ADMINISTRACION DE JUSTICIA

R. CASACION no.: 373/2022

Speaker: Her Excellency Ms. María Isabel Perelló Doménech

Counsel for the Administration of Justice: Ms. Aurelia Lorente Lamarca

SUPREME COURT
CONTENTIOUS-ADMINISTRATIVE CHAMBER
SECTION: FIRST SECTION: FIRST

A U T O

H. E. Messrs. and Excellencies. Excellencies and Excellencies.

D. César Tolosa Tribiño, Chairman

Ms. María Isabel Perelló Doménech

Mr. José Luis Requero Ibáñez

Ms. Ángeles Huet De Sande

Ms. Esperanza Córdoba Castroverde

In Madrid, on the 4th day of May 2022.

FACTS

FIRST.- Judgment appealed. The Sixth Section of the Contentious-Administrative Chamber of the High Court of Justice of Madrid, handed down judgment no. 569/2021, of 30 September, rejecting contentious-administrative appeal no. 417/2020, filed by the legal representation of Greenpeace España against the resolution of 22 June 2020.

of the Director General for Trade Policy of the Secretary of State for Trade of the Ministry of Industry, Trade and Tourism, denying the request for access to public information regarding exports of artillery ammunition manufactured by Expal Systems destined for the United Arab Emirates and/or Saudi Arabia between 2017 and the date of the request.

The judgment, based on the allegations made in the complaint, transcribes and takes into consideration Articles 20.1.d) and 105.b) of the Spanish Constitution (EC); Article 10 of the European Convention on Human Rights (ECHR); Article 346 of the Treaty on the Functioning of the European Union (TFEU); Article 14 of Law 19/2013, of 9 December, on Transparency, Access to Public Information and Good Governance (LTAIBG); Article 14 of Law 53/2007, of 28 December, on the control of foreign trade in defence and dual-use material; and Article 13 of Law 9/1968, of 5 April, on official secrets.

It then transcribes its previous judgment of 15 September 2021 (rec. 509/2020), which dismissed, in proceedings for the protection of fundamental rights, an appeal on a similar case. In it, the Court of First Instance brought up the connection between articles 105.b) and
20.1.d) EC, insofar as it includes the right to access the source of information; stressing that, as the source of information in this case is the Public Administration, the right has the limitations derived from that public interest and the protection of the economic and commercial interests of a private entity. The ruling also added that article 16 of Law 53/2007, of 28 December, provides for the relevant information on exports of defence and dual-use material to be sent to the Congress of Deputies every six months, with a subsequent opinion being issued by the Defence Committee; these annual reports can be consulted by accessing the electronic address indicated in the administrative resolution itself. As for the minutes of the Interministerial Board, the aforementioned ruling concluded that the agreement of the Council of Ministers of 13 March 1987 declared them to be classified and secret material, constituting classified documentation that cannot be communicated, disseminated or published.

Taking into account the rules and the previous judgment, the Chamber of first instance concludes in this case that "[....having verified that the minutes of the Interministerial Board Regulating the Foreign Trade of Defence and Dual-Use Material have been declared as "classified matter" -classified as secret- by Agreement of March 13, 1987, of the Council of Ministers, and having verified that the information on the requested export authorizations has been integrated in the same and its Annexes, being endorsed such considerations by resolution 648/2019, of December 4, of the Council of Transparency and Good Governance, it is necessary to resolve that the denial of the requested information is in accordance with the Law, as it fully integrates one of the most important limitations of the right of access to public information, being evident the damage that for national security, defence, intellectual and industrial property, guarantee of confidentiality and the secrecy required in decision-making processes would result from the dissemination and publicity on the exports of artillery ammunition - especially when data relating to the specific recipients of the exports are also required-". It reminds the appellant that the right of access to information is neither unlimited nor absolute, encountering both legal and natural limits derived from the very essence of the information requested -in this case relating to the nature, quantity, manufacturer, exporter and recipient of the export of war material-.

