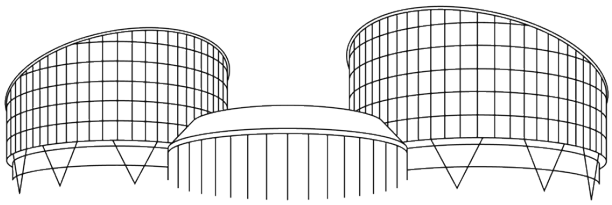

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

THIRD SECTION

CASE OF MUÑOZ DÍAZ v. SPAIN

(Application no. 49151/07)

JUDGMENT

STRASBOURG

8 December 2009

FINAL

08/03/2010

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Muñoz Díaz v. Spain,

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

Josep Casadevall, *President*,
Elisabet Fura,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Luis López Guerra, *judges*,
and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 26 May and on 17 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 49151/07) 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 a Spanish national, Mrs María Luisa Muñoz Díaz ("the applicant"), on 29 October 2007.

2. The applicant was represented by Ms M. Queipo de Llano López-Cózar, a lawyer practising in Madrid. The Spanish Government ("the Government") were represented by their Agent, Mr I. Blasco Lozano, Head of the Human Rights Department at the Ministry of Justice.

3. The applicant, a Rom of Spanish nationality, complained about a refusal to grant her a survivor's pension, following the death of M.D., also a Rom of Spanish nationality, on the sole ground that they were not a married couple under Spanish law. She alleged that there had been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 and Article 12 of the Convention.

4. On 13 May 2008 the Court decided to give notice of the application to the Government. As provided for by Article 29 § 3 of the Convention, it was also decided that the Chamber would examine the admissibility and merits of the case at the same time.

5. The parties filed their observations. In addition, third-party comments were received from Unión Romaní which had been given leave by the President to intervene in the written procedure as *amicus curiae* (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 May 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr I. BLASCO LOZANO, Head of the Human Rights Department at the Ministry of Justice, *Agent*;

(b) *for the applicant*
Ms M. QUEIPO DE LLANO LÓPEZ-CÓZAR,
Mr S. SÁNCHEZ LORENTE, *Counsel*;

(c) *for the third party*
Mr J.D. RAMÍREZ HEREDIA, Chairman of Unión Romaní.

The Court heard addresses by Mr Blasco Lozano, Ms Queipo de Llano López-Cózar and Mr Sánchez Lorente and their replies to questions from Judges López Guerra and Myjer. It also heard statements by Mr Ramírez Heredia and by Mrs Muñoz Díaz, the applicant.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1956 and lives in Madrid.

8. The applicant and M.D., both members of the Roma community, were married in November 1971 according to their community's own rites. The marriage was solemnised in accordance with Roma customs and cultural traditions and was recognised by that community. For the Roma community, a marriage solemnised according to its customs gives rise to the usual social effects, to public recognition, to an obligation to live together and to all other rights and duties that are inherent in the institution of marriage.

9. The applicant had six children, who were registered in the family record book issued to the couple by the Spanish civil registration authorities (*Registro civil*) on 11 August 1983.

10. On 14 October 1986 the applicant and her family were granted first-category large-family status, under the number 28/2220/8, pursuant to the Large-Family Protection Act (Law no. 25/1971 of 19 June 1971).

11. On 24 December 2000 the applicant's husband died. He was a builder and at the time of his death had been working and paying social security contributions for nineteen years, three months and eight days, supporting his wife (registered as such) and his six children as his

dependants. He had been issued with a social security benefit card, stamped by Agency no. 7 of Madrid of the National Institute of Social Security (*Instituto Nacional de la Seguridad Social* – "the INSS").

12. The applicant applied for a survivor's pension. In a decision of 27 March 2001, the INSS refused to grant her one on the following ground:

> "[she was] not and [had] never been the wife of the deceased prior to the date of death, as required by paragraph 2 of the seventh amendment to Law no. 30/1981 of 7 July 1981 (in force at the material time), combined with section 174 of the General Social Security Act [Ley General de la Seguridad Social – "the LGSS"] approved by Royal Legislative Decree no. 1/1994 of 20 June 1994."

13. That decision was confirmed by a decision of the same Institute dated 10 May 2001.

14. The applicant filed a claim with the Labour Court. In a judgment dated 30 May 2002 of Labour Court no. 12 of Madrid, she was granted an entitlement to receive a survivor's pension with a base rate of 903.29 euros per month, her Roma marriage thus being recognised as having civil effects. The relevant part of the judgment read as follows:

> "... In our country the Roma minority (*etnia gitana*) has been present since time immemorial and it is known that this minority solemnises marriage according to rites and traditions that are legally binding on the parties. These marriages are not regarded as being contrary to morality or public order and are recognised socially.
>
> ... Article 61 of the Civil Code provides that marriage has civil effects from the time it is solemnised but that it must be registered in the Civil Register if those effects are to be recognised. Roma marriages are not registered in the Civil Register because they have not been regarded by the State as a feature of the ethnic culture which has existed in our country for centuries.
>
> ... The argument relied upon against the applicant in order to deny her a survivor's pension is solely the non-recognition of the civil effects of her marriage to the insured person (a working man of Spanish nationality with rights and obligations governed by domestic and European Community law), notwithstanding the fact that Spain has ratified the United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966.
>
> ... The lack of regulation of the recognition of the civil effects of Roma marriage cannot hinder the protective action to which the State has committed itself by laying down social security norms.
>
> ... Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin is applicable to the present case, where the denied benefit derives from the employment relationship of the insured person, who died from natural causes while he was still working. ... Article 4 § 1 of the Civil Code states [that] 'norms are applied *mutatis mutandis* where they do not specifically contemplate the case in question but a comparable one which can be regarded as having a similar object'. Such application *mutatis mutandis* is applicable to the present case.
>
> ...

The applicant's marriage is not registered in the Civil Register, although that is not expressly ruled out. It is not recognised as having civil effects or as giving rise to the enjoyment of social protection by the survivor on the death of either spouse. Roma marriage is not covered by Spanish legislation, in spite of that ethnic minority's social and cultural roots in our country. However, as noted above, marriages solemnised according to certain religious rites and customs that were, until quite recently, foreign to our society, [do] have a legal framework. These are therefore similar cases, albeit that it is not a religion that is concerned here. They have a similar object (community of cultures and customs present within the Spanish State). The refusal by the INSS to grant the applicant a survivor's pension, the sole obstacle being that the marriage between the widow and the deceased is not recognised, reveals discriminatory treatment on grounds of ethnic affiliation in breach of Article 14 of the Spanish Constitution and Directive 2000/43/EC."

