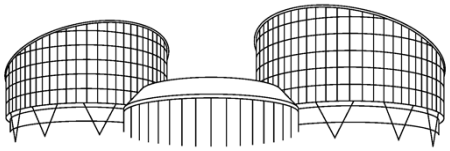

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF F.S.M. v. SPAIN

(Application no. 56712/21)

JUDGMENT

Art 6 §§ 1 and 3 (criminal) • Conviction for tax-related offences of an elderly person with a cognitive impairment • Applicant's mental health condition did not render him unfit to stand trial or unable to understand the scope and purpose of the proceedings • Applicant represented by a lawyer of his own choosing • In case-circumstances, in absence of specific request to consider procedural adjustments, domestic courts not called on to offer or provide them of their own motion • Applicant's failure to substantiate any specific impact of the lack of adjustment measures on the trial's overall fairness • Conviction based on several pieces of evidence with significant weight given to documentary evidence in view of the financial and technical aspects involved in tax-related offences • Sufficient steps taken by judicial authorities to ensure proceedings were Convention compliant• Proceedings as a whole fair

Prepared by the Registry. Does not bind the Court.

STRASBOURG

13 March 2025

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of F.S.M. v. Spain,

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

Mattias Guyomar*, President*,
María Elósegui,
Stéphanie Mourou-Vikström,
Mykola Gnatovskyy,
Stéphane Pisani,
Úna Ní Raifeartaigh,
Artūrs Kučs*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 56712/21) 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, Mr F.S.M. ("the applicant"), on 17 November 2021;

the decision to give notice to the Spanish Government ("the Government") of the complaints under Article 6 §§ 1 and 3 (b) of the Convention and declare the remainder inadmissible;

the decision not to disclose the applicant's name;

the parties' observations;

Having deliberated in private on 15 October 2024 and 4 February 2025,

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

INTRODUCTION

1. The application concerns the criminal conviction of the applicant, an elderly person with alleged difficulties in understanding the scope and course of the criminal proceedings conducted against him and in preparing his defence, owing to a cognitive impairment. It raises issues under Article 6 §§ 1 and 3 of the Convention.

THE FACTS

2. The applicant was born in 1948 and lives in Minorca. He was represented by Mr A. Xumetra Subirana, a lawyer practising in Barcelona.

3. The Government were represented by their co-Agent, Mr L.E. Vacas Chalfoun.

4. The facts of the case may be summarised as follows.

I. CIVIL PROCEEDINGS FOR THE APPLICANT'S INCAPACITATION

5. On 12 November 2015, a third party asked the public prosecutor to initiate civil proceedings for the applicant's incapacitation. The request included a report prepared by two psychologists on 18 May 2015, concluding that the applicant suffered from the effects of an attention deficit hyperactivity disorder ("ADHD"), the symptoms of which had been present since childhood, as well as a personality disorder with schizoid and compulsive features. Two additional reports were also prepared by a psychiatrist, Dr L., on 12 February and 1 June 2015 stating that the applicant showed symptoms of a psychotic disorder. The report of 12 February 2015 further indicated that while the applicant had good visual memory and mechanical skills, he had faced "ups and downs" to complete his engineering degree and that in his different jobs he had always been assisted by another person in charge of the paperwork, which he had been unable to manage.

6. On 13 January 2016 a forensic report was issued by a doctor from the Institute of Legal Medicine of the Balearic Islands after examining the applicant. That report mentioned that the applicant had had ADHD since childhood; showed signs of a personality disorder with schizoid and compulsive features; had had amnestic disorders for several years; and had had psychotic disorders with compensatory mechanisms since childhood. The expert observed disturbances in the applicant's memory and a deterioration of his intellectual capacities, as well as difficulties managing documents and administrative tasks. The report concluded that the applicant's diagnosis was compatible with a disorder starting in childhood or adolescence, schizoid and compulsive disorder, psychotic disorder with compensatory mechanisms, and the effects (*secuelas*) of ADHD with symptoms having been present since childhood. Those conditions could alter the applicant's capacity to understand his actions and act accordingly, especially in administrative matters. His incapacity was not total, but only relating to tasks or situations with economic or administrative content or requiring organisational or administrative skills. The report consequently proposed partial guardianship (*curatela*).

7. On 25 February 2016, in view of those medical reports, the public prosecutor asked for the partial incapacitation of the applicant.

8. On 9 June 2016 the applicant was examined by the judge of the Ciutadella de Menorca Court of First Instance no. 1. On 17 June 2016 the forensic doctor from the Institute of Legal Medicine of the Balearic Islands, after having re-examined the applicant, confirmed the conclusions of his previous report (see paragraph 6 above).

9. On 11 October 2016 the Ciutadella de Menorca Court of First Instance no. 1 declared the applicant partially incapacitated and ordered his placement under partial guardianship (*curatela*). The decision stated as follows:

> "[According to the report by the court's forensic expert,] Mr F.S.M. has been diagnosed with a disorder with an origin in his childhood or adolescence, schizoid and compulsive disorder and psychotic disorder with compensatory mechanisms, [arising from] ADHD with symptoms since childhood. Partial guardianship [is proposed from the medical perspective], mainly with regard to important decisions or decisions with administrative content. This report is complemented by the examination made [by the judge] and the documentary evidence ...
>
> [P]artial incapacity must be declared and Mr F.S.M. must be placed under guardianship, with the scope and limits indicated in Articles 259 to 275 of the Civil Code, in particular the need to have the consent of the person exercising the position of guardian to validly make decisions and enter into contracts, from which obligations may result for the incapacitated person, and to perform actions or make decisions or enter into contracts in the administrative sphere. This decision shall be registered in the relevant civil register."

10. The decision explicitly mentioned that there were criminal proceedings pending against the applicant (see paragraph 12 below), stating as follows:

> "Lastly, it should be pointed out that the person with allegedly diminished capacity, Mr. F.S.M., is under investigation in several preliminary proceedings, of which this court is aware owing to the distribution of criminal cases. A question will therefore have to be resolved at the appropriate time as to whether or not this decision may have an impact on the criminal cases indicated; the significance that this declaration of partial incapacity may or may not have for the criminal liability of the person concerned will not be an *a priori* exonerating circumstance but rather a question to be determined on a case-by-case basis."

11. On 21 September 2017 the applicant's relatives filed a claim seeking to change his guardian. On 17 April 2018 the person initially designated as the applicant's guardian, Mr T., resigned from his position for health reasons. Owing to the disagreement between the applicant's relatives and the public prosecutor about the person to be appointed as guardian, a hearing was held. On 18 October 2018 the first-instance court ordered that Mr T. should be replaced by the Aldaba Foundation, stating that its functions would have the same scope and limits as those set in the judgment of 11 October 2016.

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

12. In December 2013 criminal proceedings were brought against the applicant in relation to his alleged involvement in tax fraud. He was accused of evading the payment of the relevant VAT and corporate taxes while being the administrator of two companies in 2007 and 2008. On 29 April 2016, after the charges had been presented by the public prosecutor, the Barcelona investigating judge no. 28 referred the proceedings to the *Audiencia Provincial* for them to be examined on the merits (*auto de apertura del juicio oral*).

13. On 11 October 2017, at the applicant's request, the *Audiencia Provincial* held a preliminary hearing concerning the applicant's capacity to

understand the implications of the trial and the accusation against him. A forensic expert gave a verbal report, concluding that the applicant's mental health condition was not so serious as to impede him from understanding the purpose of the trial and its implications. The main hearing was adjourned for other reasons and rescheduled for 17 January 2018.