It adds in this regard that there is no infringement of Article 105 EC, nor of the fundamental right to information, which is not absolute in nature and which gives way when, as is the case in these proceedings, the subject of the request for information affects not only national defence and security, but also intellectual and industrial property rights, the guarantee of confidentiality and the secrecy required.

SECOND.- Brief of preparation. Having been notified of the sentence, the procedural representation of the plaintiff has prepared an appeal in cassation, stating, beforehand, that its request for information was projected on: 1. copies of authorizations or licenses granted and 2. minutes of the meetings of the Interministerial Regulatory Board of Foreign Trade of Defense and Dual Use Material, in relation to the war that is currently being waged in Yemen.

In its brief it alleges, first, infringement of the Agreement of the Council of Ministers of 18 March 1987; of articles 2, 3 and 13 of Law 9/1968 of 5 April 1968 on official secrets; of articles 1, 8 and 14 of Law 53/2007 of 28 December 2007 on the control of foreign trade in defence and dual-use material; and of articles 6 and 7 of the Treaty on the Functioning of the European Union (TFEU).

From the aforementioned perspective, he alleges that the judgment understands that the mere invocation by the Administration of the existence of a classified matter causes the entire transparency regulation to be exempted, generating an area of immunity that is incompatible with a social and democratic State governed by the rule of law. In this case, the appeal has been dismissed without going into what was stated in the Agreement of the Council of Ministers of 18 March 1987, which classified as classified matter, with the category of secret, the minutes of the *Interministerial Board for the Regulation of Foreign Trade in Arms and Explosives, the* body which, according to the regulations then in force, was responsible for granting authorisations to export arms. However, he adds, currently the body in charge of verifying that arms export permits comply with the provisions of the Arms Trade Treaty and Law 53/2007 is not the aforementioned Board, but rather the *Interministerial Board for the Regulation of Foreign Trade in Defence and Dual-Use Material,* which the judgment ignored, as well as the fact that the Agreement of the Council of Ministers was dated 18 March 1987, not 13 March.

It adds that the judgment disregards the new order established with regard to arms sales under the Arms Trade Treaty, and that the automatic application of the rules which is apparent in the judgment also extends to the requirement laid down in Article 346(1)(b) TFEU, which makes it possible to circumvent the obligation to disclose information relating to the arms trade where this may be necessary for the protection of interests essential to the security of the Member States. Finally, the judgment under appeal infringes the case-law on the right of access to documents.

The Court of Justice, in the so-called GAL case, and in particularly difficult circumstances, admitted the need to enter into the knowledge of classified matters in certain cases, in three SSTS of 4 April 1997 - appeals 634/1996, 602/1996 and 726/1996.

Secondly, it alleges infringement of Articles 10.2, 20.1.d) and 4 and 96 EC, of Article 10.1 and 2 of the ECHR, and of the constitutional doctrine and case law of the ECtHR. The appellant understands, firstly, that the judgment has not taken into account the case law of the ECtHR, which has evolved to the point of recognizing that the right of access to information is part of the right to freedom of expression and that non-governmental organizations such as Greenpeace should be considered *watchdogs,* as they channel information that allows the necessary debates in a democratic society, in a similar way to the media. The claim that the doctrine of the ECtHR should be incorporated in application of articles 10.2 and 96 EC has not been heard by the Court of first instance.

He goes on to argue that the lower court, by invoking its previous judgment of 15 September 2021, validates the interpretation given by the Administration - in the sense that the delivery of the documentation could affect the security and defence of the State - but neither the administrative decision nor the judgment provides a justification indicating that the effect on the security and defence of the State is real and proven. Nor does the judgment make a proportionality judgment for the imposition of limits on the fundamental rights affected, or any weighing of the conflicting legal rights.