15. The INSS appealed. In a judgment of 7 November 2002, the Madrid Higher Court of Justice quashed the impugned judgment, giving the following reasons:

"... It should be noted that the principle of equality and non-discrimination is based on the idea that equal situations should be treated equally and on [the idea] that equal treatment applied to situations which are not equal constitutes injustice. This also means that the law applicable to all should not be departed from in such a manner [as to enable] the creation of more exceptions than those that are expressly contemplated in that law.

... A distinction must be made between the legislation that is in force and is applicable at all times and what may be considered desirable by a given sector of society.

... Under the provisions of Article 49 of the Civil Code, every Spanish national (such as the applicant and the deceased) may opt for a civil marriage before a magistrate, a mayor or a public official designated [by that Code], or for a religious marriage as provided for by law.

... In accordance with the foregoing, if a civil marriage is to be solemnised through regulated formalities, that must also be the case for a religious marriage, whose formalities will be those of the religious denomination – such formalities being laid down by the State, or otherwise accepted by its legislation. [It will be in such circumstances] that the marriage produces civil effects.

... A marriage solemnised solely and exclusively according to Roma rites is not covered by any of the above-mentioned cases, as even though an ethnic group is concerned, the norms or formalities of that group do not produce any legal effect outside its own environment and are not enshrined in the law that provides for the impugned pension. [Such a marriage], which is certainly meaningful and enjoys social recognition in the environment concerned, does not exclude, and currently does not supersede, the law that is in force and is applicable to the present case, in so far as it concerns a marriage between Spanish nationals that took place in Spain. An ethnic group, moreover, is merely a group which is differentiated on grounds of race ... and a rite is merely a custom or ceremony.

... As far as customs are concerned, under Article 1 § 3 of the Civil Code they only apply in the absence of an applicable law. ... The morality of the rite or its conformity

with public order are not called into question, but only its capacity to produce *erga omnes* obligations, whereas in Spain there are statutory norms governing marriage. The answer, clearly, can only be in the negative.

...

A marriage, in order to produce civil effects, can only be one that is solemnised civilly or religiously according to the terms set out above. Roma marriage does not correspond, in the current framework of our law, to the nature of the marriages referred to above. Section 174 of the LGSS requires that a person be the spouse of the deceased in order to benefit from the survivor's pension, and the notion of spouse has been interpreted strictly according to an established constitutional and ordinary case-law (in spite of dissenting views), according to which a couple living together *de facto* as husband and wife and many others who, in reality, are not married under the applicable law, are excluded from the benefit of that pension."

16. The applicant lodged an *amparo* appeal with the Constitutional Court, relying on the principle of non-discrimination in terms of race and social condition. In a judgment of 16 April 2007, the Constitutional Court dismissed the appeal as follows:

"... The court, in a plenary sitting, reiterated ... the reasons for concluding that to limit the survivor's pension to cases of institutionalised cohabitation as husband and wife, excluding other forms of partnership or cohabitation, did not constitute discrimination on social grounds. In this connection, it was submitted that the legislature retained a significant degree of discretion in determining the configuration of the social security system and in assessing the socio-economic circumstances in a context of the administration of limited resources with a view to addressing a large number of social needs, bearing in mind that an entitlement to a survivor's pension was not strictly conditional, in a contribution-related system, on an actual situation of necessity or economic dependence, or even unfitness for work, in the case of the surviving spouse. In any event, the plenary court also commented on the fact that the extension, by the legislature, of the survivor's pension to other forms of partnership was not prohibited by Article 14 of the Spanish Constitution either.

...

A supposed discrimination on social grounds must be rejected for the reasons given above. ... No violation of Article 14 arises from the fact of limiting the survivor's pension in practice to married couples.

Similarly, no discriminatory treatment, whether direct or indirect, for racial or ethnic reasons, arises from the fact that the applicant's partnership, in accordance with the rites and customs of the Roma community, has not been assimilated with marriage for the purposes of the said pension, and that the same legal rules as those applying to '*more uxorio*' cohabitation have been applied to it.

Firstly, ... the court reiterated that 'discrimination by absence of differentiation' did not arise from Article 14 of the Spanish Constitution, as the principle of equality did not afford a right to [differentiated] treatment, nor did it protect the lack of distinction between different cases. There was thus no individual right to differentiated normative treatment. ...

> Secondly, the statutory requirement of a marital relationship as a condition for the enjoyment of a survivor's pension, and the interpretation arising from the impugned decision, taking into account the marital relationship that stems from the legally recognised forms of access to marriage, and not any other forms of cohabitation, in particular partnerships according to Roma habits and customs – such requirement not being in any way related to racial or ethnic considerations, but to the fact [for the interested parties] of having freely chosen not to formalise marriage by recognised statutory, civil or religious procedures – never takes into consideration a person's race or the customs of a given ethnic group to the detriment of others. As a result, there is no form of covert discrimination here against the Roma ethnic group. ...
>
> Lastly, the court must reject the idea that the recognition of the civil effects of a marital relationship created by certain specific religious rites, but not one that has been solemnised according to Roma rites and customs, and the refusal of the judicial body to accept the latter *mutatis mutandis* [...], may entail directly or indirectly, the alleged ethnic discrimination. ...
>
> To sum up, in view of the fact that the law establishes a general possibility – neutral from a racial and ethnic point of view – of marrying in the civil form, and that the legislature, in deciding to attach statutory effects to other forms of accession to a marital relationship, did so exclusively on the basis of religious considerations and thus without reference to any ethnic grounds, no discriminatory treatment with an ethnic connotation, as alleged, may be found."

17. A dissenting opinion was appended to the judgment. It referred to judgment no. 199/2004, in which the Constitutional Court had found a violation of the right to equality in a case concerning the widower of a civil servant, after finding that a marital relationship existed but not a marriage, since it had not been registered civilly, the parties having expressly refused such registration of their marital relationship which had been solemnised in a religious form.

18. For the dissenting judge, that case of a surviving spouse from an unregistered religious marriage was comparable to that of the applicant, in that the two claimants had applied for a survivor's pension on the basis of what they considered to be a marital relationship, albeit that it had not been registered civilly.

19. Furthermore, the dissenting judge pointed out that, even though Spain was a party to the Framework Convention for the Protection of National Minorities, which it signed at Strasbourg on 1 February 1995, the case-law of the Constitutional Court did not take into account the rites, practices or customs of a specific ethnic group, nor did it regard as valid and subject to constitutional protection the acts of individuals belonging to minorities who sought respect for their cultural traditions.

