 163 CE and 35 LOTC. In any case, in the case of a law pre-constitutional, we remind this illustrious judicial body that it is possible, as was established in the STC 4/1981, of February 2, to disapply the norm in case of having it by unconstitutional, completing the gap that would remain in the way it has been exposed in the this writing".*

The ruling *a quo* bases its resolution on the pre-constitutional LSO, among other regulations that serve as a basis to motivate its resolution, without clarifying at any time the inadmissibility of raising the question of unconstitutionality requested by my client, based in the pre-constitutionality of the Law.

3º.- The contested sentence has been issued in the special procedure for the protection of fundamental rights (88.2 i) LJCA)

The contested decision has been issued within the framework of a special protection procedure of fundamental rights, that despite the claim of the State Attorney that inadmissible, because in his opinion it was about the violation of the right of access contained in Article 105 b) EC, and the defendant understands that this is not part of the group of rights fundamental whose violation gives access to this special procedure, this claim was denied by the trial court. The Madrid Chamber admitted the processing of the appeal by this procedure, understanding that it dealt with the possible violation of Article 20.1.d) CE, although he finally dismissed my client's appeal because he understood that various limits of article 14.1 LTAIBG.

4º.- In the contested Judgment, rules have been applied in which the reason for decide on which there is no jurisprudence (88.3 a) LJCA).

The contested judgment explicitly applies both articles 20.1.d) and 4 CE, article 14.1 and 2 LTAIBG, and Law 9/1968 on Official Secrets and supports the reason for deciding on this regulation. In short, it dismisses my principal's appeal on the understanding that the freedoms recognized by article 20.1.d) CE, find their limits in what is established in the section 4 of this same provision, when it states that, *"precisely in the security and defense of the State and in the economic and commercial interests included in article 14 of the Law 19/20013 of Transparency and in Law 9/1968 on official secrets…".*

On the application of the limits established in article 14.1 LTAIBG, in accordance with section 2 of the same precept, various judgments have been issued by the Supreme Court, although referring to issues other than those raised here. The closest to the car course is the STS of March 25, 2021 -RC 2578/2020- in which the operation of the limit was analyzed provided for in article 14.1.d) LTAIBG referring to public security, in relation to data contained in the National Catalog of Strategic Infrastructures classified as “secret”.
In the present case, unlike the previous one, the reason for deciding the contested judgment, is other than the consideration that they are the limits of the security and defense of the State -14.1.a) and b) LTAIBG-, as well as the economic and commercial interests of the co-defendant company NTGS -14.1.h) LTAIBH- those that led the Court *to* dismiss the appeal of my principal. All of these issues on which there is no jurisprudence in the terms in which it has been debate has been raised.

The objective appeal interest present in this case refers to how the limits imposed on the exercise of a fundamental right such as freedom of expression. These limits are included in letters a) and b) of article 14.1 LTAIBG, and the debate is about on whether the mere invocation of the same displaces the provisions of article 14.2 LTAIBG and 20.4 CE, as well as in the jurisprudence of the ECHR on the criteria that must be followed for the imposition of limits on the exercise of fundamental rights widely proposed; and yes this invocation of the same exempts the Administration from the obligation to carry out the

proportionality judgment required by the LTAIBG and the ECtHR doctrine. interests that in accordance with article 14.2 LTAIBG, they must be weighted through an interpretation justified and proportionate to its object and purpose of protection, and that in our case it has not been accomplished.

There is also objective appealing interest due to the need to have jurisprudence that interpret the Official Secrets Act, and determine whether the powers conferred in said Act norm for the safeguarding of "the security of the State", or of "national defense, external peace or the constitutional order", can be used to preserve the "economic interests and commercial" of the companies dedicated to the arms trade. And this in the terms that it proposes the contested sentence, which considers the administrative decision to deny the information contained in the minutes of the JIMDDU --understanding that they are matter classified with the qualification of secret-- and that the knowledge of said acts by my represented could be detrimental to the economic and commercial interests of the codemandada NTGS.

Finally, this part, which is also of objective appealing interest, understands the need to determine if, being affected the right recognized in article 20.1.d) CE - as recognized the sentence *a quo*- the limits "security and defense of the State" or "the economic interests and commercial" collected in the Transparency Law and in the LSO, can be considered included in those established in article 20.4 CE, which refers to respect for the rights recognized in the same Constitutional Title, in the precepts of the laws that develop it, or in the right to honour, to privacy, to one's own image and to the protection of youth and childhood.

These are aspects, all of them, on which there is no jurisprudence

For the above, and in accordance with articles 86 and concordant of the Law of the Contentious-Administrative Jurisdiction,

TO THE CHAMBER I REQUEST That, considering that this document and its copies, agree to have duly prepared the CASSATION APPEAL AGAINST THE JUDGMENT 510/2021 of September 15, 2021, of this Chamber and Section by which dismisses the contentious-administrative appeal filed by this party against the Resolution of September 15, 2020, of the General Directorate of Commercial Policy of the Ministry of Industry, Commerce and Tourism denying access to the requested public information for my part on August 20, 2020, and once the summonses have been practiced, the records and the administrative file for the appropriate purposes.

OTHERWISE I SAY that this party expresses its manifest will to have complied in the present written the requirements demanded by the LJCA, so

TO THE CHAMBER I REQUEST that, in the event of having incurred in any procedural defect, it be grant this party the appropriate procedure for its correction, in accordance with the provisions of the art. 231 of the Law of Civil Procedure.

In Madrid, on November 5, 2021

This writing has 33,332 characters with space, which is certified.