14. On 16 January 2018 the applicant's legal aid lawyer requested the suspension of the proceedings arguing that the applicant could not understand the administrative concepts related to the facts of which he had been accused. She stressed that the defence of the applicant had been severely affected by his cognitive impairment, his difficulties in understanding the documents and the lack of cooperation from the lawyers who had previously represented the applicant. She informed the *Audiencia Provincial* of the judgment declaring the applicant partially incapacitated (see paragraph 9 above) and submitted several documents concerning his mental health, namely the report prepared by the forensic expert from the Institute of Legal Medicine (see paragraph 6 above) and an additional report, prepared by Dr L. at the applicant's request, which stated that the applicant's capacity to understand the scope of the proceedings was limited. The lawyer concluded that the applicant did not have the necessary capacity to participate in the proceedings and asked for the hearing to be adjourned, further stating that the proceedings should be discontinued. Alternatively, she asked the court to obtain expert evidence aimed at clarifying the applicant's condition and to allow the applicant to participate via videolink and to be assisted by his guardian.

15. On 17 January 2018 the hearing was adjourned and rescheduled for 23 May 2018, since neither the applicant nor the representative of one of the other parties were present. The *Audiencia Provincial* ordered a new forensic examination in order to evaluate the applicant's cognitive and volitional capacity, the origins and consequences of his disorders and whether he had sufficient capacity to stand trial and to understand the scope and consequences of the trial and his statements. It further stated that any new evidence would be submitted on the day of the hearing.

16. On 22 May 2018 the forensic expert issued a second report on the applicant's condition. It stated that the applicant had a history of mental illnesses, including attention deficit hyperactivity disorder, personality disorder and cognitive impairment. However, it noted that there were no medical reports confirming the origins and development of his conditions. In addition, it stated that he was able to identify the difference between right and wrong and act accordingly. The report concluded that at the moment of the examination he did not exhibit signs of any cognitive or volitional disorders, nor did he show signs of an acute psychiatric disorder or systemic delirium. The report also referred to his capacity to stand trial. It stated as follows:

> "Concerning his capacity to attend a hearing, the illnesses he suffers from do not prevent him from appearing at the hearing as long as procedural adjustments [*medidas preventivas*] are taken, such as the assignment and support of another person throughout

> the judicial proceedings and/or, failing that, a minimally invasive environment is provided, such as testifying via videolink."

17. On 29 May 2018, following the applicant's failure to appear for trial for the second time and in view of its finding that he was trying to evade justice, the *Audiencia Provincial* ordered his pre-trial detention. The applicant's lawyer opposed this measure, mainly relying on the applicant's mental health condition and the fact that he was under partial guardianship. The *Audiencia Provincial* noted that (i) according to the forensic reports available, the applicant had sufficient capacity to stand trial; (ii) the incapacity proceedings (see paragraphs 5 - 11 above) had been initiated following the accusation against him; (iii) the proceedings for replacing his guardian (see paragraph 11 above) had been brought shortly before the respective dates of the hearings; (iv) Mr T. had continued to act as guardian until his resignation had been formally accepted; and (v) the presence of the guardian at the trial was unnecessary, in view of the forensic reports and the incapacity judgment.

18. On 14 June 2018 the *Audiencia Provincial* dismissed the applicant's appeal against the pre-trial detention order and asked the hospital for information regarding the applicant's admission to hospital, which had been reported by his representative. In reply, the hospital stated that the applicant had been voluntarily admitted to hospital between 1 and 14 June 2018 because he had been having thoughts of self-harm. It also provided information regarding the specific medical treatment given and submitted the applicant's medical file.

19. On 22 June 2018 the applicant was taken voluntarily to the Minorca prison.

20. On 26 June 2018 the applicant's lawyer submitted a private psychiatric expert report dated 21 June 2018 and requested the discontinuation of the proceedings and the applicant's release. The report stated as follows:

> "Owing to the significant deterioration of mental functions impacting his cognitive and volitional faculties [and that] from the perspective of testifying at a hearing, the patient does not possess the necessary capacity in relation to memory, calculation, mental focus, deliberative critical thinking and abstract thinking, as well as other cognitive functions which are needed to give correct answers to the questions put to him, nor can he properly perform the mental functions essential to his defence".

21. On 18 July 2018 the applicant's lawyer asked the *Audiencia Provincial* – in the event that it did not order the discontinuation of the proceedings as previously requested – to admit new evidence related to the applicant's capacity, call a number of experts to the hearing and order a psychiatric expert report. The lawyer further requested the applicant's release.

22. On 26 July 2018 the *Audiencia Provincial* rejected the requests to discontinue the criminal proceedings and to accept new evidence. With regard to the psychological report submitted by the defence, it stated:

> "The above-mentioned report concludes ... that the accused shows a moderate deterioration [in his mental capacity]. This does not contradict the two other previous forensic reports that were issued [on 11 October 2017 and 22 May 2018] in response to the defence's request, both of which, while acknowledging that Mr [F.S.M.] had certain limitations, stated that he had sufficient capacity to stand trial and to understand its scope and purpose, corroborating what was established in the decision granting the status of incapacity."

The *Audiencia Provincial* further noted that the applicant's admission to hospital (see paragraph 18 above) had been voluntary and that, during his time there, the applicant had insisted on his incapacity and "his lack of responsibility with regard to the legal problems that were pending". The *Audiencia Provincial* found that the applicant was able to understand the scope of the proceedings against him and to stand trial, finding it inappropriate to discontinue them under Articles 381 to 384 of the Criminal Procedure Act. The *Audiencia Provincial* also held that the new evidence requested should be declared inadmissible as the request had been made out of time, but it would be possible to propose new evidence at the beginning of the hearing. The court stated that it was unnecessary to order a new forensic report as there had already been two previous forensic reports assessing the applicant's capacity. An additional related request was rejected on 13 September 2018 for the same reasons.

23. In parallel, on 24 July 2018 the applicant appointed two new lawyers to replace the legal aid lawyer. On 25 July 2018 the new lawyers requested the provisional release of the applicant, arguing that owing to his mental health condition there was no risk of his absconding. They also stated that they would personally ensure his attendance at the hearing.

24. On 26 July 2018 the *Audiencia Provincial* ordered the applicant's provisional release, imposing on him an obligation to appear either before the *Audiencia Provincial* or before the court of his judicial district twice a month.

25. On 8 January 2019 the applicant's lawyer asked the *Audiencia Provincial* to admit into evidence new documents, including a forensic report dated 1 October 2018, which concluded that the applicant had the capacity to understand the consequences of the trial, but that his cognitive deterioration, mainly affecting his memory and orientation, "could have an impact on his ability to answer the questions put by the parties and to participate in his defence and could therefore compromise both".

26. The hearing took place on 16 and 17 January 2019. The applicant's lawyer asked the *Audiencia Provincial* to admit into evidence the documents submitted on 8 January 2019; to agree to an additional forensic examination of the applicant; and, on that basis, to discontinue the criminal proceedings, in accordance with Article 383 of the Criminal Procedure Act. The court

stated that it had previously concluded that there were no circumstances impeding the applicant from standing trial and that it could not be inferred from the new forensic report that he suffered from a disorder that could justify the discontinuation of the proceedings. It further refused to admit the additional evidence submitted on 8 January 2019. During the hearing, the applicant made use of his right to remain silent and only intervened during his closing statement. In particular, when asked if he intended to reply to the questions put forward by the other parties, he stated: "I cannot reply because I don't know", and when asked again he responded: "It's not that I don't want [to reply], but I can't". In his closing statement he said: "I don't know anything. I can only say that I had cancer, I had it for many years, and they told me not to sit down, so I went to the construction sites, the paperwork was managed by others. Now I have cancer again. I don't have any idea about anything. I was told 'sign here, sign there'. I don't know anything else."