20. According to the dissenting judge, the situation presented in this *amparo* appeal showed, for the first time, that the protection of minorities had a much broader constitutional significance than simply the response received by the applicant. The applicant should not have been obliged to take her case to a supranational body in order to obtain the protection

claimed. In cases concerning the protection of ethnic minorities, the guarantee of equality required measures of positive discrimination in favour of the underprivileged minority, and respect, with the appropriate sensitivity, for the subjective value that a person belonging to such a minority accorded and required as regards respect for its traditions and the heritage of its cultural identity. The dissenting judge concluded as follows:

> "It is disproportionate for the Spanish State, which took into consideration the applicant and her Roma family by issuing them with a family record book, granting them large-family status, affording health-care assistance to her and her six children and collecting the corresponding contributions from her Roma husband for nineteen years, three months and eight days, now to refuse to recognise the Roma marriage when it comes to the survivor's pension."

21. On 3 December 2008, under the third amendment of Law no. 40/2007 of 4 December 2007 pertaining to certain social security measures, the applicant was granted a survivor's pension with effect from 1 January 2007, as the partner of M.D.

II. RELEVANT DOMESTIC AND EUROPEAN LAW

22. The relevant provisions of the Spanish Constitution are as follows:

Article 14

> "Spaniards shall be equal before the law; they may not be discriminated against in any way on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance."

Article 16

> "1. Freedom of ideas, religion and worship shall be guaranteed to individuals and communities without any restrictions on its expression other than those necessary for the maintenance of public order as protected by law.
>
> 2. No one shall be required to declare his ideological, religious or other beliefs.
>
> ..."

Article 32 § 2

> "1. Men and women shall have the right to enter into a marriage with full legal equality.
>
> 2. The law shall determine the forms of marriage, the requisite age and capacity for marriage, the rights and duties of the spouses, the grounds for separation and dissolution and the effects thereof."

23. The relevant provisions of the Civil Code, as in force in 1971, read as follows:

Article 42

"The law recognises two forms of marriage: the canonical form and the civil form.

Marriage shall be solemnised in the canonical form when at least one of the participants identifies with the Catholic faith.

Civil marriage shall be authorised where it is established that neither of the parties identifies with the Catholic faith."

24. The provisions applicable to the present case of the Civil Registration Rules, as in force at the relevant time (Decree no. 1138/1969 of 22 May 1969), read as follows:

Article 245

"Persons who have renounced the Catholic faith shall, as soon as possible, provide proof that they have given notice of such renunciation to the priest of their home parish."

Article 246

"...

2. In cases not provided for by the previous provision, proof of non-affiliation to the Catholic faith may be produced, either by a certificate of affiliation to another religious denomination, delivered by the competent minister or the authorised representative of the religious association in question, or in the form of an express declaration by the person concerned before the registrar."

25. The relevant provisions of the Civil Code, in its current version, read as follows:

Article 44

"A man and a woman shall have the right to enter into marriage in accordance with the provisions of the present Code."

Article 49

"Any Spanish national is entitled to marry in Spain or abroad:

1. Before a magistrate, a mayor or a public servant designated by the present Code.

2. In the religious form provided for by law.

[Any Spanish national] may also marry abroad in accordance with the formalities required by the law in the place where the marriage is solemnised."

26. The relevant provision of Law no. 30/1981 of 7 July 1981, amending the provisions of the Civil Code pertaining to marriage and the procedure to be followed for cases of nullity, judicial separation and divorce, reads as follows:

Tenth amendment

"...

2. [As regards persons] who have not been able to marry on account of the legislation currently in force but who have lived as [a married couple], when the death of one of the partners has occurred before the entry into force of the present Law, the survivor will be entitled to the benefits provided for in the first paragraph of the present provision and to the corresponding pension in accordance with the following paragraph."

27. Section 2 of the Large-Family Protection Act (Law no. 25/1971 of 19 June 1971) reads as follows:

"1. A family shall be classified as large when, in addition to fulfilling the other conditions laid down herein, it is made up of:

(a) the head of the household, his spouse and four or more children ..."

28. Section 174 of the *Ley General de la Seguridad Social* ("the LGSS") (as in force at the material time) read as follows:

"1. The surviving spouse ... shall be entitled to a survivor's pension.

2. ... In the event of nullity of a marriage, the surviving spouse's entitlement to the survivor's pension shall be recognised in proportion to the period of his or her cohabitation with the insured person, provided he or she has not acted in bad faith and has not remarried ..."

29. Section 174 of the LGSS, approved by Royal Legislative Decree no. 1/1994 of 20 June 1994, reads as follows:

"1. A survivor's pension shall be granted for life ... to the surviving spouse when, on the death of his or her spouse the latter had been working ... and had paid contributions for the statutory period ...

2. In the event of judicial separation or divorce, a survivor's pension shall be granted to a person who is or was a lawful spouse, provided in the case of divorce that he or she has not remarried, in proportion to the period of cohabitation with the deceased spouse and regardless of the causes of the judicial separation or divorce.

In the event of nullity of a marriage, a survivor's pension shall be granted to the surviving spouse provided that he or she has not acted in bad faith and has not remarried, in proportion to the period of his or her cohabitation with the insured person. ..."

30. Law no. 40/2007 of 4 December 2007 on social security measures, amending the LGSS, reads as follows:

Third transitional amendment

"Exceptionally, a survivor's pension shall be granted where the death of the insured person occurred before the entry into force of the present Act, subject to fulfilment of the following conditions:

(a) at the time of the death of the insured person, who was working and paying social security contributions as provided for by section 174 of the simplified text of the General Social Security Act, [the survivor] was unable to claim an entitlement to the survivor's pension;

(b) the beneficiary and the insured person lived together continuously as unmarried partners ... for at least six years prior to the death;

(c) the insured person and the beneficiary had children together;

(d) the beneficiary has no recognised entitlement to receive a contributory pension from the social security;

(e) to have access to the pension [hereunder], the claim must be filed within a non-extendable period of twelve months following the entry into force of the present Act. The recognition of the pension entitlement will take effect from 1 January 2007, subject to the fulfilment of all the conditions provided for in the present provision."

