

CADIZ CRIMINAL COURT OF APPEAL: THE BDS MOVEMENT DOES NOT INVOLVE HATE CRIMES

I. BACKGROUND

1. On 12 August 2016, the Cadiz City Council adopted a Resolution through which it declared Cadiz a city free of Israeli apartheid and committed to abstain from procurement and cooperation with companies and institutions involved in Israel's violations of Palestinian human rights, endorsing the Apartheid-Free Zones Campaign (in Spanish: Espacio Libre de Apartheid Israeli, hereafter: ELAI Resolution). With this Resolution, the City of Cadiz also expressed its support to the Boycott, Divestment and Sanctions (hereafter: BDS) movement. Through a subsequent Resolution issued on 28 September 2017, (hereafter: Israeli film-festival Resolution) the Cadiz City Council decided to cancel an Israeli Embassy-sponsored film festival in a city-owned venue in line with the mentioned policy.

2. In response, in October 2017, the Association "Action and Communication On the Middle East" (hereafter: ACOM), a pro occupation organisation registered in Spain, , filed an administrative complaint in front of the Cadiz Administrative Court, asking for the annulment of the ELAI Resolution. The Administrative Court, in the judgement of 27 March 2019, decided in favour of ACOM. The City of Cadiz has filed an appeal, which is currently still pending.

3. ACOM also filed a criminal complaint against the members of the City Council who voted in favour of both Resolutions, as well as the Andalusian Association for Human Rights (hereafter: APDHA) who sponsored those Resolutions. This was admitted by the Cadiz Court of First Instance in June 2019. ACOM argued that, by adopting the ELAI Resolution and by cancelling the film festival, they had committed both a hate crime and a crime of arbitrary exercise of power (prevaricación). On 12 November 2019, the Prosecutor's Office of Cadiz requested rejection of the case and on 16

December 2019, the Cadiz Court of First Instance issued a judgement ordering the dismissal of the complaint (Proceeding No. 161/2018). The Court of First Instance stated that no crime of arbitrary exercise of power was upheld, since there were no elements to affirm that the members of the City Council were aware of any unlawfulness of those Resolutions. The hate crime allegation was dismissed as well, since the Court affirmed that the suppression of the Israeli film festival did not give rise to anti-Semitic motives, nor did it show contempt for elementary rules of coexistence or the dignity of the individual. ACOM appealed to the Cadiz Court of Appeal.

4. Set out below is the European Legal Support Center's Executive Summary of the final decision of the Cadiz Court of Appeal dated 21 May 2020, which upheld the reasoning and decision of Cadiz Court of First Instance and dismissed ACOM's appeal. **ELSC believes that this decision of the Cadiz Court of Appeal is significant, because it invalidates ACOM's claims to criminalise and punish the members of the Cadiz City Council by means of meritless complaints under Spanish hate crimes law. ELSC considers that these claims had been made in order to intimidate Spanish local government bodies against adopting measures which are lawful and necessary and which ensure that these bodies do not recognise or assist Israel's flagrant violations of international law and human rights of the Palestinian people.**

With this Executive Summary, the ELSC aims to make this important decision of the Cadiz Court of Appeal more widely accessible.

II. EXECUTIVE SUMMARY

5. The ruling has been issued by the **Cadiz Court of Appeal**, Division Three, Order N° 247/20, on 21 May 2020 (notice: 28 May 2020). The Appeal Proceeding is the N° 118/2020. The Court of Appeal addressed whether, through the adoption of ELAI Resolution and the Israeli film-festival Resolution, the Cadiz City Council and the APDHA can be held responsible for the crime of arbitrary exercise of power and hate crime.

6. ACOM claims.

- (I) The appellant claimed that, through the adoption of the Resolutions, the Cadiz City Council and the APDHA have violated Article 404 of the Spanish Criminal Code, and therefore should be accountable for

the **crime of arbitrary exercise of power** (prevaricación). The provision states that “A public authority or official who knowingly makes an arbitrary decision in an administrative matter shall be subject to the penalty [...]”. ACOM also referred that, when the ELAI Resolution was issued, there were several administrative appeals against other City Councils, which adopted similar resolutions. According to ACOM, this should have discouraged the adoption of the ELAI Resolution by the Cadiz City Council.

- (II) ACOM argued that the defendants also committed **hate crime**, infringing Articles 510 and 510 bis of the Spanish Criminal Code. Article 510, in particular, provides that “Anyone who publicly encourages, promotes or incites, directly or indirectly, hatred, hostility, discrimination or violence against a group, a part of a group or a particular person on the grounds of his or her membership of that group, on grounds of racism, anti-Semitism or other grounds relating to ideology, religion or belief, family status, membership of an ethnic group, race or nation, national origin, gender, sexual orientation or identity, or on grounds of gender, illness or disability [...] shall be punished”. ACOM claimed that the Cadiz City Council had supported the ELAI campaign and the BDS movement by passing a Resolution that seeks to incite hate against Israel, its people and companies, and that encourages people not to acquire goods or services from a company of Israeli origin, and that the Council had accordingly banned a film festival purely because of its national origin. According to ACOM, “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”.