27. On 11 February 2019 the *Audiencia Provincial* found the applicant guilty of three criminal offences against the Public Treasury. He was sentenced to two years and six months' imprisonment for each of the three offences, as well as to three fines, and, among other penalties, special disqualification from exercising a profession or engaging in an industrial or commercial occupation or business administration for the duration of the prison sentence, and loss of the opportunity to obtain public subsidies or assistance and the right to enjoy tax or social security benefits or incentives for a total of thirteen years and six months. In addition, the judgment ordered the applicant to pay the Public Treasury a total of 4,678,368.99 euros (EUR) in respect of the sums defrauded.

28. The *Audiencia Provincial* considered proven that in 2008 the applicant, with full awareness and willingness, and with the aim of circumventing tax obligations and the payment of the relevant taxes, concealed part of the economic activity in the VAT declarations of two companies of which he was the sole administrator, and unduly included sums to be compensated from previous years, evading the payment of EUR 2,702,456.68 for the first company and EUR 1,098,881.56 for the second one. Nor did he submit the corporate tax declaration for the second company, evading the payment of EUR 877,030.75.

29. The *Audiencia Provincial* noted that the applicant had made use of his right not to testify and relied on several pieces of evidence, namely the statement of the co-accused; two expert reports by a treasury inspector and a tax inspector; the statements of several witnesses, including colleagues and relatives of the accused; and several documents not challenged by the parties. The court indicated that it was undisputed, as it was shown by the available documents and expert reports and had not been challenged by the defence: (i) that the applicant had been the sole administrator of the two companies at the relevant time and had had an obligation to submit the relevant tax declarations; (ii) that he had personally intervened in two specific property

sales by his companies without properly declaring the relevant amounts in the VAT declarations; and (iii) that the corporate tax declaration for the second company for the 2008 period had not been submitted. In the judgment it was noted that, according to the documents submitted, the applicant had created several companies since 1999 and had directly or indirectly managed them, acting with full capacity, for several years. The court therefore concluded that the applicant had concealed several sums despite being under an obligation to declare them and being aware of that obligation.

30. The *Audiencia Provincial*'s judgment addressed the applicant's capacity as a preliminary matter, stating:

> "In the preliminary questions procedure, Mr [F.S.M.'s] lawyer proposed the admission of the documentary evidence submitted on 8 January 2019 ... [Part of the evidence] is intended to support the request, already raised repeatedly, to discontinue the proceedings, under Article 383 of the Criminal Procedure Act, on the grounds of the defendant's mental disturbance on the basis of medical reports already in the case file, with the sole exception of a forensic report issued ... on 1 October 2018 in the proceedings against Mr [F.S.M.] before the Barcelona no. 13 investigating judge.
>
> ... With regard to the recurring question of Mr [F.S.M.]'s incapacity ... the medical documentation that was intended to be included is already in the case file and was assessed at the time, namely two forensic reports requested by the defence, the first dated 11 October 2017 issued in Barcelona and the second dated 22 May 2018 in Minorca [which were prepared on the basis of the] examination and assessment of the medical documentation submitted by the party itself, as well as the decision on partial incapacity placing the defendant under guardianship, ordered by the Ciutadella de Menorca Court on 11 October 2016, [both of them] concluding that the accused had sufficient capacity to know and understand the scope and purpose of the proceedings, and by virtue of which this court issued an order dated 26 July 2018, in which the psychiatric report of 21 June 2018 was assessed ... Furthermore, those conclusions about the applicant's awareness of the object and consequences of the proceedings are corroborated by [his] closing statement, in which he exercised his right to remain silent and stated that he 'could not declare' and that he 'did not know anything, [he] only went to the construction site and signed what [he] was asked to sign' and that he 'was suffering from cancer at that time'.
>
> ...
>
> The only new evidence submitted was a new forensic report dated 1 October 2018 issued in separate proceedings before the Barcelona no. 13 investigating judge, which also did not conclude that he lacked the capacity to know and understand the scope of the criminal proceedings."

31. On 10 May 2019 the applicant lodged an appeal on points of law (*recurso de casación*) with the Supreme Court. He argued that the refusal to admit some of the medical reports had amounted to a violation of his right of access to justice and to prepare his defence under Articles 17 and 24 of the Spanish Constitution and Article 6 § 3 (b) of the Convention. He alleged that those items of evidence were relevant to the decision to discontinue the criminal proceedings on the basis of his diminished mental capacity or, alternatively, that they could have led to the application of a mitigating circumstance of mental disturbance in his case.

32. On 4 March 2021 the Supreme Court dismissed the appeal and upheld the judgment of the *Audiencia Provincial*, endorsing its conclusions concerning the applicant's capacity to stand trial. With regard to the application of Article 383 of the Criminal Procedure Act, the Supreme Court stated:

> "[Article 383 of the Criminal Procedure Act] ... is connected with an essential requirement, namely the need for a procedural framework that outlines the exercise of *jus puniendi* by the State to define a scenario that makes it possible for the right to a defence to be upheld. A defendant who lacks the mental faculties to be aware of the legal scope of his or her answers to the prosecution's examination or, in general, of the constitutional value of the right not to confess guilt and the presumption of innocence is defenceless in the face of the State's punitive power ...
>
> In sum, the assessment made by the first-instance court of the capacity of the appellant, who, despite his condition, was considered to be in a position to exercise his defence rights effectively, seems appropriate since the medical information provided, assessed as a whole, cannot be considered to have such significance that the above-mentioned Article 383 is applicable, which is why there is no doubt about his capacity to mount a defence, as was evidenced by those statements which, as we have seen, he made in his closing statement; the decision to discontinue the proceedings [under Article 383] requires much more."

33. The applicant lodged an *amparo appeal* with the Constitutional Court, alleging a violation of his right to an effective judicial protection under Article 24 of the Spanish Constitution. The applicant's lawyer complained about the rejection of additional evidence, reiterating that it had been relevant in deciding whether to discontinue the proceedings and/or apply a mitigating circumstance. He argued that, owing to the applicant's memory problems, he could not participate in his defence by providing an alternative version of the facts and/or relevant information and, therefore, he was not able to defend himself. He asked the Constitutional Court to quash the judgments of the *Audiencia Provincial* and the Supreme Court and to restore the proceedings to the moment of the hearing before the *Audiencia Provincial* in order to properly assess the unduly rejected evidence.

34. The *amparo* appeal was declared inadmissible on 29 June 2021 for lack of constitutional relevance.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

35. The relevant Article of the Spanish Constitution reads as follows:

> **Article 24 (The right to an effective remedy and to a fair trial)**
>
> "1. Every person has the right to obtain the effective protection of the judges and the courts in the exercise of his or her legitimate rights and interests, and in no case may he or she go undefended.
>
> 2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought

against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent.

The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences."

36. The relevant parts of the Criminal Procedure Act read as follows:

Article 381

"If the judge notices signs of diminished mental capacity in the defendant, he or she shall immediately submit him or her to an examination by forensic experts at the establishment in which he or she is imprisoned, or in another public establishment if it is more convenient or if he or she is at liberty.