31. Various cooperation agreements have been entered into between the Government and religious denominations: agreement with the Holy See (Concordat of 1979), agreement with the Evangelical Federation under Law no. 24/1992 of 10 November 1992, agreement with the Islamic Commission under Law no. 26/1992 of 10 November 1992, and agreement with the Jewish Federation under Law no. 25/1992 of 10 November 1992. Marriages solemnised according to the rites of those religious denominations are therefore recognised by the Spanish State as constituting a valid form of expression of consent to marriage. They thus produce civil effects by virtue of agreements entered into with the State.

32. The relevant case-law of the Constitutional Court is as follows:

"Constitutional Court judgments no. 260/1988 of 22 December 1988 and no. 155/1998 of 13 June 1998, among others, concerned entitlements to a survivor's pension in cases where canonical marriage had not been possible because of the impossibility of divorce.

Constitutional Court judgment no. 180/2001 of 17 September 2001 recognised the right to compensation for the death of a partner if a canonical marriage had not been possible on account of a conflict with freedom of conscience or religion (before the legislative amendment of 1981).

Constitutional Court judgment no. 199/2004 of 15 November 2004 concerned a survivor's pension entitlement derived from a canonical marriage that did not fulfil the statutory conditions of form because the parties had voluntarily omitted to register it in the Civil Register. The Constitutional Court recognised in that case an entitlement for the widower to receive a survivor's pension."

33. The Council of Europe's Framework Convention for the Protection of National Minorities, opened for signature on 1 February 1995, contains the following provisions in particular:

Article 1

"The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international cooperation.

..."

Article 4

"1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.

2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination."

Article 5

"1. The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

2. Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation."

34. Spain signed the Convention on the day that it was opened for signature and ratified it on 1 September 1995. It came into force in respect of Spain on 1 February 1998.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

35. The applicant complained that the refusal to grant her a survivor's pension, on the ground that her marriage solemnised according to the rites of the Roma minority to which she belonged had no civil effects, infringed the principle of non-discrimination recognised by Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. The provisions in question read as follows:

Article 14 of the Convention

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol No. 1

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. ..."

A. Admissibility

36. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

37. The applicant observed that the Government had not explained why her situation had been regarded as a "*more uxorio*" cohabitation and not as a marriage which was null and void but believed in good faith to exist, and

which might entitle her, as surviving spouse, to a survivor's pension. She pointed out that there had been no reason for her to believe that the welfare entitlements she had enjoyed during her husband's life would be withdrawn from her after his death.

38. The applicant emphasised that, in other cases, the inexistence of a "legal" marriage had not precluded the granting of such a pension: under the General Social Security Act a pension entitlement was granted, in the event of the nullity of a marriage, to a spouse who had shown good faith. In addition, case-law afforded a pension entitlement to couples who believed in the existence of a marriage even though it was not registered civilly, to couples who were prevented from legally marrying because of the impossibility of divorce, or to couples who did not marry because it was against their beliefs.

(b) The Government

39. The Government contested that argument. They took the view that, the law applicable to the applicant being the same for all Spanish nationals, there had been no discrimination based on ethnic origin or any other reason and that the alleged difference in treatment could be explained by the fact that the applicant had not married M.D. but had had a *more uxorio* relationship with him.

40. The Government emphasised that there was no obligation to treat in the same manner those who had complied with the statutory formalities and those who, without being prevented from doing so, had not complied with them. The statutory requirement that there had to be a legal marital relationship for a survivor's pension entitlement to be granted did not constitute discrimination on racial or ethnic grounds. The refusal to grant the said pension to the applicant stemmed solely from her free and voluntary decision not to observe the statutory formalities of marriage, which were not based on the fact of belonging to a particular race, nor on the traditions, habits or customs of a particular ethnic group to the detriment of others. Those formalities did not therefore constitute direct or indirect discrimination against the Roma community.

(c) The third party

41. Unión Romaní pointed out that Roma marriage was no different to any other types of marriage. It explained that Roma marriage existed when a man and a woman expressed their intention to live together and their desire to found a family, which was the foundation of the Roma community. It took the view that it was disproportionate for the Spanish State, having issued the applicant and her family with a family record book, having granted them large-family status, having provided the applicant and her six children with health care and having collected her husband's

contributions for over nineteen years, now to disregard the validity of her Roma marriage when it came to the survivor's pension.

2. The applicability of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1

42. The Court reiterates that Article 14 of the Convention has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and of the Protocols thereto (see, among many other authorities, *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, ECHR 2008). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see, among many other authorities, *Gaygusuz v. Austria*, 16 September 1996, § 36, *Reports of Judgments and Decisions* 1996-IV; *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV; *Koua Poirrez v. France*, no. 40892/98, § 36, ECHR 2003-X; and *Andrejeva v. Latvia* [GC], no. 55707/00, § 74, ECHR 2009). The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 40, ECHR 2005-X).

43. It should therefore be determined whether the applicant's interest in receiving a survivor's pension from the State falls "within the ambit" or "within the scope" of Article 1 of Protocol No. 1.

44. The Court has previously held that all principles which apply generally in cases concerning Article 1 of Protocol No. 1 are equally relevant when it comes to welfare benefits (see *Andrejeva*, cited above, § 77). Thus this provision does not, as such, guarantee the right to acquire property (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 35 (b), ECHR 2004-IX) or, as such, any entitlement to a pension of a given amount (see, for example, *Domalewski v. Poland* (dec.), no. 34610/97, ECHR 1999-V, and *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X). In addition, Article 1 places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of

Protocol No. 1 for persons satisfying its requirements (see *Stec and Others* (dec.), cited above, § 54).

45. As the Court held in *Stec and Others* (dec.), (cited above, § 55):

> "In cases, such as the present, concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question ... Although [Article 1 of] Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14."

46. In view of the foregoing, since the applicant belongs to the Roma community and was the spouse of M.D., as had been recognised for certain purposes by the Spanish authorities but not for the survivor's pension, the Court finds that the applicant's proprietary interests fall within the ambit of Article 1 of Protocol No. 1 and the right guaranteed therein to the peaceful enjoyment of possessions, this being sufficient for Article 14 of the Convention to be engaged.

3. Compliance with Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1

(a) The Court's case-law

47. According to the Court's established case-law, discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. The "lack of objective and reasonable justification" means that the impugned difference in treatment does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised" (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 175 and 196, ECHR 2007-IV, with further references).

48. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment (see, among other authorities, *Gaygusuz*, § 42, and *Thlimmenos*, § 40, both cited above). The scope of this margin will vary according to the circumstances, the subject matter and the background. Thus, for example, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may, without objective and reasonable justification, give rise to a breach of that Article (see *Thlimmenos*, cited above, § 44; *Stec and Others v. the United Kingdom*

[GC], nos. 65731/01 and 65900/01, § 51, ECHR 2006-VI; and *D.H. and Others*, cited above, § 175).