Thirdly, it alleges infringement of Articles 14(1)(a), (b), (j) and (k), 14.2 and 16 LTAIBG. As regards the limit to the right of access of Article 14.1.a), it is alleged that it was justified how the information requested could in no case affect *National Security,* based on the concept of National Security as defined in Article 3 of Law 36/2015, of 28 September, on National Security. And in the same way it was proceeded with respect to the limits of

letters b), j) and k) of the aforementioned precept in relation to the concepts of *National Defence*, *professional secrecy*, *intellectual and industrial property* and the *guarantee of confidentiality and secrecy required in decision-making processes.* The sentence, on the other hand, without contrasting the regulations and jurisprudence that delimit the indeterminate legal concepts of the aforementioned precepts with the reality of the documentation whose access had been requested, denied access to the information by considering sufficient the mere mention by the Administration that it was a classified matter, without even considering the need to have the mandatory "judgment of relevance" or that a possible partial access to the information could be admitted.

Fourthly, it alleges the infringement of Additional Provision 1.ª LTAIBG, as it cannot be considered that the regime established in Law 53/2007, of 28 December, establishes a specific legal regime for access to information -in relation to the six-monthly information sent to the Congress of Deputies and the statistical information on the arms trade-.

With regard to the concurrence of the objective interest in the appeal, the appellant alleges the assumption of Article 88.2.b) of Law 29/1998, of July 13, 1998, regulating Contentious-Administrative Jurisdiction (LJCA) by considering that the doctrine established in the appealed judgment is incompatible with a social and democratic rule of law by creating an area of immunity for the Administration, which is closed to citizens, and even contrary to the recently approved regulations on access to information (Order of 30 October 2020, which regulates the procedure against disinformation) which stresses that access to truthful and diverse information is one of the pillars underpinning democratic societies.

Secondly, it invokes the concurrence of the presumption of Article 88.3.a) LJCA. It alleges that although there is case law on the limits established in Article 14.1 LTAIBG, nevertheless, these are judgements

referring to issues other than those raised here -specifically mentioning the STS of 25 March 2021 (RCA 2578/2020) referring to the limit of public security in relation to strategic infrastructure-. On the other hand, the question referred to the need to know whether the mere generic invocation of the presence of classified material in the request for information formulated, allows for an exception to the obligation to justify the limits to access established in the transparency regulations and exempts the Administration from the obligation to carry out the proportionality trial required by the LTAIBG and the doctrine of the ECHR, interests that must be weighed. Finally, he alleges that there is no jurisprudence on the question referring to the possible specific legal regime of access to information, ex DA 1.ª, which could be contained in Article 16 of Law 53/2007, of 28 December, on the control of arms trade (as the rulings handed down by the Supreme Court have been in relation to the specific regime established in other regulations).

THIRD.- Order taking the appeal as prepared and summoning the parties. The Chamber of first instance considered the appeal to be prepared by order of 14 January 2022, ordering the summons of the parties to appear before this Chamber within a period of thirty days, as well as the remittance of the original case files and the administrative file.

Appearing before this Chamber, Greenpeace España, represented by attorney Marta Sanz Amaro, as appellant; and, as respondent, Expal Systms, S.A., represented by attorney Ana Maravillas Campos Pérez-Manglano, the Abogado del Estado, in the representation he legally holds, who opposes the admission of the appeal in cassation.

The Magistrate Rapporteur is Her Excellency Ms. María Isabel Perelló Doménech, Magistrate of the Chamber.

LEGAL ARGUMENTS

FIRST.- Formal requirements of the brief of preparation. The brief of preparation complies, from a formal point of view and *a priori,* with the requirements of Article 89 LJCA, so there is nothing to oppose the admissibility of the appeal from this point of view.

SECOND.- Issue in dispute. As stated in the precedents of this decision, the disputed issue at the instance focused on the denial of the request for information regarding arms exports to Saudi Arabia/United Arab Emirates during a certain period of time. The Court of First Instance upheld that refusal, finding it to be in accordance with the law.