III. LINE OF ARGUMENTS OF THE CADIZ COURT OF APPEAL

7. First and foremost, the Cadiz Court of Appeal considered that the ELAI campaign simply pushed Israel to comply with the Resolutions of the United Nations General Assembly and other national and international bodies as regards Palestine (pp. 3-4). The Court also specified that the defendant APDHA was not part of the Cadiz governing body in 2016 and thus they were not competent to suspend the Israeli film festival. Indeed, APDHA, along with

many other associations, only encouraged the Cadiz City Council to adopt those Resolutions (pp.4-5).

8. The Cadiz Court of Appeal then dismissed the case as follows:

- (I) With regard to the **crime of prevaricación** (pp. 5-6), the Court of Appeal referred to the distinctive element of the offence, namely the arbitrary exercise of power (ex Article 9(3) of the Spanish Constitution). This occurs when the authority adopts a decision which is based solely on their wishes and turned into an apparent source of legislation, without reason or an acceptable technical legal basis, and when the administrative decision is issued in the knowledge that it is unfair. The Court clearly affirmed that such requirement is not met in the case at hand. According to the Court, the behaviour that could be subject to prosecution would be the adoption of the ELAI Resolution, which endorsed the ELAI campaign and the BDS movement. However, this did not amount to a conduct of arbitrary exercise of power, since there was no evidence that the adoption of the ELAI Resolution was arbitrary nor that the members of the Cadiz City Council were aware of the existence of administrative complaints against other City Councils following similar events. And even if they had been aware of these proceedings, this would not necessarily mean that they knowingly and wilfully committed an offence, since many of these administrative rulings annulling the ELAI resolutions issued by other Spanish cities were issued after 2016. Thus, the Court concluded that the conduct is lawful (indeed, there was the appearance of legality as such ELAI resolutions were adopted in many other cities in Spain). The elements required by Article 404 did not exist also with regard to the Israeli film-festival Resolution, because it was not an arbitrary decision by the Councillor responsible for Culture or by the Mayor, as they merely acted in compliance with the ELAI Resolution. The Court concluded that the defendants were not aware of any unlawfulness of the adopted Resolutions. In the light of these arguments, the Court clearly stated that in such context a finding of conduct of arbitrary exercise of power could not be upheld, as the behaviour of the members of the Cadiz City Council and of the APDHA did not meet the definition of a crime. Indeed, the Spanish Parliament on 27 June 2017 had

unanimously passed a motion recognising the right to campaign for BDS.

- (II) The Court also addressed the allegation of **hate crime** (pp. 6-7). The main elements of the crime are the following: (a) the subjective intent (i.e., a manifestation of exclusive intolerance towards specific persons or groups of persons because of their shared characteristics) which leads the perpetrator to commit an act that requires an externalisation to the outside world through words or acts. The Spanish Supreme Court (STS 47/2019) specified that "the legal right protected by the statutory definition of the crime [...] is the dignity of the person or group of people for whom, due to their particular vulnerability, the Code grants specific protection". (b) the multi-offensive nature, requiring different aspects to be analysed to consider that the protected legal right has been affected, namely (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; and (2) the action or omission must involve disregard for the intrinsic dignity of human beings. (c) the nature of crime of danger, considering the content of the messages and the way in which they are spread. The hate crime has been defined by OSCE (Article 1, of Framework Decision 2008/913/JAI) as "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".

In this case, the 2016 ELAI Resolution was referred to as a legitimate reaction to the Israeli policies in the Occupied Palestinian Territory (OPT). The Court acknowledged that it is debatable that such form of criticism might amount to anti-Semitism and discrimination, but such allegations should be always supported by evidence. In the ELAI Resolution, it cannot be deduced that the elements of disregard for human dignity and discrimination are met, since it recalls many UN Resolutions and it is consistent with International Law. As to the Israeli film-festival Resolution, the defendants decided to cancel the film festival only because the event was organized by the Israeli Embassy and not because of the nationality of the movies. This led the Court to conclude that

there was no discriminatory intent and therefore “the elements included in the statutory definition of the [hate] crime do not exist”.

9. Decision. In conclusion, the Cadiz Court of Appeal **upheld the decision** of the Cadiz Court of First Instance, and thus it **dismissed the ACOM’s appeal**.