49. Similarly, a wide margin is usually allowed to the State when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the State's policy choice unless it is "manifestly without reasonable foundation" (see, for example, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, *Reports* 1997-VII, and the Grand Chamber judgment in *Stec and Others*, cited above, § 52).

50. Lastly, as regards the burden of proof in the sphere of Article 14 of the Convention, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see *D.H. and Others*, cited above, § 177).

(b) Application of the case-law to the present case

51. As to the circumstances of the present case, the applicant complained about the refusal to grant her a survivor's pension on the ground that she had not been married to M.D, her marriage according to Roma rites and traditions having been regarded as a *more uxorio* relationship – a mere *de facto* marital relationship. For the applicant, to treat her relationship with M.D. as a mere *de facto* marital relationship for the purposes of the survivor's pension constituted discrimination in breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. That discrimination was based on the fact that her application for a survivor's pension had received different treatment in relation to other equivalent cases in which an entitlement to a survivor's pension had been recognised even though the beneficiary had not been married according to the statutory formalities, whereas, in her case, neither her good faith nor the consequences of the fact that she belonged to the Roma minority had been taken into account.

52. The Court finds that the applicant was married to M.D. in November 1971 according to the rites and traditions of the Roma community. They had six children together. The applicant lived with M.D. until his death on 24 December 2000. On 11 August 1983 the civil registration authorities issued them with a family record book indicating the couple and their children. On 14 October 1986 they were granted the administrative status of "large family", for which the parents had to be "spouses" (see paragraph 27 above), and were able to exercise all the corresponding rights. Moreover, M.D. was covered by social security, to which he contributed for nineteen years, three months and eight days, and his social security benefit card indicated that he supported the applicant, as his wife, and his six

children. The Court notes that this is an official document as it is stamped by Agency no. 7 of Madrid of the National Institute of Social Security.

53. As regards the arrangements for survivor's pensions at the material time, the Court observes that the General Social Security Act, according to the version then in force, recognised an entitlement to a survivor's pension for the surviving spouse. That statutory provision was, however, supplemented and nuanced both in the law itself and in the case-law of the domestic courts, including that of the Constitutional Court (see paragraph 32 above).

The constitutional case-law has indeed taken into account, in recognising survivor's pensions, the existence both of good faith and of exceptional circumstances rendering the celebration of marriage impossible, even though no legally valid marriage has taken place. The Court notes that the tenth amendment to Law no. 30/1981 of 7 July 1981, amending the provisions pertaining to marriage (see paragraph 26 above), recognised an entitlement to a survivor's pension even in the absence of marriage, in cases where it had not been possible to give consent according to canonical rites. It observes that, according to the interpretation of that provision by constitutional case-law, a survivor's pension may be granted in the event of an impediment to marriage (in the canonical form), for example where a divorce could not be obtained, or where marriage was against the couple's beliefs (see paragraph 32 above). The General Social Security Act, as in force at the material time, recognised in section 174 an entitlement to a survivor's pension where there had been a belief in good faith in the existence of a marriage that was null and void. The Constitutional Court has moreover recognised, in particular in its judgment no. 199/2004 (see paragraph 32 above), a survivor's pension entitlement in the event of a canonical marriage where the statutory requirements were not met, as the marriage had not been registered in the Civil Register for reasons of conscience.

54. In view of the foregoing, the question arising in the present case is whether the fact that the applicant was denied the right to receive a survivor's pension reveals discriminatory treatment based on her affiliation to the Roma minority, in relation to the manner in which legislation and case-law have treated similar situations where the persons concerned believed in good faith that they were married even though the marriage was not legally valid.

55. The applicant based her claim, firstly, on her conviction that her marriage, solemnised according to Roma rites and traditions, was valid, and secondly, on the conduct of the authorities, which had officially recognised her as the spouse of M.D. and had consequently accepted, in her submission, the validity of her marriage.

56. The Court takes the view that the two questions are closely linked. It observes that the domestic authorities did not deny that the applicant

believed in good faith that she was really married. Her belief was all the more credible as the Spanish authorities had issued her with a number of official documents certifying her status as spouse of M.D.

For the Court, it is necessary to emphasise the importance of the beliefs that the applicant derives from belonging to the Roma community – a community which has its own values that are well established and deeply rooted in Spanish society.

57. The Court observes, in the present case, that when the applicant got married in 1971 according to Roma rites and traditions, it was not possible in Spain, except by making a prior declaration of apostasy, to be married otherwise than in accordance with the canon-law rites of the Catholic Church. The Court takes the view that the applicant could not have been required, without infringing her right to religious freedom, to marry legally, that is to say under canon law, in 1971, when she expressed her consent to marry according to Roma rites.

58. Admittedly, following the entry into force of the Spanish Constitution of 1978 and by virtue of Law no. 30/1981 of 7 July 1981 (paragraph 26 above), the applicant could have opted for a civil marriage. The applicant argued, however, that she believed in good faith that the marriage solemnised according to Roma rites and traditions produced all the effects inherent in the institution of marriage.

59. In order to assess the applicant's good faith the Court must take into consideration the fact that she belongs to a community within which the validity of the marriage, according to its own rites and traditions, has never been disputed or regarded as being contrary to public order by the Government or the domestic authorities, which even recognised in certain respects the applicant's status as spouse. The Court takes the view that the force of the collective beliefs of a community that is well-defined culturally cannot be ignored.

60. The Court observes in this connection that there is an emerging international consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (see paragraph 33 above, in particular the Council of Europe's Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 93, ECHR 2001-I).

61. The Court takes the view that, while the fact of belonging to a minority does not create an exemption from complying with marriage laws, it may have an effect on the manner in which those laws are applied. The Court has already had occasion to point out in its *Buckley* judgment (albeit in a different context), that the vulnerable position of Roma means that some special consideration should be given to their needs and their different

lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (see *Buckley v. the United Kingdom*, 25 September 1996, §§ 76, 80 and 84, *Reports* 1996-IV; *Chapman*, cited above, § 96; and *Connors v. the United Kingdom*, no. 66746/01, § 84, 27 May 2004).

62. In the present case, the applicant's belief that she was a married woman, with all the effects inherent in that status, was undeniably strengthened by the attitude of the authorities, who had recognised her as the wife of M.D. and had done so very concretely by issuing her with certain social security documents, in particular a registration document showing her as a wife and the mother of a large family, this situation being regarded as particularly worthy of assistance and requiring, pursuant to Law no. 25/1971 of 19 June 1971, recognition of status as spouse.