The questions raised in this appeal, with relevance to the ruling of the contested decision, can be reduced to two: (a) whether Article 16 of Law 53/2007, of 28 December, establishes a specific legal regime for access to information - in relation to the six-monthly information sent to the Congress of Deputies and the statistical information on the arms trade; b) whether the declaration of the Minutes and Annexes of the Inter-Ministerial Board (in charge of reporting arms imports and exports) as *classified material,* with classification as secret, constitutes *per se* a limit to the right of access to information as it affects national security, national defence or the commercial interests of third parties, as the appealed judgment seems to understand, or, on the contrary, it does not exempt from the obligation to justify and weigh the limits to access established in the transparency regulations, applying the proportionality judgement required by the LTAIBG and the doctrine of the ECtHR.

Certainly, the appellant association also claims in its cassation appeal the incorporation of the case law of the ECtHR which, it alleges, integrates the right of access to information into the right to freedom of expression. In our legal system, according to the plaintiff, it would fall under the right to receive truthful information as contemplated in Article 20.1.d) EC;

right for which the Constitution itself imposes specific limits in article 20.4 CE, which, the appellant alleges, do not include the limits relating to the protection of defence or national security, among others. This question, however, is based on the previous judgment handed down by the Court of First Instance in another appeal processed through the special fundamental rights procedure and reproduced in this appeal.

THIRD.- Verification of the concurrence of an objective interest in the appeal. Having verified, therefore, the absence of formal impediments and having identified the controversy in the terms set out above, it is now necessary to determine whether the issue raised has an objective interest for the creation of jurisprudence that justifies a pronouncement by this Chamber, taking into account that, together with the case provided for in Article 88.2.b) LCJA, the appellant invokes the concurrence of the presumption provided for in Article 88.3.a) LJCA.

Regarding the aforementioned presumption, this Section has stated on multiple occasions -among others, AATS of 10 April 2017 (RRCA 225/2017 and 227/2017)- that it is not a presumption of an absolute nature since Article 88.3 LJCA itself, *in fine*, allows the inadmissibility (by means of
"The Court of Cassation has also ruled that the Supreme Court should not be able to reject the appeals that initially benefited from it when it "considers that the case manifestly lacks an objective interest for the formation of jurisprudence"; a lack that must be evident and without complex legal reasoning.

The aforementioned doctrine leads, it is already anticipated, to the admission of the cassation appeal as there is no *manifest lack of* interest in the issues raised, both with respect to the existence or not of a specific regime of the right of access to information in this area, as well as with respect to the singular tension between the right of access to information, and the limits established in the law, and the classification of certain matters as classified (and secret).

Thus, with regard to the question relating to the interpretation of the First Additional Provision of the LTAIBG, although it is true that there are already pronouncements by this Chamber, it is also true that they have been made in other sectorial spheres.

Thus, for example, in the STS no. 314/2021, of March 8, 2021 (rec. 1975/2020), qualifying the previous case law, it was stated that "[...] there is certainly a specific regime when in a particular sector of the legal system there is a complete regulation that develops in that area the right of access to information by either citizens in general or interested parties. In such cases it is clear that such regime shall be applied in preference to the regulation of the Law on Transparency, which in any case shall be supplementary for those aspects that have not been covered in such specific regulation provided, of course, that they are compatible with it. In this sense, it should be emphasized that, contrary to what has been alleged on occasions, the existence of a specific regime itself does not exclude the supplementary application of the Law on Transparency"; to add, however, that "(...) more frequent than a complete alternative regulation is the existence in various sectoral areas of provisions, prior to the Law on Transparency, which contain provisions that affect the right of access to information, especially in relation to its limits, as in the present case with the provision on confidentiality in the sector of medical devices. Well, we must specify that in this case, and although it is not a complete specific regime, such partial regulation is also of prevalent application in accordance with the provisions of the additional provision, maintaining the Transparency Act its supplementary application in everything else, that is, the general framework of the right of access to information and the rest of the rules established in the Transparency Act, except for what has been displaced by the partial regulation. It follows, therefore, that when the first additional provision provides that matters that have a specific legal regime of access to information shall be governed by its specific regulations, it includes the prevailing application of any sectoral regulation that refers to access to information, even if it is not configured as a global and systematic treatment of it, remaining in any case the Law on Transparency as a supplementary regulation". In the same sense, the STS of 10 March 2022 (RCA 148/2021).

