CASE NOTE

SPANISH COURT RECOGNISES THE SPANISH NATIONALITY OF A STATELESS 'INVISIBLE CHILD' IN ORDER TO REMEDY A VIOLATION OF HER HUMAN RIGHTS†

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I INTRODUCTION

The Audiencia Provincial de Guipúzcoa (Guipuzcoa Court of Appeal) ('Court of Appeal') has issued an unprecedented judgment in which a stateless child has been granted Spanish nationality in order to remedy a breach of her human rights.[1] This judgment upholds a previous ruling issued by the Juzgado de Primera Instancia No 5 de Donostia San Sebastián (First Instance Court No 5 of San Sebastian) ('First Instance Court').[2]

These rulings deal with the so-called 'invisible children', which refers to children born on the move. These children are born during their mothers' migratory journey — between the country of origin and the country of destination/residence — and become stateless due to the particular circumstances of their birth. These children do not have a birth certificate and/or their birth is not registered. They then arrive irregularly in the countries of destination with their mothers, where they establish their home. In that country, they face the

† An earlier, shorter version of this case note was published on the European Network on Statelessness blog: see José Alberto Navarro and Laura Lozano, 'Landmark Judgment from Spain: Court Grants Spanish Nationality to a Stateless Child Born En Route (A Case of "Invisible Children")', *European Network on Statelessness* (Blog Post, 7 July 2022) <https://www.statelessness.eu/updates/blog/landmark-judgment-spain-court-grants-spanish-nationality-stateless-child-born-en-route>, archived at <https://perma.cc/J9D3-5S8C>.

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1 Audiencia Provincial de Guipúzcoa, Sentencia No 341/2022, 11 May 2022, ECLI:ES:APSS:2022:203 ('Audienca Provincial de Guipúzcoa Judgment').

2 Juzgado de Primera Instancia No 5 de Donostia San Sebastián, Sentencia No 310/2021, 24 November 2021, ECLI:ES:JPI:2021:2608 ('Juzgado de Primera Instancia Judgment').

consequences of not having proof of birth: they will not be allowed to obtain any identity documents or have access to the nationality of any of the countries with which the child has a connection. The countries of connection are, firstly, the country of the mother. The consular authority of the country of the mother may consider itself incompetent to register the birth and recognise the nationality of the child. Consular authorities may only be competent to deal with children that are born in the country of destination/residence. Even though the law of the country of the mother may formally acknowledge its nationality to the child by descent — *jus sanguinis* — the consular office will refer such decision to the authorities in the country of origin. This would create additional requirements for accessing nationality which, in this case, would be impossible to fulfil. The child could not travel because they do not have a passport or travel documents. The second country of connection is the country of birth. The authorities of the country of birth may deny any connection with the child because there is no proof that the child was born in its territory. Furthermore, the country of birth will very likely not grant its nationality *jus soli*. The third country of connection is the country of destination/residence. The birth did not occur in its territory and, therefore, the national authorities may consider themselves incompetent to register it. The child would also not be acknowledged as a national because they do not satisfy the requirements set by the country's legislation, whether it is a *jus sanguinis* or *jus soli* country. Therefore, these 'invisible children' will be stateless. In practice, this will result in a breach of their human rights, as children have the right to have an identity and a nationality and access education and national health services, among other rights. As some authors have noted, the lack of birth registration jeopardises the rights of these children.[3]

In the aforementioned judgments, the Spanish courts handled the case of an 'invisible child' for the first time. The courts, in ground-breaking rulings, concluded that Spanish nationality had to be given to the child as it was the only mechanism to remedy her statelessness and the breach of her fundamental rights.