63. For the Court, the applicant's good faith as to the validity of her marriage, being confirmed by the authorities' official recognition of her situation, gave her a legitimate expectation of being regarded as the spouse of M.D. and of forming a recognised married couple with him. After the death of M.D. it was natural for the applicant to hope that she would be entitled to a survivor's pension.

64. Consequently, the refusal to recognise the applicant as a spouse for the purposes of the survivor's pension was at odds with the authorities' previous recognition of such status. Moreover, the applicant's particular social and cultural situation were not taken into account in order to assess her good faith. In this connection, the Court notes that, under the Framework Convention for the Protection of National Minorities (see paragraphs 33 and 34 above), the States Parties to the Convention are required to take due account of the specific conditions of persons belonging to national minorities.

65. The Court takes the view that the refusal to recognise the applicant's entitlement to a survivor's pension constituted a difference in treatment in relation to the treatment afforded, by statute or case-law, to other situations that must be considered equivalent in terms of the effects of good faith, such as belief in good faith in the existence of a marriage that is null and void (section 174 of the General Social Security Act, and Constitutional Court judgment no. 199/2004 of 15 November 2004 – see paragraphs 29 and 32 above –, concerning a failure to register a religious marriage on grounds of conscience). The Courts finds it established that, in the circumstances of the present case, the applicant's situation reveals a disproportionate difference in treatment in relation to the treatment of marriages that are believed in good faith to exist.

66. Admittedly, section 174 of the LGSS, as in force at the material time, recognised a survivor's pension entitlement in the absence of a legal marriage only where the marriage was null and void and was believed in good faith to exist. However, that provision cannot exempt a respondent State from all responsibility under the Convention. The Court observes in

this connection that Law no. 40/2007 introduced into the LGSS the possibility for a survivor's pension to be granted in cases of a *de facto* marital relationship (see paragraph 30 above).

67. The Court observes that, in its judgment of 30 May 2002, Labour Court no. 12 of Madrid interpreted the applicable legislation in the applicant's favour. It referred to Article 4 § 1 of the Civil Code, which provides that norms may be applied *mutatis mutandis* where they do not specifically contemplate the case in question but a comparable one, the object in both cases being regarded as similar. The Labour Court accordingly interpreted the applicable legislation in accordance with the criteria set out by the Court in its above-mentioned *Buckley* judgment.

68. The Labour Court judgment was, however, overturned on appeal by the judgment of 7 November 2002. The Higher Court of Justice of Madrid then took the view (see paragraph 15 above) that "the principle of equality and non-discrimination [was] based on the idea that equal situations [had to] be treated equally" and "that equal treatment applied to situations which [were] not equal constitute[d] injustice". The Court notes that the appellate court drew no conclusion from the specificities of the Roma minority, even though it did recognise that Roma marriage was "certainly meaningful and enjoy[ed] social recognition in the environment concerned" and that the morality of the rite or its conformity with public order were not called into question. For the Higher Court of Justice, it was clear that this situation "[did] not exclude, and currently [did] not supersede, the law that [was] in force and [was] applicable to the present case".

69. In the light of the foregoing and in view of the specific circumstances of the present case, the Court finds that it is disproportionate for the Spanish State, which issued the applicant and her Roma family with a family record book, granted them large-family status, afforded health-care assistance to her and her six children and collected social security contributions from her Roma husband for over nineteen years, now to refuse to recognise the effects of the Roma marriage when it comes to the survivor's pension.

70. Lastly, the Court cannot accept the Government's argument that it would have been sufficient for the applicant to enter into a civil marriage in order to obtain the pension claimed. The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by entering into a civil marriage – would render Article 14 devoid of substance.

71. Consequently, the Court finds that in the present case there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 12 OF THE CONVENTION

72. The applicant complained that the failure in Spain to recognise Roma marriage as having civil effects – it being the only form of marriage to produce effects *erga omnes* within her own community – even though the minority had been present in Spain for at least five hundred years, entailed a breach of her right to marry. She relied on Article 14 of the Convention taken in conjunction with Article 12. Those provisions read as follows:

Article 14

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 12

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

73. The Government contested the applicant's argument. They contended that there had been nothing to prevent her from entering into a civil marriage and took the view that Articles 12 and 14 of the Convention could not be interpreted as obliging the authorities to treat, on an equal footing, married couples who had complied with the statutory formalities and all other couples who had not done so. They referred to the margin of appreciation enjoyed by States in order to determine the exercise of the rights provided for under Article 12 of the Convention.

74. For the Government, the right to marry had been fully upheld in the present case, in the same conditions as for any other citizen. No discrimination could be found. The applicant had voluntarily decided not to get married according to the formalities laid down in the law. The Spanish State could not therefore be criticised for not attributing the same effects to this situation as it did to marriages that met the statutory requirements. Articles 12 and 14 of the Convention could not be interpreted as obliging a State to accept a particular form of expression of consent to marry purely on account of a community's social roots or its traditions. It was not therefore contrary to Article 12 of the Convention for the State to impose particular formalities for the expression of such consent.

75. The applicant asserted that in 1971, when she married M.D. according to the Roma rites, only religious marriage existed in Spain and civil marriage was not possible except in cases of apostasy. She married according to Roma rites because they were the only rites recognised by her community and because, in good faith, she was not free to give her consent in any other form. The applicant therefore protested that she was deprived of welfare entitlements on the pretext that she had not been married to M.D., refusing to be considered merely as his "partner".

76. For the applicant, the non-recognition under Spanish law of Roma rites as a form of expression of consent to marry, while certain religious rites did constitute valid forms of expression of consent, entailed, *per se*, a violation of the rights invoked. The applicant pointed out that Roma marriage had existed for over five hundred years in Spanish history; it consisted of a form of expression of consent which was neither civil nor religious but was deeply rooted in the culture of her community, being recognised and producing effects *erga omnes* in that community, through the validating effect of custom. Spanish law did not take into account the specificities of the Roma minority because it obliged that community to comply with a form of expression of consent that its members did not recognise.

77. Unión Romaní referred to the finality of the consent given in Roma marriage and sought recognition by the State of the validity of their rites. It argued that the Roma community in Spain had maintained its traditions for centuries and invited the Court to find that respect for ethnic minorities, with their traditions and cultural heritage and identity, was an essential component of the Convention.