In such a case, the experts shall give their report in the manner set forth in Chapter VII of this Title."

Article 383

"If mental disturbance occurs after the offence has been committed, once the summary proceedings have been concluded, the competent court shall order the case to be discontinued until the defendant is restored to health, and the provisions of the Criminal Code shall also apply to the defendant as prescribed for those who commit an offence in a state of mental disturbance.

...."

37. With regards to the specific measures to be applied where a person commits an offence in a state of mental disturbance, the Criminal Code states:

Article 101

"1. Persons who have been declared exempt from criminal responsibility under Article 20 § 1 may be committed, if necessary, for medical treatment or special education to an appropriate facility for their mental disorder or disturbance, or any of the other measures established by Article 96 § 3 may be imposed on them. The confinement may not exceed the duration that a sentence of imprisonment would have lasted, had the individual been declared responsible, and to that end the judge or court shall set that maximum limit in the sentence."

38. In 2021 the Code of Civil Procedure was amended to include a specific provision regulating procedural adjustments for persons with disabilities. This provision was further amended in 2023 to regulate procedural adjustments for elderly persons. Under Article 4, this Code is applicable to criminal proceedings in the absence of specific provisions in the Criminal Procedure Act. The relevant rule, as in force since March 2024, reads as follows:

Article 7 bis

"1. In proceedings involving persons with disabilities or elderly persons, the necessary accommodations and adjustments shall be made to enable them to participate on an equal footing if they so request or, in any event, if they are 80 years of age or older.

To this end, persons aged 65 years or older shall be considered as elderly persons.

In cases concerning persons with disabilities, the accommodations and adjustments shall be made both at request of the parties or of the public prosecutor and by the court of its own motion.

In cases concerning elderly persons below the age of 80, the accommodations and adjustments shall be made at the person's request.

In cases concerning persons aged 80 or older, the accommodations and adjustments shall be made both at the person's request and by the court of its own motion.

The accommodations and adjustments shall be made at every stage and within each procedural step in which they are necessary, including communications, and may refer to communication, understanding and interactions with the environment.

2. Persons with disabilities, as well as elderly persons, have the right to understand and be understood in every step that may be taken. To this end:

(a) All communications, verbal or in writing, addressed to a person with a disability, aged 80 years old or older, or elderly person who has requested so, shall be made in a clear, simple and accessible language, in a manner that takes into account his or her personal characteristics and needs, using means such as easy-read versions. If necessary, the information shall also be given to the person who is supporting the person with a disability in the exercise of his or her legal capacity.

(b) Persons with disabilities shall be provided with the necessary assistance or support to be understood, which shall include interpretation in sign languages legally recognised and support for the verbal communication of deaf people, people with a hearing disability and deafblind people.

(c) The participation of an expert performing the necessary accommodation and adjustments in order to allow a person with a disability to understand and be understood shall be permitted.

(d) Persons with disabilities and elderly persons may be accompanied by a person of their own choosing from the first contact with the authorities.

..."

39. The relevant provisions of the Spanish Civil Code in force at the relevant time read as follows[1]:

Article 289

"The guardianship of incapacitated persons shall have as its purpose the guardian's assistance in those acts expressly referred to in the judgment that established the guardianship."

Article 290

"In the event that the judgment on incapacitation has not specified the acts for which the intervention of the guardian should be necessary, such intervention shall be deemed to extend to the same acts for which guardians require judicial authorisation, in accordance with this Code."

[1] These provisions were modified by Law no. 8/2021 of 2 June 2021 on reforming civil and procedural legislation to support persons with disabilities in exercising their legal capacity.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

40. The applicant complained under Article 6 § 1 and 3 (b) of the Convention that he had been unable to prepare his defence properly because of his cognitive impairment, which had prevented him from comprehending the proceedings and being able to communicate adequately with his lawyer.

41. Article 6 of the Convention, in so far as relevant, provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (b) to have adequate time and facilities for the preparation of his defence ..."

42. The Court reiterates that the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1; accordingly, the Court will examine the complaint under those two provisions taken together (see, among other authorities, *F.C.B. v. Italy*, 28 August 1991, § 29, Series A no. 208-B; *Vaudelle v. France*, no. 35683/97, § 35, ECHR 2001-I; and *Bogdan v. Ukraine*, no. 3016/16, § 32, 8 February 2024).

A. Admissibility

1. The parties' submissions

(a) The Government

43. The Government argued that the application should be declared partly inadmissible owing to non-exhaustion of domestic remedies. The applicant's complaints concerning the alleged difficulties in preparing his defence as a result of his condition had not been adequately raised as a separate complaint in the *amparo* appeal before the Constitutional Court. The applicant had not claimed, neither in his *amparo* appeal nor in his appeal on points of law, that the fact that he had not participated in the hearing via videolink or that the guardian had not been present at the hearing had negatively affected his defence. The Government further argued that, at the beginning of the hearing of January 2019, the applicant's lawyer had limited himself to submitting new evidence and requesting the discontinuation of the proceedings, without arguing that there had been any difficulties in preparing the applicant's defence or requesting any procedural adjustments (such as participation via videolink or the presence of the guardian at the hearing). Nor had the lawyer appealed against the *Audiencia Provincial*'s decision of 26 July 2018 (see

paragraph 22 above). Lastly, the applicant had not appealed against or requested the review of the incapacitation judgment of 11 October 2016.

(b) The applicant

44. The applicant argued that Article 35 of the Convention should not be applied with excessive formalism with regard to exhaustion of remedies. The *amparo* appeal lodged with the Constitutional Court had been formally articulated as a single allegation, but had nevertheless pertained to a violation of Article 24 of the Spanish Constitution in two different ways: a violation of the right to the use of evidence relevant to the defence of the accused in a criminal case (Article 24 § 2), as well as of the right to effective judicial protection and a defence (Article 24 § 1). He further argued that the difficulties in the preparation of the defence had not been raised at the hearing because it was not a new element and, indeed, the *Audiencia Provincial* had requested a forensic report which had stated the measures needed to preserve his right to defend himself (see paragraphs 14 and 16 above). Domestic remedies had therefore been duly exhausted.

2. The Court's assessment

45. The Court reiterates that the purpose of the requirement of exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. That rule must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the complaints intended to be made subsequently before the Court should have been raised, "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law", before the national authorities (see *Castells v. Spain*, 23 April 1992, § 27, Series A no. 236, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I). The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available both in theory and in practice at the relevant time, that is to say that the remedy was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Tiba v. Romania*, no. 36188/09, § 21, 13 December 2016, with further references).

46. In the present case the Court notes that while the Government referred to several available remedies, they did not provide any examples where the use of those remedies had resulted in the domestic courts granting any

specific procedural adjustments. The Court further notes that the issue of the applicant's mental health condition was raised before the domestic authorities on several occasions. While it is true that the applicant's allegations were focused on stressing that he could not stand trial and that the proceedings should be discontinued, the various documents submitted in support of that request did refer to a history of several mental health disorders and to the deterioration of his cognitive faculties. In the Court's view, those elements sufficiently drew the attention of the domestic courts to the existence of doubts about the applicant's capacity to effectively participate in the proceedings, in a manner which appears to be consistent with the relevant domestic law. Lastly, it appears that at the time of the events, there were no legal provisions expressly regulating specific types of procedural adjustments for elderly persons or persons with disabilities (see paragraph 38 above).

47. In view of the foregoing considerations, the Court will proceed on the assumption that the applicant exhausted domestic remedies in accordance with Article 35 § 1 of the Convention. Accordingly, the Government's preliminary objection should be dismissed.

