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Notice: 28/05/2020 I Proceedings Date:27/05/2020 I Case: PN-2019/42.A Juan Domingo Valderrama Martínez I Court Representative: Rosa Jaén Sánchez De La Campa

### ORDER N° 247/20

CADIZ REGIONAL COURT OF APPEAL  
Cádiz Regional Court of Appeal, Division Three

HONOURABLE JUDGES  
PRESIDING JUDGE:  
MANUEL GROSSO DE LA HERRAN

JUDGES:  
MIGUEL ANGEL RUIZ LAZAGA  
JUAN JOSE PARRA CALDERON

CADIZ INVESTIGATING COURT N°1 (FORMER TRIAL COURT OF GENERAL JURISDICTION N°7)  
APPEAL PROCEEDINGS N° 118/2020  
PRELIMINARY INVESTIGATIONS N° 161/2018

In the city of Cádiz, on twenty-one May two thousand and twenty.

Division Three of the Cádiz Regional Court of Appeal of this Court, comprising the aforementioned Judges, heard the appeal brought against the order issued in the above proceedings, which was filed by ACCION Y COMUNICACION SOBRE ORIENTE MEDIO (ACOM) [action and communication on the Middle East], which is represented by the Court Representative JOSE MANUEL JIMENEZ LOPEZ in conjunction with the judicial assistant ALEJANDRA CRESPO DE LA CONCEPCION CREMADES & CALVO SOTELO. The respondent is the Public Prosecutor JOSE MARIA GONZALEZ SANTOS AND OTHERS.

### FACTS IN ISSUE

**ONE.** On 16 December 19, the Honourable Judge of CADIZ INVESTIGATING COURT N°1 (FORMER TRIAL COURT OF GENERAL JURISDICTION N°7) issued an order, the operative part of which stated: "*I hereby order that these criminal proceedings be suspended without prejudice as no criminal offence has been committed*".

**TWO.** The representative of ACCION Y COMUNICACION SOBRE ORIENTE MEDIO (ACOM) filed an appeal against this decision and after the corresponding procedures were followed, the proceedings were brought before this Court, where the appeal was duly recorded and a date was set to vote and decide on it.

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The Reporting Judge was the Honourable JUAN JOSE PARRA CALDERON, who expressed the opinion of the Court.

## LEGAL BASIS

**ONE.** The above challenges against the decision to dismiss these criminal proceedings without prejudice, which were originally brought based on the complaint filed by ASOCIACION ACCION Y COMUNICACIÓN SOBRE ORIENTE MEDIO (ACOM) citing a breach of official duties under article 410 of the Criminal Code and a hate crime under article 510 and 520 bis of the Criminal Code against members of the Local Governing Body of Cádiz Council, Asociación Pro Derechos Humanos de Andalucía [Andalucía human rights association] and others, wherein the appellant maintains:

1. Infringement of article 24 of the Spanish Constitution due to the appealed decision's lack of grounds, as it contains no reasoning to dispute that the alleged facts have the potential to generate and encourage acts of discrimination and hate against Israeli people and companies, and ignores the procedural process and the acts of the defendants, who admitted that the Israeli film festival was cancelled because of its origins, along the activities to support and promote the ideology of the BDS [Boycott, Divestment and Sanctions movement], which extended beyond simple political matters.

2. Existence of the necessary requirements in the alleged offences. It is prudent to consider the ideologies of the BDS and the ELAI (ESPACIO LIBRE DE APARTHEID ISRAELI) [Israeli apartheid-free area] movements, the first of which seeks the disappearance of Israel, justifies Palestine's armed struggle against Israel, compares Israel to the Nazi regime and South African apartheid system, has clear connections with organisations that the European Union deems to be terrorist groups and seeks to isolate Israel from sports events, as well as commercially, culturally and socially. Based on this ideology, Cádiz Council has legitimised and supported these ideas by passing a resolution that seeks to incite hate against Israel, its people and companies in that it encourages people not to acquire goods or services from a company of Israeli origin and bans a film festival because of its provenance, as the defendants admit.