78. The Court reiterates that Article 12 secures the fundamental right of a man and woman to marry and to found a family (see *F. v. Switzerland*, 18 December 1987, § 32, Series A no. 128, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 98, ECHR 2002-VI). The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see *I. v. the United Kingdom* [GC], no. 25680/94, § 79, 11 July 2002).

79. The Court observes that civil marriage in Spain, as in force since 1981, is open to everyone, and takes the view that its regulation does not entail any discrimination on religious or other grounds. The same form of marriage, before a mayor, a magistrate or another designated public servant, applies to everyone without distinction. There is no requirement to declare one's religion or beliefs or to belong to a cultural, linguistic, ethnic or other group.

80. It is true that certain religious forms of expression of consent are accepted under Spanish law, but those religious forms (Catholic, Protestant,

Muslim and Jewish) are recognised by virtue of agreements with the State and thus produce the same effects as civil marriage, whereas other forms (religious or traditional) are not recognised. The Court observes, however, that this is a distinction derived from religious affiliation, which is not pertinent in the case of the Roma community. But that distinction does not impede or prohibit civil marriage, which is open to the Roma under the same conditions of equality as to persons not belonging to their community, and is a response to considerations that have to be taken into account by the legislature within its margin of appreciation, as the Government have argued.

81. Accordingly, the Court finds that the fact that Roma marriage has no civil effects as desired by the applicant does not constitute discrimination prohibited by Article 14. It follows that this complaint is manifestly ill-founded and must be rejected under Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. 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

83. The applicant initially claimed 60,959.09 euros (EUR) in respect of the pecuniary damage that she alleged to have sustained. At the hearing of 26 May 2009 she indicated that she had been receiving a survivor's pension since 1 January 2007 by virtue of the third amendment of Law no. 40/2007 of 4 December 2007 on social security measures, as *de facto* partner of M.D. (see paragraph 21 above). She accordingly reduced her claim for pecuniary damage to the sum of EUR 53,319.88. She further claimed EUR 30,479.54 in respect of non-pecuniary damage.

84. The Government contested her claims.

85. The Court reiterates that the well-established principle underlying the provision of just satisfaction is that the applicant should, as far as possible, be put in the position he or she would have enjoyed had the violation of the Convention not occurred (see, *mutatis mutandis*, *Kingsley v. the United Kingdom* [GC], no. 35605/97, § 40, ECHR 2002-IV). Furthermore, the indispensable condition for making an award in respect of pecuniary damage is the existence of a causal link between the damage alleged and the violation found (see *Nikolova v. Bulgaria* [GC],

no. 31195/96, § 73, ECHR 1999-II), and this is also true of non-pecuniary damage (see *Kadiķis v. Latvia (no. 2)*, no. 62393/00, § 67, 4 May 2006).

86. Without wishing to speculate on the precise amount of the pension to which the applicant would have been entitled had the violation of Article 14 not occurred, the Court must have regard to the fact that she undoubtedly suffered pecuniary and non-pecuniary damage. Ruling on an equitable basis, as is required by Article 41 of the Convention, and having regard to all the special circumstances of the case, it awards her EUR 70,000 to cover all heads of damage (see, *mutatis mutandis*, *Koua Poirrez v. France*, no. 40892/98, § 70, ECHR 2003-X).

B. Costs and expenses

87. The applicant claimed EUR 3,480 for costs and expenses incurred before the Constitutional Court and EUR 3,382.56 for those relating to the proceedings before this Court. She produced supporting documents in respect of this claim.

88. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been 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 EUR 6,862.56 for the costs and expenses incurred in the domestic proceedings and the proceedings before it, less the EUR 1,450 already paid by the Council of Europe in the present case by way of legal aid. It thus awards the applicant EUR 5,412.56.

C. Default interest

89. 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

1. *Declares* unanimously the complaint under Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1, admissible;

2. *Declares* by a majority the complaint under Article 14 of the Convention, taken in conjunction with Article 12, inadmissible;

3. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;

4. *Holds* by six votes to one
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
(i) EUR 70,000 (seventy thousand euros), plus any tax that may be chargeable, for all heads of damage combined;
(ii) EUR 5,412.56 (five thousand four hundred and twelve euros and fifty-six cents), plus any tax that may be chargeable to the applicant, 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;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 8 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Myjer is annexed to this judgment.

J.C.M.
S.Q.

DISSENTING OPINION OF JUDGE MYJER

"*Maria Luisa Muñoz pide en Estrasburgo una reparación histórica para los gitanos*" ("Maria Luisa Muñoz seeks historic reparation for the Roma at the Strasbourg Court"), according to the headline of *Nevipens Romani* (1-15 June 2009). The subheadline continues: "*Catorce millones de gitanos podrían verse beneficiados de la decisión del Tribunal de Derechos Humanos*" ("Fourteen million Roma stand to benefit from the judgment of the [European] Court of Human Rights").

I am genuinely in favour of Roma equality; indeed that cause has been the object of the Council of Europe's efforts for many years. And I can well imagine that Roma may wish a marriage contracted between two persons of Roma ethnicity according to Roma traditions and standards to be recognised as a legally valid marriage by civil authority. Even so, I consider that it is not for this Court to translate such a wish into an obligation flowing from the Convention.

In its Section I, the Convention enumerates fundamental rights which Contracting States are bound to secure to everyone within their jurisdiction (Article 1). The Court's task is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto" (Article 19). To that end the Court is entrusted with jurisdiction extending to "all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it" (Article 32). In so doing the Court must as far as possible limit its examination to the issues raised by the concrete case before it (see, among many other authorities, *Deweer v. Belgium*, 27 February 1980, § 40, Series A no. 35, and *Minelli v. Switzerland*, 25 March 1983, § 35, Series A no. 62). Its task is not to review *in abstracto* under the Convention the domestic legislation complained of (see, among many other authorities, *F. v. Switzerland*, 18 December 1987, § 31, Series A no. 128).

Admittedly, the Convention is a living instrument and the Court has had occasion to extend the scope of Convention rights beyond their original intended meaning in the light of societal developments not envisaged at the time when the Convention was drafted (see, for example, *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31, and *Opuz v. Turkey*, no. 33401/02, § 164, ECHR 2009). In so doing the Court has recognised that "the very essence of the Convention is respect for human dignity and human freedom" (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI) but it has nonetheless weighed the general interest against the interest of the individual concerned (ibid., § 93).