48. The application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

49. The applicant alleged that the right to adequately prepare one's defence comprises the effective communication between the accused and the lawyer and the ability of the accused to understand and answer the questions concerning the accusations. It was therefore impossible to have an adequate defence in situations where the accused suffered from a cognitive impairment preventing him from understanding the charges and from properly answering the relevant questions put to him or her. The applicant accepted that States had a wide discretion as regards the means to ensure that their legal systems were in compliance with the requirements of Article 6 of the Convention. In his view, in the Spanish domestic system, the relevant safeguards in that connection were provided by Article 383 of the Criminal Procedure Act and Article 101 of the Criminal Code (see paragraphs 36 and 37 above) and referred to the Supreme Court's case law in that regard (see paragraph 32 above).

50. The applicant stated that the conclusions of the forensic reports of June and October 2018 called for additional evidence to verify his mental health condition, particularly in view of the time that had elapsed between the reports requested by the *Audiencia Provincial* and those submitted by the

applicant. He further argued that the procedural adjustments indicated by the forensic report of May 2018 (see paragraph 16 above) had been ignored by the domestic courts. His right to a fair trial had therefore been breached by the non-observance of the adjustments indicated in the forensic report. He further argued that the fact that the guardian had provided relevant information and documents to the lawyer was independent from the assistance that he should have received during the trial, especially to properly understand and answer the questions put to him.

(b) The Government

51. The Government submitted that the overall fairness of the proceedings had been respected. The domestic courts had ensured that the applicant had been examined by two forensic experts, who had reported that he had only showed a moderate cognitive impairment that did not prevent him from standing trial and being aware of the accusation against him and the consequences of the trial. The *Audiencia Provincial* had indeed examined the additional evidence that the applicant had tried to submit and concluded, through decisions that were not arbitrary or unreasonable, that it did not contradict the previous conclusion.

52. The Government noted that the applicant had only been placed under partial guardianship, which meant that he would be assisted by a third party for some actions but that did not imply that he would be represented by that person. The incapacitation judgment had expressly stated that the impact of the applicant's incapacity in the pending criminal proceedings against him had been a matter to be determined in the framework of those proceedings. Furthermore, the domestic courts had ensured that the applicant had been assisted by a lawyer at every stage of the proceedings, which had been sufficient to guarantee his defence rights. Taking into account that the role of the guardian was not to represent the applicant, it had not been necessary for them to participate in the proceedings or to have them attend the hearing before the *Audiencia Provincial* and, in any case, the lawyer had been able to obtain information from them.

53. In any case, the Government stated that the applicant had not argued in which way his defence had been negatively affected. The proceedings had started in 2013, and since then the applicant had had ample opportunity to access the file and prepare his defence. Furthermore, the applicant had remained silent during the hearings, without that resulting in any negative inferences against him, and his conviction had been based on extensive evidence.

2. The Court's assessment

(a) General principles

54. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (see *Beuze v. Belgium* [GC], no. 71409/10, § 121, 9 November 2018). In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see, for example, *Salduz v. Turkey* [GC], no. 36391/02, § 50, ECHR 2008; *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010; *Dvorski v. Croatia*, no. 25703/11, § 76, ECHR 2015; and *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015). However, those minimum rights are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Beuze*, cited above, § 122; see also *Mayzit v. Russia*, no. 63378/00, § 77, 20 January 2005, and *Seleznev v. Russia*, no. 15591/03, § 67, 26 June 2008).

55. The "rights of defence", of which Article 6 § 3 (b) gives a non-exhaustive list, have been instituted, above all, to establish equality, as far as possible, between the prosecution and the defence. The facilities which must be granted to the accused are restricted to those which assist or may assist him or her in the preparation of the defence (see *Mayzit*, cited above, § 79).

56. Article 6 § 3 (b) implies that the substantive defence activity on behalf of an accused may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings. The facilities which everyone charged with a criminal offence should enjoy include the opportunity to acquaint him or herself, for the purposes of preparing his or her defence, with the results of investigations carried out throughout the proceedings (see *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 306, 26 September 2023).

57. The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case (see *Iglin v. Ukraine*, no. 39908/05, § 65, 12 January 2012).

58. Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general, this includes, *inter alia*,

his or her right not only to be present, but also to hear and follow the proceedings (see *G. v. France*, no. 27244/09, § 52, 23 February 2012). The Court has also stated that special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see, *Vaudelle*, cited above, § 60, with further references). Additionally, the Court has held that in cases concerning serious charges against persons whose mental faculties are impaired, the national authorities have to take additional steps in the interests of the proper administration of justice (ibid., § 65).

59. Given the sophistication of modern legal systems, many adults of normal intelligence are unable to fully comprehend all the intricacies and all the exchanges which take place in the courtroom: this is why the Convention, in Article 6 § 3 (c) emphasises the importance of the right to legal representation (see *S.C. v. the United Kingdom*, no. 60958/00, § 29, ECHR 2004-IV). However, "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (ibid., § 29). The circumstances of a case may require the Contracting States to take positive measures in order to enable the applicant to participate effectively in the proceedings (see *Liebreich v. Germany* (dec.), no. 30443/03, 8 January 2008).

(b) Application of the above principles to the present case

60. The issue to be determined in the instant case is whether the manner in which the proceedings were conducted in relation to the applicant guaranteed him effective enjoyment of the right to a fair hearing and enabled him to exercise his defence rights and to effectively participate in the proceedings.

61. The Court observes at the outset that the applicant's lawyers raised on multiple occasions the issue of the applicant's mental health condition, mainly in order to request the discontinuation of the proceedings on that ground (see paragraphs 13, 14, 20-22 and 26 above). The *Audiencia Provincial* accepted the examination of the applicant by two forensic experts (see paragraphs 13 and 14 above) and, on the basis of their conclusions and considering that the applicant had sufficient capacity to understand the scope and purpose of the proceedings, rejected the request for their discontinuation (see paragraphs 22, 26 and 30 above). The Supreme Court, for its part,

confirmed that the threshold to order the discontinuation of the proceedings under Article 383 of the Criminal Procedure Act had not been met (see paragraph 32 above).

62. The Court sees no reason to depart from the domestic court's conclusions concerning the possible discontinuation of the proceedings on account of the applicant's mental health condition. It observes in this regard that none of the various forensic reports analysing the applicant's situation found him unfit to stand trial or unable to understand the scope and purpose of the proceedings (see paragraphs 13, 16, 20 and 25).

63. The Court must therefore assess whether, in the circumstances of the present case, the applicant's mental health condition, without reaching a level of impairment warranting the discontinuation of the proceedings, called for other procedural adjustments on the part of the domestic authorities in order to ensure his effective participation and whether, in the absence of such adjustments, the criminal proceedings against the applicant, taken as a whole, could be considered as unfair.

64. The Court reiterates that, depending on the circumstances of the case, the Contracting States may be required to take positive measures in order to enable the persons involved to participate effectively in the proceedings (see paragraph 59 above). This positive obligation includes, where needed, the provision of procedural adjustments for persons who, due to an impairment of their mental faculties, are not fully capable of acting for themselves (see paragraph 58 above).

65. The Court notes in this connection that in 2021 and 2023 legislative amendments reinforcing the procedural rights of elderly persons and persons with disabilities were adopted in Spain, undoubtedly contributing positively to the enjoyment of those people's right to effective participation in legal proceedings through the provision of procedural adjustments, where requested and/or deemed appropriate. Those developments occurred after the events in the present case and are not at issue. The Court's task is limited to examining whether in the particular circumstances of the case, including the relevant domestic law, the proceedings were fair and the applicant's Article 6 rights were respected.