Notwithstanding the foregoing, in view of the nuances introduced and the peculiarity of the field regulated by Law 53/2007, of 28 December, on the control of foreign trade in defence and dual-use material, a new pronouncement by this Chamber seems appropriate in order to clarify whether the

Article 16 of the aforementioned Law does or does not constitute a specific regime for the purposes of the First Additional Provision of the LTAIBG; a question, however, which, although raised by the appellant association, does not seem to be stated in the judgment under appeal, which emphasises the regime of communication of this information to the Congress of Deputies and, therefore, the possibility of accessing it.

It is appropriate at this point to bring up STS no. 144/2022, of 7 February (RCA 6829/2020) in which it was argued that "In view of this jurisprudential doctrine, it must be agreed that Law 3/2015, of 30 March, regulating the exercise of senior positions in the General State Administration, contains a specific legal regime, specific and differentiated in relation to the subjects to which it is addressed, which includes the obligations imposed on senior officials in terms of declaration of assets and rights and activities. It establishes a specific regime of publicity, i.e. it regulates the duty of publicity (active transparency) of the OIC. However, the right of Ms. (...) is not exhausted with what is published by the OIC, since the information she requests falls within the definition of public information of Law 19/2013" and adds that "Article 22 establishes that this information is not part of the active publicity of the entity -it is not published in the BOE-. But it does not exclude that this information is public information. Law 3/2015 establishes what information will be published, not what information the citizen has access to through a request". And concludes that "The reality is that Law 3/2015 does not provide a specific procedure for access to public information and, therefore, Law 19/2013 is of direct application in everything related to such access. In short, Article 22 of Law 3/2015 does not regulate a specific legal regime of access to information, but rather establishes (i) the content of the report that the OCI must submit every six months to the Government for its submission to the Congress of Deputies; and (ii) the information that is subject to publication in the BOE".

In view of the foregoing, this Section considers that the presumption provided for in Article 88.3.a) LJCA applies in order to reinforce existing case law - especially the aforementioned STS of February 2022 (RCA 6829/2020) - in order to clarify whether Article 16 of Law 53/2007, of 28 December, contains a specific regime regulating the right of access to information in this area.

As regards the second question, it has already been seen that the judgment under appeal bases its rejection of the appeal on the fact that the

Minutes and the Annexes thereto, drawn up by the Interministerial Board in charge of reporting arms imports and exports, have been declared as *classified material*, classified as secret; This circumstance leads to the conclusion that the resolution appealed against is in accordance with the law, as it is evident that the dissemination and publicity of the exports of artillery ammunition -all of them limits to the right of access included in article 14 LTAIBG- would be detrimental to national security, defence, intellectual and industrial property, guarantee of confidentiality and the secrecy required in decision making processes.

It is that conclusion which is at issue in the present action since, in the applicant's view, the Court of First Instance applied the rule automatically and en bloc, without stating reasons for assessing whether or not each of the abovementioned thresholds was met and without weighing it up in any way.

The issue raised in the appeal is, in short, to determine the scope, in relation to the limits of the right of access to information, of the fact that certain documents have been classified as *classified material,* with classification as secret; specifically, whether this classification exempts the Administration from justifying the limits to the right of access established in Article 14.1 LTAIBG - in this specific case, those established in its letters a), b), j) and k) -.