Cádiz Council and its Governing Body endorsed the discriminatory and anti-Semitic ELAI and BDS movements by encouraging the commercial boycott and suspending the Israeli film festival on ideological grounds at the request of the defendant. In this way, the only intention of the endorsement of the ELAI campaign and BDS movement was to boycott Israel and, as a result of the above, find justification to suspend the Israeli film festival.

The defence team of the defendant ASOCIACION PRO-DERECHOS HUMANOS DE CADIZ challenged the appeal as, along with the complaint, it did not clarify any matters of fact that were attributable to this Association, which was not part of the council's governing body in 2016 and had no authority to suspend the Israeli film festival.

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The defence team of the defendants José María González Santos, David Navarro Vela, Álvaro de la Fuente Carrasco, Ana Isabel Fernández Galván, Martín Vila, Laura Jiménez, Adrián Martínez de Pinillo, Ana Camelo, María Romay and Eva Tubio also challenged the appeal on the basis that the only argument is about the criminality of the facts and that no evidence has been given in the case to contend that the aim of the resolution passed on 12 August 2016 by the Local Governing Body and the subsequent resolution to cancel the Israeli film festivals organised by the Israeli Embassy was to discriminate against Israel, its people or corporations and support the disappearance of the same. What these resolutions did aim to do was to comply with numerous international resolutions. There are doubtless grounds to appeal the decision due to the way the Public Prosecutor's report was published and its rationale. However, there is no evidence whatsoever that a breach of official duties or hate crime has been committed. Finally, the appeal should not be allowed as the appellant (the Association) is not authorised to bring a private action and should instead have filed a complaint and public interest action.

The Public Prosecutor challenges the appeal on the grounds that the appealed order expresses sufficiently well the reasons why the Judge deemed that the facts did not meet the definition of the crime as it referenced the Public Prosecutor's preliminary report. With respect to the elements of the alleged offences, the appellant restricts their argument to mention of the BDS and ELAI, stating that the actions taken contain evidence that is more than sufficient to consider that the alleged offences took place.

However, in reality events are very different to those alleged by the complainant, as the contested claim was doomed to failure, as requested by the Public Prosecutor and the defence teams, which pre-empts the decision to be made by the Chamber, as the case contained numerous motions for reconsideration of a ruling and a secondary appeal, wherein it would have been logical to issue a decision on this matter first, as the Chamber was unaware of the reason said decision was delayed (the lack of the complainant's authority was argued against the Order of 6 March 2018, Decision of 21 May 2018, Order of 19 September 2018, Decision of 11 April 2019 and the Decision 6 May 2019), as well as the request to declare the case complex filed by the Public Prosecutor on 8 August 2019, to which the complainant adhered.

**TWO.** In her ruling of 5 April 2019, the Judge bases her findings on the dismissal of criminal proceedings without prejudice prescribed by article 641.1 of the LECRIM [Criminal Procedure Act], as follows: *"if the crime giving rise to the case has not been duly justified"*. She also gives a reasoned explanation of and minimal grounds for (reference to the Public Prosecutor's report is accepted) the items contained in Legal Basis 2 and 3, which is sufficient for the purposes hereto, indicating that from the complaint report and the statements and documents provided it cannot be deduced that a crime has been committed, given that it is possible to agree or disagree with the campaign that calls on all public and democratic authorities to comply with and also require that the Israeli government complies with the resolutions of the United Nations and other authorities as regards Palestine. It cannot however be denied that said international resolutions exist (United Nations Security Council Resolution 242 of 22 November 1967, Resolution 338 of 1973, Resolution 446 of 1979, Resolution 452 of 1979, Resolution 465, 475 and 478 of 1980, Resolution 1397 of 2002, Resolution 1515 of 2003, Resolution 1850 of 2008 and, more recently, Resolution 2334, in addition to several resolutions passed by the European Parliament, and the numerous ratifications of these resolutions by different nations, including the Spanish Parliament, as well as local councils, administrations and humanitarian organisations, with special emphasis on Resolution 242 of the United Nations Security Council and the Declaration of the International Court of Justice of 9 July 2004, etc.).