66. At the outset, the Court considers that the fact that the applicant was represented by a lawyer of his own choosing during the hearing in January 2019 is an important factor in determining whether he was capable of defending himself effectively (see, *mutatis mutandis*, *Liebreich*, cited above, and contrast *Vaudelle*, cited above). It further observes that this lawyer, unlike the legal aid lawyer previously representing the applicant (see paragraph 14 above), did not request any specific procedural adjustments but only asked for the discontinuation of the proceedings. While this could be considered as a defence strategy primarily addressed at achieving the result that was considered more favourable for the applicant, it could also be interpreted by the domestic courts as an acknowledgement that procedural

adjustments would not really have assisted the applicant in presenting his defence and were not considered necessary by his own lawyer. Furthermore, both the applicant and his lawyer were present at the hearing and had the opportunity to address the court (contrast *Vaudelle*, cited above), but neither of them referred to any need for procedural adjustments, despite the existence of a forensic report indicating the need for them (see paragraph 14 above). While the relevant domestic law at the material time did not specify any adjustments that could be requested (see paragraph 38 above), the applicant did not point to any provision of domestic law that would prevent that type of request or state that such an arrangement was impossible in practice (see, *mutatis mutandis*, *Golubev v. Russia* (dec.), no. 26260/02, 9 November 2006). In the Court's view, had the applicant considered himself unprepared for the hearing or in need of any assistance, it was incumbent on him and his lawyer to bring such concerns to the attention of the authorities (see, *mutatis mutandis*, *Hasáliková v. Slovakia*, no. 39654/15, § 68, 24 June 2021). It has not been alleged that the diminished mental capacity of the applicant went as far as preventing him from understanding his own difficulties and, in any event, it is evident that the lawyers assisting him were fully in a position to assess the need for requesting adjustment measures and to specify their nature.

67. The Court further observes that the requests submitted by the applicant's lawyers, namely the request to have the proceedings discontinued and to accept further forensic reports, were duly addressed by the domestic courts. The courts requested two additional forensic reports, paying full attention to the assertions of diminished mental capacity. The courts assessed the conclusions of those reports and provided reasoned decisions and gave appropriate reasons to refuse the additional forensic evidence submitted by the applicant. In the Court's view, those steps were sufficient to comply with the relevant provisions of domestic law, namely Articles 381 and 383 of the Criminal Procedure Act. Lastly, the Court cannot overlook the fact that the domestic courts observed in their decisions that some steps in the incapacity proceedings had been taken in parallel to the developments in the criminal proceedings and that they considered that the presence of the guardian was unnecessary (see paragraph 17 above).

68. While it is true that the domestic courts did not assess whether the adjustments indicated in the forensic report of 22 May 2018 were warranted, in the Court's view the necessity of those measures, taking into account their nature, was to be best assessed by the applicant and his lawyers, who were in direct contact with him. In the absence of a specific request by them to consider those adjustments, the Court considers that, in the circumstances of this case, the domestic courts were not called on to offer them or provide them of their own motion.

69. Lastly, the Court observes that the applicant did not substantiate, either before the domestic courts or before the Court, any specific impact of

the lack of adjustment measures on the overall fairness of the trial. The Court notes in this connection that at the hearing of January 2019, the applicant, who was assisted by a lawyer of his own choosing, made use of his right to remain silent. The domestic courts did not rely on the applicant's statements to assess whether he was guilty of the charges or to examine his participation in the acts. They only referred to his statement in order to confirm his capacity to understand the object and consequences of the proceedings against him (see paragraph 30 above). The Court further notes that the applicant's conviction was based on several pieces of evidence and takes into account the significant weight given to the documentary evidence (see paragraphs 28-29 above), in view of the financial and technical aspects involved in tax-related offences. The applicant has not suggested that the absence of procedural adjustments, such as the assistance of another person or the opportunity to testify via video-link, in any way influenced his decision to exercise his right to silence or prevented or discouraged him from giving evidence in his defence (see, *a contrario*, *Hasáliková*, cited above, §§ 45-48 and 66).

70. The Court is therefore not persuaded that the steps taken by the national judicial authorities to ensure that the criminal proceedings against the applicant were in compliance with the requirements set forth in Article 6 §§ 1 and 3 of the Convention were insufficient: they ensured that the applicant was represented by a lawyer at every stage of the proceedings; they requested two forensic reports to verify whether the applicant understood the charges and the scope of the criminal proceedings, and examined the additional reports submitted by the applicant; and they made sure that the applicant was able to exercise his right to remain silent, without drawing any adverse inferences.

71. Having regard to the above considerations, the Court considers that, taken as a whole, the proceedings in issue were fair for the purposes of Article 6 §§ 1 and 3 of the Convention. It follows that there has been no violation of that Article.

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 of the Convention;

Done in English, and notified in writing on 13 March 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Mattias Guyomar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Elósegui joined by Judge Mourou-Vikström is annexed to this judgment.

CONCURRING OPINION OF JUDGE ELÓSEGUI JOINED BY JUDGE MOUROU-VIKSTRÖM

1. I agree with my colleagues on the findings of admissibility and no violation of Article 6 §§ 1 and 3 of the Convention. The intention of my concurring opinion is to show that there was, and still are, various lacunae in the Spanish legal system regarding the possibility of making procedural adjustments during criminal proceedings in cases where a defendant has a mental illness and needs assistance from another person, or some other kind of adjustment, in order that the accusations be properly understood, and defence rights properly protected[1].

2. Article 383 of the Criminal Procedure Act only allows for the discontinuation of criminal proceedings in cases involving a defendant's total incapacity:

> "If mental disturbance occurs after the offence has been committed, once the summary proceedings have been concluded, the competent court shall order the case to be discontinued until the defendant is restored to health, and the provisions of the Criminal Code shall also apply to the defendant as prescribed for those who commit an offence in a state of mental disturbance".

In addition, this provision is only relevant where it is considered that a defendant suffering from a mental disturbance may recover, and criminal proceedings may be resumed. Nothing is said about the situation where there is no possibility of a defendant's recovery, for instance, where a defendant is suffering from Alzheimer's disease or dementia[2]. Furthermore, in reality, this lacuna is the result of the fact that Article 383 of the Criminal Procedure Act

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[1] Grima Lizandra, Vicente, "El derecho de defensa del imputado con graves anomalías psíquicas", *Revista Jurídica de la Comunidad Valenciana*, nº 34, 2010, pp. 67-84.
p. 68: "La elección de este tema se debe a la constatación en la práctica de los múltiples problemas que se plantean en la defensa de tales imputados y la deficiente regulaciónnormativa al respecto" ("This subject was chosen because of the many problems encountered in practice in the defense of such defendants and the lack of regulation in this area"). See also, Farto Piay, T., "El enjuiciamiento penal de las personas con problemas de salud mental", *Estudios Penales y Criminológicos*, vol. XLI (2021).https://doi.org/10.15304/epc.41.6718. ISSN 1137-7550: 895-935.