II Facts

In 2015, a Cameroonian woman gave birth to a girl in Agadir, Morocco, during her migratory journey to Europe. The birth occurred in a private house without any medical assistance. No birth certificate was issued. The mother could not register the birth of her daughter before any authority. Indeed, the consulate of Cameroon was far away (more than 550 km) and Morocco was a foreign, unknown and hostile country for her.[4]

In 2018, the mother and her daughter arrived at the coasts of southern Spain irregularly, by boat. They were sheltered in a specialist reception centre run in the city of Cordoba by the Ödos program, which assists migrant women who are

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[3] See, eg, Jacqueline Bhabha, 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?' (2009) 31 *Human Rights Quarterly* 410; Cristina Manzanedo Negueruela, 'Menores Extranjeros Acompañados: La Problemática Invisible de los Niños y Niñas Migrantes Acompañados que Llegan a la Frontera sur Española' (2019) 18 *Revista Crítica Penal y Poder* 260; José Alberto Navarro Manich and Laura Lozano García, 'El Derecho de los "Niños Invisibles" a su Inscripción Después del Nacimiento y a Adquirir una Nacionalidad. La Obligación de Evitar la Apatridia Infantil' (2021) 57 *Actualidad Jurídica Uría Menéndez* 23.

[4] Juzgado de Primera Instancia Judgment (n 2) 2.

travelling with children.[5] Afterwards, the family settled in the city of San Sebastian, where they established their home.[6]

The Ödos program identified that the girl lacked a birth certificate and proof of identity or nationality due to the special circumstances of her birth. Proceedings to remedy this situation were initiated.

In 2019, the Embassy of Cameroon in Spain was requested to register the birth of the child and to acknowledge her Cameroonian nationality by descent (*jus sanguinis*). This request was rejected.[7] The Embassy of Cameroon stated that the baby girl was not born in Spain and, therefore, they were not competent to deal with her case. They pointed out that this case had to be addressed to the Embassy of Cameroon in Morocco or the Ministry of Justice in Cameroon. This answer implied the existence of additional requirements that were impossible to meet. Indeed, the child could not travel to those countries, due to the impediment to obtaining a passport or travel documents.

A similar request was submitted to the Embassy of Morocco in Spain, which was not answered.[8]

A request was also submitted to the Spanish Civil Registry in San Sebastian. The Spanish Civil Registry denied the registration of the birth because it had not occurred in Spanish territory. It also denied the recognition of Spanish nationality — by mere presumption — because it considered that the child was Cameroonian by descent (*jus sanguinis*).[9]

In conclusion, the authorities of the three states denied the registration of the birth and the acknowledgment of the child's Spanish nationality. The lack of nationality and identification documents had damaging effects on the child. Firstly, even though the mother obtained an immigration permit of residence from the Spanish authorities, the daughter was denied this permit. Secondly, the child could not be registered in the municipal registry, which is a requirement to access public services and public benefits. Thirdly, the child could not fully exercise her fundamental rights, such as access to education or the national health service.

III Issues and Holding

Based on the previous facts, the mother and the daughter submitted a claim before the First Instance Court, through the special procedure for the protection of fundamental rights. The First Instance Court ruled in favour of the claimants, agreeing that, firstly, the child was stateless; secondly, her human rights had been breached; and, thirdly, Spanish law should be applied broadly according to the principles and fundamental rights of the children set by public international law. These include the principle of the best interests of the child as well as art 7(1) of the UN *Convention on the Rights of the Child* ('*CRC*'), which declares the right of every child to be registered after birth and to acquire a nationality.[10] This broad interpretation allowed the Court to acknowledge that the only remedy for avoiding

[5] See *Programa Ödos* (Website) <https://programaodos.org>, archived at https://perma.cc/9RBQ-M9Y8.

[6] Juzgado de Primera Instancia Judgment (n 2) 3.

[7] Juzgado de Primera Instancia Judgment (n 2) 2.

[8] ibid.

[9] ibid.

[10] Juzgado de Primera Instancia Judgment (n 2) 5. See also, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990) ('*CRC*').

statelessness and the breach of the child's human rights was recognising her Spanish nationality. Therefore, the judgment ordered the Spanish authorities to register the birth of the child and her Spanish nationality in the Civil Registry.[11]

The Government of Spain's counsel appealed the judgment of the First Instance Court. The Court of Appeal rejected the appeal and confirmed the previous ruling in every aspect.[12] The judgment of the Court of Appeal was not challenged and is, therefore, final.