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It is clear that all legal practitioners agree that in its Resolution of 12 August 2016, the Governing Body of Cádiz Municipal Council unanimously endorsed the ELAI (ESPACIO LIBRE DE APARTHEID ISRAELI) campaign "which seeks to obtain a fair business environment and responsible consumer behaviour by encouraging people not to buy products that have been grown or manufactured under apartheid conditions in the territories occupied by Israel and illegally expropriated from Palestine in the West Bank including East Jerusalem and Gaza" and "support cooperation with the BSD movement, which is coordinated at state level by the Red Solidaria contra la ocupación de Palestina [solidarity network opposing the occupation of Palestine] and at autonomous level by the Plataforma Andalucía con Palestina [Andalucian platform with Palestine]. Similarly, all legal practitioners also agreed to the suspension of the Israeli film festival organised by the Israeli Embassy, which involved the screening of several films in the ECCO (Espacio de Cultura Contemporánea) [venue for contemporary culture] in Cádiz, which had already started and which was part of Cádiz Municipal Council's cultural programme, such action being justified (although not made official in writing) Cádiz Municipal Council's commitment to the ELAI Campaign and communicated by Ms Tubio, the Councillor responsible for culture, and the Mayor to the Honorary Israeli Consul in Cádiz, Huelva and Extremadura by email on 28 September 2017, which is when the Fundación Municipal de Cultura del Ayuntamiento [the Municipal Council's cultural foundation] also issued a press release on the cancellation and published the Resolution to endorse the ELAI campaign. Finally, on 10 October 2017 an appeal against an administrative decision was also filed via the special channel for the protection of basic individual rights with respect to the two facts argued by the complainant, which gave rise to Proceedings in respect of Basic Rights 720/2017 at Cádiz Administrative Court Number One, wherein the action was limited to the second Resolution of 20 October 2017, as it was considered that the first resolution was final and unappealable as the above judicial body had stated that a basic right had been violated, even though the defendants' grounds focused on the entity that organised the event rather than the nationality of the films to be shown there, a matter which, although it may not be relevant as regards the violation of the principle of equality and which is not in any way questioned, is material as regards criminal procedure as in their statements, all the defendants mentioned that it was the circumstances surrounding the film festival that were important rather than the content or origin of the films themselves, i.e. that the project was proposed by and organised in conjunction with the Israeli Embassy.

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The defendant ASOCIACION PRO-DERECHOS HUMANOS DE CADIZ was not part of the governing body in 2016 and had no authority to suspend the Israeli film festival. Its only link to both decisions being its efforts to encourage Cádiz Municipal Council (along with many other associations such as ELAI) to endorse the campaign to force Israel to comply with UN resolutions and international law; wherein the complaint and even the appeal against it clearly lack clarity as they consider that the Association allegedly committed a crime (rather than inciting one). That being the case, it is not possible to conclude that asking public authorities not to collaborate with companies that produce or manufacture products in Israeli-occupied Palestine territories could result in a criminal charge not only for this Association, but also for thousands of other associations and governments that supported the ELAI campaign.

**THREE.** As regards the breach official duties under article 404 of the Criminal Code, the elements contained in the statutory definition of the crime do not exist. This provision classifies as an offender "*an authority or public official that/who issues an arbitrary decision in an administrative matter knowing it to be unfair....*".

Under modern case law (STS [Supreme Court Judgment] 755/2007 of 25 September), which ignores the highly contested objective arguments that describe this type of crime as the "patent and clear knowledge of to what extent the administrative act is at odds with the law" and considers that the distinguishing factor determining the breach of official duties as opposed to administrative lawlessness "is the arbitrary exercise of power, as prescribed in article 9.3 of the Spanish Constitution", which occurs when an authority or official issues a decision based solely on their wishes, converting power into an apparent source of legislation without reason or an acceptable technical and legal basis, and that this administrative decision was issued wilfully in the knowledge that it was unfair and with a malevolent intention to distort the law.