[2] Tomé García, José Antonio, "Particularidades de la instrucción en el proceso penal cuando el investigado presenta indicios de enfermedad o trastorno mental (LECrim y Anteproyecto de 2020) (1)", *LA LEY Penal* nº 151, julio-agosto 2021: Los presupuestos psíquicos de la responsabilidad penal, Nº 151, 1 de jul. de 2021, Editorial Wolters Kluwer. Nota 23: "While there is no provision for the situation where a defendant is suffering from a mental disability from which he or she will not recover and is able to be physically present during the proceedings but unable to understand them, it is evident that this situation will result not only in the temporary suspension of a trial (*suspensión del juicio oral*), but also a permanent suspension with the case left unresolved (*archivo de la causa*)" (original in Spanish).

does not distinguish between total and partial incapacity. In practice it is applied only in situations of total incapacity[3].

3. Moreover, there is no provision for a situation where a defendant with partial incapacity as a result of a mental illness is able to be present during the criminal proceedings but, notwithstanding his or her representation by a lawyer, might need some assistance in order to be able to understand the process and defend himself or herself properly. The issue is that the defendant has to be able to understand the consequences of exercising the right to give evidence or using the opportunity to speak at the end of the trial.

4. As the Criminal Procedure Act does not clearly set out the possibility of requesting procedural adjustments, it is understandable that the applicant's lawyers concentrated their efforts on asking that Article 383 of the Criminal Procedure Act be applied. In this regard, the Court in its judgment accepts that the Spanish domestic courts examined this matter and concluded that the applicant was aware of the process and understood the accusation against him (see paragraph 62 of the present judgment), and, as such, Article 383 of the Criminal Procedure Act was not applicable (see paragraph 61):

> "The Supreme Court, for its part, confirmed that the threshold to order the discontinuation of the proceedings under Article 383 of the Criminal Procedure Act had not been met (see paragraph 32 above)".

5. In 2021 the Code of Civil Procedure was amended to include a specific provision regulating procedural adjustments for persons with disabilities. This provision was further amended in 2023 to regulate procedural adjustments for elderly persons. Under Article 4, this Code is applicable to criminal proceedings in the absence of specific provisions in the Criminal Procedure Act. The relevant rule, as in force since March 2024, reads as follows:

> "Article 7 bis
>
> 1. In proceedings involving persons with disabilities or elderly persons, the necessary accommodations and adjustments shall be made to enable them to participate on an equal footing if they so request or, in any event, if they are 80 years of age or older.
>
> To this end, persons aged 65 years or older shall be considered as elderly persons.
>
> In cases concerning persons with disabilities, the accommodations and adjustments shall be made both at request of the parties or of the public prosecutor and by the court of its own motion.

[3] See STS, 28 de mayo de 2020 - ROJ: STS 1326/2020, STS, 23 de julio de 2004 - ROJ: STS 5510/2004, AAP Girona, 09 de febrero de 2021 - ROJ: AAP GI 933/2021,
AAP Murcia, a 22 de diciembre de 2022 - ROJ: AAP MU 614/2022, AAP Barcelona, a 06 de junio de 2023 - ROJ: AAP B 7267/2023, AAP Pontevedra, a 08 de mayo de 2020 - ROJ: AAP PO 497/2020, SSTS STC 65/2003 y 207/2002, SSTC 92/96, 143/2001 y 198/2003, AAP La Rioja, a 02 de mayo de 2017 - ROJ: AAP LO 223/2017).

In cases concerning elderly persons below the age of 80, the accommodations and adjustments shall be made at the person's request.

In cases concerning persons aged 80 or older, the accommodations and adjustments shall be made both at the person's request and by the court of its own motion.

The accommodations and adjustments shall be made at every stage and within each procedural step in which they are necessary, including communications, and may refer to communication, understanding and interactions with the environment.

2. Persons with disabilities, as well as elderly persons, have the right to understand and be understood in every step that may be taken. To this end:

(a) All communications, verbal or in writing, addressed to a person with a disability, aged 80 years old or older, or elderly person who has requested so, shall be made in a clear, simple and accessible language, in a manner that takes into account his or her personal characteristics and needs, using means such as easy-read versions. If necessary, the information shall also be given to the person who is supporting the person with a disability in the exercise of his or her legal capacity.

(b) Persons with disabilities shall be provided with the necessary assistance or support to be understood, which shall include interpretation in sign languages legally recognised and support for the verbal communication of deaf people, people with a hearing disability and deafblind people.

(c) The participation of an expert performing the necessary accommodation and adjustments in order to allow a person with a disability to understand and be understood shall be permitted.

(d) Persons with disabilities and elderly persons may be accompanied by a person of their own choosing from the first contact with the authorities."

6. Firstly, however, this provision was not in force at the time of the criminal proceedings against the applicant or when the final judgment was delivered. Secondly, even this new provision, introduced into the Code of Civil Procedure, falls short in the context of criminal proceedings. Judges in civil proceedings are more accustomed to dealing with the matter of procedural adjustments than judges dealing with criminal cases, who do not apply these measures. This Code is, however, applicable in criminal proceedings only in the absence of specific provisions in the Criminal Procedure Act. In order for the concept of procedural adjustments for vulnerable persons to be effectively applied in practice, it might be necessary to introduce a specific provision into the Criminal Procedure Act and the Criminal Code. Spain has little experience of making accommodations and adjustments in criminal trials for defendants with partial incapacity. It is not clear from the current legislation whether accommodations and adjustments must be requested by the defendant and/or his or her lawyers or whether they may or should be made by the court of its own motion. The criminal process is very different for defendants who have a physical disability and those with a mental one. Moreover, under the new regulations (see paragraph 5 above), it will be necessary to consider who is responsible for determining a defendant's capacity or lack thereof (even if partial). In a case where a forensic doctor carries out an examination of the defendant and gives an

opinion that certain additional or special measures are required in order to assist the defendant (as happened in the present case), judges are not obliged to follow it.

7. The relevant provision, Article 289 of the Criminal Code, which is still in force, reads:

> "The guardianship of incapacitated persons shall have as its purpose the guardian's assistance in those acts expressly referred to in the judgment that established the guardianship".

Furthermore Article 290 of the same Criminal Code states:

> "In the event that the judgment on incapacitation has not specified the acts for which the intervention of the guardian should be necessary, such intervention shall be deemed to extend to the same acts for which guardians require judicial authorisation, in accordance with this Code."

8. It is true that the applicant's lawyer limited himself to submitting new evidence and requesting that the proceedings be discontinued, without arguing that there had been any difficulties in preparing the applicant's defence or requesting any procedural adjustments, such as participation via video link or the presence of a guardian at the hearing (see paragraphs 43 and 66 of the present judgment), but is also true criminal procedure does not clearly provide for the possibility for lawyers to request procedural adjustments.

9. This is recognised by the Court in paragraph 46 the present judgment:

> "The Court further notes that the issue of the applicant's mental health condition was raised before the domestic authorities on several occasions. While it is true that the applicant's allegations were focused on stressing that he could not stand trial and that the proceedings should be discontinued, the various documents submitted in support of that request did refer to a history of several mental health disorders and to the deterioration of his cognitive faculties. In the Court's view, those elements sufficiently drew the attention of the domestic courts to the existence of doubts about the applicant's capacity to effectively participate in the proceedings, in a manner which appears to be consistent with the relevant domestic law. Lastly, it appears that at the time of the events, there were no legal provisions expressly regulating specific types of procedure".