IV Reasoning

A *The Child is Stateless*

The Court of Appeal upheld the conclusion of the First Instance Court that the child was stateless, with reference to the interpretation provided by a lead expert of the United Nations High Commissioner for Refugees ('UNHCR'), which was produced as evidence.[13] The Court of Appeal also pointed out that the Government of Spain, in its appeal, did not challenge this conclusion.[14]

The First Instance Court had concluded that the child was stateless: no state recognised her as a national 'by birth'. According to the aforementioned interpretation provided by a lead expert of UNHCR, art 1(1) of the 1954 *Convention relating to the Status of Stateless Persons* defines a stateless person as someone 'who is not considered as a national of any State under the operation of its law'.[15] Therefore, what is relevant is how in practice each state applies its legislation. In this particular case, it was proven that the child would not be automatically recognised as a Cameroonian national 'by birth'. Indeed, the Embassy of Cameroon in Spain required additional procedures to acquire the nationality that were impossible to fulfil: the child was required to appear before the authorities of Cameroon in Morocco or Cameroon even though the child could not travel due to her lack of a passport or travel documents.[16]

The First Instance Court also concluded that the country of birth (Morocco) would not recognise the child.[17] According to Moroccan law, nationality cannot be acquired *jus soli*.[18] In addition, the place and specific circumstances of the birth could not be proven in this case. Therefore, the Court found that the child was stateless by birth. She was not recognised as a national by either the state of origin

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11 Juzgado de Primera Instancia Judgment (n 2) 6.

12 Audienca Provincial de Guipúzcoa Judgment (n 1) 5.

13 See ibid:

> As it has been stated, the State Attorney, when appealing the first instance ruling, did not question the statelessness of the minor. Mr Ortiz, Statelessness Officer of the United Nations High Commissioner for Refugees (UNHCR), considers that we should consider Raimunda [the child] to be stateless (the country of nationality of origin of her mother — Cameroon — does not automatically attribute its nationality in origin to her), having admitted the DGRN that there is a situation of original statelessness when, by the sole fact of the birth, nationality is not automatically acquired (thus, for example, Resolution of 22 March 2019).

14 ibid.

15 ibid 3.

16 ibid 4.

17 Juzgado de Primera Instancia Judgment (n 2) 5.

18 *Code de la Nationalité Marocaine 2007*, art 9 (Morocco).

of the mother or the state of birth 'under the operation' of their respective legislation.[19]

B *Broad Interpretation of Spanish Law on the Recognition of Spanish Nationality*

On the one hand, there are two main public international law rules that constitute the hermeneutical principles for a broad interpretation of Spanish law. Firstly, the principle of the best interests of the child. According to Spanish law and public international law — art 3(1) of the *CRC* — this principle must be the primary consideration in and govern any decision issued by an authority (administrative or judicial) that affects a child.[20] Secondly, art 7 of the *CRC* declares the right of every child to be registered at birth and to acquire a nationality. It also states that state parties (such as Spain) have an obligation to ensure those rights 'in particular where the child would otherwise be stateless'.[21]

On the other hand, even though Spanish nationality has traditionally been acquired *jus sanguinis*, the *Civil Code of Spain* ('*Civil Code*') was amended — through *Law No 51/1982* — to allow cases of *jus soli* nationality acquisition in order to avoid situations of statelessness for children born in Spain.[22] In particular, art 17(1)(c) of the *Civil Code* establishes a safeguard that grants nationality to children born in Spain to stateless parents or parents unable to pass on their nationality.[23] This provision is inspired by the principle of *favor nationalitis* and it 'was introduced … in response to Spain's obligations under international treaties in order to avoid as far as possible the existence of situations of statelessness'.[24] In addition, Spanish authorities have developed case law that recognises children as Spanish nationals when they are born in Spain and do not automatically acquire their parents' nationality or nationalities because certain bureaucratic procedures have to be followed after their birth.

Considering all of the previous discussion, the Court of Appeal found that art 17(1)(c) of the *Civil Code* could be applied in a broad way in this case. The specific circumstances of the case underpin these conclusions. In particular, the Court appreciated that 'a genuine effort has been made by the [mother] to remove

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19 See Audienca Provincial de Guipúzcoa Judgment (n 1) 5.

20 *CRC* (n 10) art 3(1).

21 ibid art 7(2).

22 See *Ley No 51/1982 de modificación de los artículos 17 al 26 del Código Civil* (Spain).

23 ibid art 17(1)(c).