Irrespective of the matters expressed in the contentious-administrative jurisdiction, which are not contested, as they are not political acts and are not limited to issuing a simple statement of intentions, both the resolution of 12 August 2015 (Endorsement Resolution of the Local Governing Body) and the resolution of 28 September 2017 suspending the Israeli film festival are connected insofar as the first acts as justification for the second, the difference between them being the perpetrators of the alleged crime and the authorities that endorsed each decision. The contentious-administrative courts have indicated that, when it passed said Endorsement Resolution, the Municipal Council's Local Governing Body overstepped its authority and encroached on an area under exclusive state authority, as provided for by article 149.1 3 of the Spanish Constitution.

However, despite the above, the statutory elements of the crime under analysis do not exist, as the decision to suspend the film festival was not based on the will of the Councillor responsible for Culture or the Mayor, as, in a strange turn of events, they only acted in order to comply with the aforementioned Endorsement Resolution, a circumstance that is supported by the fact that the council supported the film festival and it was only because the alleged perpetrators did not voice their opinions about the Municipal Council's involvement with the Israeli Embassy being inconsistent with the previous commitment that the cancellation was approved. Clearly, this leads us to conclude, as indicated in the appealed decision, that the defendants were not aware of the fact that the resolution (which was passed as a result of the previous Endorsement Resolution) was not lawful because of the campaign's prominence in the press.

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Therefore, the factor that would make the above behaviour subject to prosecution would be the Resolution to endorse the ELAI and BDS which, as we have explained above, does not constitute a breach of official duties as there is no evidence that the defendants were aware of the findings of other contentious-administrative appeals against other Municipal Councils following similar events. In fact, even if they had been aware of these proceedings, this would not necessarily mean that they knowingly and wilfully committed an offence, insofar as the ruling was not issued with respect to the complaint about the resolution passed in 2016; rather, many of the rulings were issued after this date, which suggests that the conduct at issue is lawful as it is widespread. Furthermore, on 27 June 2017 the Spanish Parliament unanimously passed a motion recognising the right to campaign for the BDS. Thus, it can be concluded that in this climate of opinion it cannot be held that a breach of official duties has taken place, as the behaviour at issue does not meet the definition of a crime.

**FOUR.** As regards a hate crime under articles 510 and 510 bis of the Criminal Code, the elements included in the statutory definition of the crime do not exist. When studying this matter a clear definition of what the hate crime is must be determined which, in accordance with the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE), and similarly under article 1 of Framework Decision 2008/913/JAI is deemed to be "any offence committed against people and property when the victim, place or target of the offence is chosen due to their connection, relation, affiliation, support or membership of a group that may be based on race, nationality or ethnicity, language, colour, religion, age, physical or mental disability, sexual orientation or other similar factors, which may be real or assumed". This conceptual extension shapes what is understood as hate speech, which is the necessary limit of freedom of expression that, due to its broad definition, presents a spectrum of boundaries that are difficult to define. SSTC [Constitutional court ruling] 235/2007 and SSTC 177/2015 defines hate speech as the direct encouragement to commit violence against people in general or against people of a specific race or belief system.

The element that characterises these crimes is the subjective intent that causes the perpetrator to commit an act that requires an externalisation to the outside world through word or deed. This intent is nothing more than a manifestation of exclusive intolerance, which must be manifested in animosity towards specific people or groups because they share common traits, making it necessary to give adequate thought to the conflicting interests.

STS [Supreme court judgment] 47/2019 of 4 February states that "the legal right protected by the statutory definition of the crime under article 510 of the Criminal Code is the dignity of the person or group of people for whom, due to their particular vulnerability, the Code grants specific protection"; and STS 235/2007 of 7 November states that "human dignity is the framework within which the exercise of basic rights must take place".