10. However, referring to the adjustments indicated in the forensic report, the Court states in paragraph 68 of the present judgment, that in the circumstances of the case "the domestic courts were not called on to offer them or provide them of their own motion", and in paragraph 69 the Court concludes:

> "...the Court observes that the applicant did not substantiate, either before the domestic courts or before the Court, any specific impact of the lack of adjustment measures on the overall fairness of the trial ... The applicant has not suggested that the absence of procedural adjustments, such as the assistance of another person or the opportunity to testify via video-link, in any way influenced his decision to exercise his right to silence or prevented or discouraged him from giving evidence in his defence (see, a contrario, *Hasáliková*, cited above, §§ 45-48 and 66)".

11. Comparative law shows that in several countries of the Council of Europe, for instance, Ireland, France and Luxembourg, it is possible to ask for procedural adjustments during criminal proceedings in respect of persons diagnosed with a mental illness. In Ireland, which has an adversarial legal system, it is for lawyers to ask for procedural adjustments rather than for a judge to make adjustments of his or her own motion. In Ireland, there is a clear procedural distinction between (a) a request for the termination of criminal proceedings; and (b) asking for special measures to be put in place during the trial to assist someone who has mental or communication difficulties. These are two completely different procedures. Moreover, there is currently a sharp distinction between victims and defendants in Irish criminal proceedings when it comes to special measures:

1. There is a detailed statutory framework for special measures for victims, whereas defendants have not been included in this framework [4] .
2. The basic legislative framework for victims who require special measures is Section 14 of the Criminal Evidence Act 1992 as amended (intermediaries) and Section 13 of the same Act - the legislation limits the use of special measures to particular types of case (essentially sexual and violent crimes). Allegedly, court might order special measures for victims under its 'inherent jurisdiction' also, if it were necessary to do so in a particular case. Special measures are used regularly in sex/violence cases in respect of victim-witnesses.

12. In France, for instance, the legislation requires a defendant who lacks capacity to be accompanied during the trial by a guardian or curator, as well as by his or her lawyer[5]. There is an obligation in French law, at the very least,

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[4] Delahunt, Mirian, *Vulnerable Witnesses and Defendants in Criminal Proceedings*, Clarus Press, 2024. The author of the book refers at p.165 (para 17-113) to an Irish Court of Appeal case, *DPP v. Harrison* [2016] IECA 212, where it seems that the court considered that special measures could be ordered by an Irish court for a defendant in a criminal trial by reason of the constitutional and ECHR guarantees of a right to a fair trial, notwithstanding the absence of a legislative framework providing for this to happen. In the case *DPP v. Harrison* the court seems to have based the possibility of ordering such measures in the case of a defendant on the court's 'inherent jurisdiction'. It was a case of a person with pretty severe mental problems (arising from head injuries) who was a defendant.

[5] Mauro, Cristina, "Le traitement procédural du malade mental (Francia)", en Flores Prada, I. (Dir.), Derechos y garantías del investigado con trastorno mental en el sistema de justicia penal, p. 184: "La première loi est inspirée de préoccupations purement procédurales et fondée sur le constat qu'en procédure civile plusieurs mécanismes de représentation permettent à des incapables, même majeurs, de faire valoir leurs droits en justice grâce à l'intervention d'un tuteur ou à l'assistance d'un curateur. Les articles 706-112 et suivants du Code de procédure pénale viennent ainsi prévoir l'intervention de ces mêmes personnes dans le cadre de la procédure pénale en adaptant cependant leur rôle aux finalités du procès pénal dont on sait qu'il doit permettre de connaître de faits mais également de la culpabilité d'une

to inform the curator. It is even considered that the Public Prosecutor's Office must be aware of the situation of protected adult of the accused/defendant who is going to be tried and must summon the guardian/curator. This is a very heavy obligation that weighs on French prosecutors. The goal is not to leave a "vulnerable" person alone at their trial. The lawyer provides another type of assistance.

Article 706-113 of the French Code of Criminal Procedure requires that the curator or guardian be informed of the existence of the proceedings. This obligation to inform also requires that the agent be notified of the hearing date (Crim. 14 Apr. 2010, no. 09-83.503), failing which it will be null and void. The judgment that ignores this obligation to provide information when it has not been effective is subject to cassation (Crim. 6 June 2023, no. 23-81.726). However, it has been held that the delay in providing information does not necessarily constitute a grievance (Crim. 28 September 2010, no. 10-83.283). The protected adult must therefore establish that the failure to provide information by the curator has harmed his or her interests if he or she intends to rely on nullity.

For French cases, the reference judgment is *Vaudelle v. France*, 2001, also *Labergere v. France*, 2006, §§ 21-22 (practical impossibility of appealing in the context of compulsory hospitalization), compare with *G. v. France*, 2012, §§ 54-57 for a non-violation of 6 (precautions taken for the preparation of the appearance before the assize court, examination of the capacity to defend oneself and to appear). For a strike-off in a recent case, cf. *Brockhoff v. France (dec.)* [committee], 2023 (the failure to notify the curator having prevented the protected adult from appealing).

13. The Spanish system must be improved and develop more clearly the positive measures required (see paragraph 64 of the present judgment):

> "to enable the persons involved to participate effectively in the proceedings (see paragraph 59 above). This positive obligation includes, where needed, the provision of procedural adjustments for persons who, due to an impairment of their mental faculties, are not fully capable of acting for themselves (see paragraph 58 above)."

and to ensure the protection of human rights (see paragraph 58 of the present judgment):

> "Additionally, the Court has held that in cases concerning serious charges against persons whose mental faculties are impaired, the national authorities have to take additional steps in the interests of the proper administration of justice (ibid., § 65)."

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personne et de prononcer la peine la plus adaptée pour en assurer la réinsertion et la resocialisation. Le procès pénal ne peut donc pas faire abstraction de la personne poursuivie et, sinon de sa présence, du moins de son point de vue".

14. In conclusion, the Spanish legal system is still very far[6] from ensuring the required level of positive obligations to protect persons with a mental disability in criminal proceedings, as guaranteed by the Convention[7] (see paragraph 59 of the present judgment):

> "It means that he or she, if necessary, with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence (ibid., § 29). The circumstances of a case may require the Contracting States to take positive measures in order to enable the applicant to participate effectively in the proceedings (see *Liebreich v. Germany* (dec.), no. 30443/03, 8 January 2008)."

In 2020 a draft Civil Procedure Law was prepared in Spain but never came into force. The text stated:

> "b) The necessary inquiries shall be made to determine whether a guardian or curator has been appointed and if so, the immediate presence of that person shall be requested and that person shall be informed of the accused person's procedural rights... If there is no such person, the presence of a family member or another person from [the accused person's] support network who is suitable for these purposes and for whom there is no conflict of interest, shall be ensured".

There is much still to be done.

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[6] Flores Prada, I. (Dir.), *Derechos y garantías del investigado con trastorno mental en el sistema de justicia penal*, págs. 108-109.
https://www.pensamientopenal.com.ar/system/files/2018/06/doctrina46702.pdf
According to the author: "The fundamental purpose of this report is to highlight the shortcomings, defects and imbalances in the treatment of persons with mental disorders in the Spanish criminal justice system, highlighting the tensions between the explicit legal model contained in the Criminal Procedure Law and the implicit model of fair or due process proposed by the 1978 Constitution" (Original in Spanish).

[7] Ortega Lorente, J.M., "¿El acusado psíquicamente discapacitado, puede intervenir en juicio con la mera asistencia de letrado, o debe estar asistido, también,
por su tutor, guardador de hecho o defensor judicial?", en Bach Fabregó, R., (Dir.), 84 cuestiones sobre la dirección y publicidad del juicio oral, CGPJ, Madrid, 2011, págs. 164-68.