24 See Audienca Provincial de Guipúzcoa Judgment (n 1) 5, where the Court stated:

> In our legal system, *jus sanguinis* has traditionally been the criteria for attribution of Spanish nationality. However, the reform of the *Spanish Civil Code* operated by *Law 51/1982 of 13 July*, introduced a modification regarding cases of statelessness, and expanded the cases of attribution of Spanish nationality to include those born in Spain to foreign parents 'if both lack nationality or if the legislation of none of them attributes a nationality to the child' (current 17.1 c CC). This modification responded to the obligations assumed by Spain through international treaties in order to avoid, as far as possible, the existence of situations of statelessness. Therefore, we find ourselves with a norm prior to the adoption of the *Convention on Rights of the Child* of 1989 and its subsequent integration into the Spanish legal system inspired by the principle of *favor nationalitatis* in order to avoid situations of statelessness.

the obstacles in order to seek recognition of the child's Cameroonian nationality' and the child's first official known place of stay was Spain.[25]

The Court concluded that recognising the child as a Spanish national was the only mechanism that allowed for compliance with the legal provisions contained in the international treaties to which Spain is a party, respecting and effectively complying with the best interests of the child.[26] The Court explained that the child could not remain stateless and experience discrimination in comparison with other children, as this constituted a violation of her basic and fundamental rights. Indeed, it was proven that the statelessness situation of the child jeopardised her fundamental right to access education and public health services.[27]

The Court declared that the child held Spanish nationality 'by birth' and that her Spanish nationality and birth must be registered by the Spanish authorities.[28]

V CONCLUSION

These ground-breaking Spanish judgments are important as they raise awareness about the reality of the 'invisible children', how they become stateless due to the particular circumstances of their births during their mothers' migratory journeys, and the consequent breaches of their fundamental and basic rights. This case shows the importance of authorities correctly identifying these situations when they encounter them. Identification is crucial for effectively protecting the human rights of these children and eradicating this category of statelessness. It is also essential that public authorities and legislators provide general regulations, measures and solutions to avoid these cases of statelessness.

The facts of this case are not unique, although the rulings are unprecedented. There are several other cases of 'invisible children' that have been identified in Spain and other European countries.[29] It is reasonable to expect that more 'invisible children' exist worldwide in connection with the migration of pregnant women and women accompanied by newborn babies.

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25 See Audienca Provincial de Guipúzcoa Judgment (n 1) 5, where the Court stated:

> [t]aking into account the circumstances of this case, in which we consider that a genuine effort has been made by the plaintiff to remove the obstacles to trying to recognize the minor's Cameroonian nationality, we believe that an extensive application of art. 17.1 c CC, such as the one that has been carried out by the first instance court, recognizing the minor's Spanish nationality of origin, constitutes the only mechanism that allows the compliance with the legal provisions contained in the international treaties to which Spain is a party, respecting and fulfilling effectively the best interests of the minor enshrined in national provisions, since allowing the minor to remain in the limbo of statelessness, in a situation of inequality with respect to other minors, with a significant reduction in their basic and fundamental rights (such as, among others, the right to education — art 27 of the Constitution — with the present consequences that this entails for her and that have been proven, supposes disregarding said interest to her detriment.

26 ibid.

27 ibid.

28 ibid.

29 For example, in 2021, the case of a woman from Cameroon who gave birth in Algeria and months later moved to Spain, was brought before the Spanish Civil Registry in the municipality of Montilla (Cordoba). The child's birth had not been registered in Algeria. Even though the birth had not occurred in Spain, the judge in charge of the Civil Registry issued an innovative resolution dated 15 October 2021 by which the child's birth was registered, in order to protect her right to a legal identity and her fundamental rights. Other similar cases have been identified in Spain and France by the Ödos program.

Therefore, it is relevant that the rulings have focussed on principles and provisions of public international law; the best interests of the child and art 7 of the *CRC*. These principles and provisions, together with the obligation to protect the human rights of children, underpin the claim for the recognition of a nationality for a stateless child. They also strengthen the legal foundations to apply a broad interpretation of the national law regulating access to nationality in order to remedy the statelessness of the child and the violation of his or her human rights. Indeed, the international law invoked would include a principle according to which, in the case of a stateless child, the recognition of a nationality by the relevant authorities should be a preferred option and given priority over granting statelessness status.