From the above, the violation of multiple legal norms is inferred, and the idea that the matter involves a mere advancement of the protective barriers of criminal law must be rejected. As memorandum 7/2019 from the Chief Public Prosecutor states, different aspects must be assessed in order to consider that a legal right has been impaired:

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1. The behaviour of the perpetrator must constitute unequal or discriminatory treatment, which means there must be a difference in behaviour that does not constitute objective, reasonable, necessary and proportionate justification, as not all discrimination has specific characteristics that classify it as expressing a hate crime, as there are logical exceptions.
2. The action or omission must involve disregard for the intrinsic dignity that all humans have merely for being human, causing that which is different to be attacked as an expression of intolerance that is not compatible with coexistence".

For this reason, criminal prosecution will be brought against any behaviour that infringes the most basic rules governing tolerance and coexistence and that impacts on the common values and principles of the population by having a negative effect on the dignity of any human being and that, as such, must be considered as an attack on the structure and key components of constitutional order and, ultimately, the entire system of rights and freedoms of a democratic society.

This offence is considered a crime of endangerment. However, as STS 259/2011 of 12 April states, the "existence of danger... depends on both the content of the message and the way it is imparted, without ignoring the society or social sphere the acts at issue are intended for". Returning to this specific case, it is not possible to objectively characterise people from the region of Cádiz as being anti-Semitic or as supporting the social, financial or cultural exclusion of Israeli nationals.

In any case, the 2016 ELAI Endorsement Resolution was referred to as a reaction to the political measures adopted by Israel; therefore, it is debatable whether this constitutes concealed anti-Semitism or an exclusion of people and businesses due to their nationality. Furthermore, from a reading of the Resolution it cannot be deduced that the elements of disregard for human dignity required by the statutory definition of the crime exist, as it is based on Resolutions of International Law and is backed by the Asociación Pro-Derechos Humanos, which has also not behaved in a way that meets these requirements. As regards the suspension of the film festival, it has already been explained that the investigations associated this with the organisation of the event by the Israeli Embassy rather than the nationality of the films; therefore, there is no intent.

**FIVE.** It was this lack of reasonable evidence of criminality that led the lower court Judge to consider that the alleged facts do not constitute a crime in accordance with the formula used by articles 779.1. 1 of the LECRIM, thereby dismissing and closing the proceedings with good reason.

This reflects the case law which states that *"the preliminary investigation phase in criminal proceedings serves as preparation for the trial and to prevent trials being commenced unnecessarily" "proceedings must be dismissed when, rationally, it is not likely that a conviction will take place due to the inadequacy of the available evidence... To act otherwise would be a violation of the right to a speedy trial, for both the defendants and the accusers, who would have to wait unnecessarily for a final, predictable decision to be issued, while their procedural, financial and personal resources decline, especially if they are a private party"*, as is exactly the case here.

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The above leads us to agree with the arguments put forward by the lower court Judge and to reject the appeal against her decision to dismiss and close the case.

**SIX.** In accordance with article 239 and following articles of the LECRIM, court costs are to be borne by the state.

The above in light of both the aforementioned precepts and any others of relevant and general application.

### DECISION

We hereby **DISMISS the appeal** brought by the complainant ASOCIACION ACCION Y COMUNICACIÓN SOBRE ORIENTE MEDIO (ACOM) against the Order of 16 December 2019 handed down by Cádiz Investigating Court Number One, and, in agreement with the decision to dismiss the criminal proceedings without prejudice and close the case, we **UPHOLD** said decision.

Court costs for this appeal are to be borne by the state.

The parties are hereby served notice of this decision and a certified copy of the same is sent to the original court, making it know that an ordinary appeal cannot be brought against the same.

As was ordered and signed by the aforementioned Honourable Judges, to which I, the Court Clerk, attest.

JUDGES            COURT CLERK

"The text of this decision may only be disclosed to parties that are not involved in the proceedings at issue once the personal data contained in the same has been removed and with full respect for the right to privacy, the rights of people who require special guardianship obligations and with the guarantee of anonymity for victims or injured parties, where necessary.

The personal data included in this decision may not be assigned or communicated for purposes that are contrary to the law."

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