FOURTH.- Identification of the question of objective cassational interest. In line with the previous legal reasoning, and in due compliance with the provisions of article 90.4 LJCA, we declare that the issues raised by the appellant that present objective interest for the formation of case law consist of:

(i) clarify whether article 16 of Law 53/2007 of 28 December 2007 contains a specific regime for the right of access to information in this area, in accordance with the provisions of the

Additional provision one, section two, of the Transparency Act.

(ii) clarify the scope (the effects) of the classification of certain documents as *classified and secret matter* in relation to the right of access to information; in particular, from the perspective of the limits of the right of access, whether such classification exempts the Administration from justifying the application of the limits in question, established in Article 14.1 of Law 19/2013, of 9 December, on transparency, access to public information and good governance - in this case, and in relation to the export of arms, those established in its letters a), b), j) and k) -.

The rules that, in principle, will be subject to interpretation are paragraphs 1.d) and 4 of Article 20 EC and Articles 10.2, 96 and 105 EC; Article 10 of the European Convention on Human Rights (ECHR); Articles 14.1.a), b), j) and k) of Law 19/2013, of 9 December, on Transparency, Access to Public Information and Good Governance (LTAIBG); and Article 13 of Law 9/1968, of 5 April, on Official Secrets. All of this without prejudice to the fact that the judgment must be extended to others if so required by the debate finally brought in the appeal, ex article 90.4 of the LJCA.

FIFTH.- Publication on the website. In accordance with the provisions of Article 90.7 LJCA, this order will be published in its entirety on the website of the Judiciary, in the section corresponding to the Supreme Court, making reference to the same, with a brief mention of the rules that will be subject to interpretation.

SIXTH.- Communication to the Court of First Instance and referral to the Third Section. The Chamber of first instance should be immediately notified of the decision adopted in this order, as provided for in Article 90.6 LJCA and the proceedings should be given the procedure provided for in Articles 92 and 93 LJCA, referring them to the Third Section of this Chamber, competent for their substantiation and decision in accordance with the rules of distribution.

The Admissions Section agrees:

1. To admit for processing appeal no. 373/2022, prepared by the legal representation of Greenpeace España, S.A. against judgment no. 569/2021, of 30 September, handed down by the Sixth Section of the Contentious-Administrative Division of the High Court of Justice of Madrid in appeal no. 417/2020.

2.º Declare that the questions raised in the appeal which present an objective interest for the formation of case law consist of the following:

(i) clarify whether Article 16 of Law 53/2007, of December 28, 2007, contains a specific regime of the right of access to information in this area, in accordance with the provisions of the First Additional Provision, paragraph two, of the Law on Transparency.

(ii) clarify the scope (the effects) of the classification of certain documents as *classified and secret matter* in relation to the right of access to information; in particular, from the perspective of the limits of the right of access, whether such classification exempts the Administration from justifying the application of the limits in question, established in Article 14.1 of Law 19/2013, of 9 December, on transparency, access to public information and good governance - in this case, and in relation to the export of arms, those established in its letters a), b), j) and k) -.

3.º Identify as legal rules that, in principle, will be subject to interpretation: paragraphs 1.d) and 4 of Article 20 EC and Articles 10.2, 96 and 105 EC; Article 10 of the European Convention on Human Rights (ECHR); Articles 14.1.a), b), j) and k) of Law 19/2013, of 9 December, on Transparency, Access to Public Information and Good Governance (LTAIBG); and Article 13 of Law 9/1968, of 5 April, on official secrets. All of the above

without prejudice to the fact that the judgment must be extended to others if so required by the debate finally brought in the appeal, ex Article 90.4 of the LJCA.

4.º To publish this order on the website of the Supreme Court, making reference to it, with a brief mention of the rules that will be interpreted.

5.º Immediately communicate the decision adopted in this order to the Chamber of the Court of First Instance.

6.º To refer the proceedings to the Third Section of this Third Chamber, to which it corresponds in accordance with the rules on the distribution of cases, for the substantiation of the appeal,

No appeal shall lie against this decision. So agreed and

signed.