However, the Court's jurisdiction cannot extend to the creation of rights not enumerated in the Convention, however expedient or even desirable such new rights might be. In interpreting the Convention in such a way, the Court may ultimately forfeit its credibility among the Contracting States as

a court of law, thus undermining the unique system of international human rights protection of which it has been the linchpin until now.

In guaranteeing "the right to marry", Article 12 clearly leaves the modalities of the exercise of this right to domestic authority ("according to the national laws governing the exercise of this right"). As the Court held in the above-mentioned *F. v. Switzerland* judgment (§ 32):

> "Article 12 secures the fundamental right of a man and a woman to marry and to found a family. The exercise of this right gives rise to personal, social and legal consequences. It is 'subject to the national laws of the Contracting States', but 'the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired' ...
>
> In all the Council of Europe's member States, these 'limitations' appear as conditions and are embodied in procedural or substantive rules. The former relate mainly to publicity and the solemnisation of marriage, while the latter relate primarily to capacity, consent and certain impediments."

As far as I am aware, all Contracting States attribute legal consequences to a lawful marriage. Those legal consequences are diverse in nature; they may relate to, for example, the mutual obligation of maintenance – in some cases, even after a marriage has ended –; pension or social security rights of the surviving spouse in the event of the death of the other; or inheritance rights. They may also be pertinent for third parties, who may have a right to seize marital property to secure the payment of debts owed by only one of the spouses. Some Contracting Parties provide for the registration of partnerships, attributing to registered partnerships all or part of the legal consequences of a marriage.

The Court has been slow to intervene in Contracting Parties' exercise of their prerogative in such matters; it has hitherto done so only in cases where a man and a woman were actually prevented by operation of law from contracting marriage (see *F. v. Switzerland*, cited above, and *B. and L. v. the United Kingdom*, no. 36536/02, 13 September 2005). The present case is different.

I find, as the majority do (paragraph 80 of the judgment), that "civil marriage ... is open to the Roma under the same conditions of equality as to persons not belonging to their community". The applicant has therefore not been the victim of a "difference in treatment" relevant to Article 14 of the Convention. More generally, absent any such difference in treatment I do not accept that the State is under a positive obligation to adapt its marriage laws to the wishes of individuals or groups following a particular lifestyle, not even if, like Roma in Spain, such individuals or groups constitute a large proportion of the population. I therefore concur with the majority in declaring the complaint under Article 14 taken in conjunction with Article 12 inadmissible.

I dissent from the majority in that I find no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1. Although the majority claim

to have arrived at their finding solely on the basis of the specific circumstances of the case, I have an uneasy feeling that they may have been moved to point out to the Spanish authorities what they see as the failure to adopt legislation that adequately reflects the special position of Roma. To me, this is apparent from, for example, paragraph 61 of the judgment, where they state the view that "while affiliation to a minority does not create an exemption form complying with marriage laws, it may have an effect on the manner in which those laws are applied". I wonder whether such a statement can be based on the case-law cited in paragraphs 60 and 61 of the judgment, which – as the judgment itself admits – was developed against a wholly different factual and legal background, namely that of spatial planning.

Nor is it obvious to me that such reasoning is valid in the context of the application of social security legislation bestowing benefits on recipients. To me, a closer parallel is *Goudswaard-Van der Lans v. the Netherlands* (dec.), no. 75255/01, ECHR 2005-XI, which states:

> "... although the Convention, supplemented by its Protocols, binds Contracting Parties to respect lifestyle choices to the extent that it does not specifically admit of restrictions, it does not place Contracting Parties under a positive obligation to support a given individual's chosen lifestyle out of funds which are entrusted to them as agents of the public weal."

This situation is distinguishable from that of a couple who are not lawfully married having children and starting a family. The Court has long recognised that children born out of wedlock may not be treated differently – in patrimonial as in other family-related matters – from children born to parents who are married to each other (principle stated in *Marckx*, cited above; compare also, among other examples, *Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C). The corollary, in my view, is that if the Spanish authorities had refused to recognise the applicant as the mother of a large family and grant her the attendant pecuniary benefits, or if they had refused to enter the children in the family record book, they would most likely have had to be found to be discriminating against the applicant and her family. But as is pointed out in the *Marckx* judgment (cited above, § 67), that reasoning cannot be turned on its head:

> "The fact that, in law, the parents of an 'illegitimate' child do not have the same rights as a married couple also constitutes a breach of Article 12 in the opinion of the applicants; they thus appear to construe Article 12 as requiring that all the legal effects attaching to marriage should apply equally to situations that are in certain respects comparable to marriage. The Court cannot accept this reasoning; in company with the Commission, the Court finds that the issue under consideration falls outside the scope of Article 12."

The question might well be raised whether the applicant could reasonably be unaware of the precarious legal status of her Roma marriage.

I am not convinced that the attitude of the Spanish authorities justifies the view that the applicant was entitled to assume that her marriage was valid as a matter of Spanish law. I am prepared to assume that she was unaware of the legal position when she was married according to Roma rites at the age of 15. Even so, I consider it unreasonable to impute her ignorance to the respondent Party. It would be even more unreasonable to impute the equal treatment, in certain respects, of the applicant and her family as compared to marriage-based families to the Spanish authorities as a fault.

I get the impression from the written observations of the intervening third party, Unión Romaní, and their oral submissions at the hearing that the applicant's case is viewed as a test case to achieve the fulfilment of a long-held wish, namely the recognition of Roma marriage as lawful. This is also reflected by the newspaper headlines which I have quoted above. As matters stand, there appear to be many Spanish Roma who marry twice, both in accordance with Spanish law and according to Roma traditions, to be on the safe side. This is little different from the situation in many other countries, including my own (the Netherlands), in which a lawful marriage is solemnised before a public authority after which, if the parties so wish, a religious ceremony may follow.

In that connection, I have doubts as to whether there is any factual or legal basis to paragraph 57 of the judgment: can it really be said that "the applicant could not have been required, without infringing her right to religious freedom, to marry legally, that is to say under canon law, in 1971, when she expressed her consent to marry according to Roma rites"? Nothing is known about the applicant's religious affiliation, if any; moreover, the Convention (including Article 9 which guarantees freedom of religion) was not yet in force for Spain in 1971. That aside, a statement like that is a bold one to make *obiter dictum*.

I find it gratifying that on 3 December 2008 "under the third amendment of Law no. 40/2007 of 4 December 2007 pertaining to certain social security measures the applicant was granted a survivor's pension with effect from 1 January 2007, as the partner of M.D." (see paragraph 21 of the judgment). A desirable situation has thus been achieved at the appropriate level, the domestic one.