

Application no. 50181/22

C.P. v. Spain

**THIRD PARTY INTERVENTION BY ASOCIACIÓN MUJERES JUEZAS
DE ESPAÑA (ASSOCIATION OF WOMEN JUDGES OF SPAIN)**

Legal and jurisprudential requirements for a lawful detention in Spain.

1. Any deprivation of liberty constitutes an interference with the constitutional right to personal freedom and security, proclaimed in Article 17 of the 1978 Spanish Constitution, which states:

“1. Everyone has the right to liberty and security. No one may be deprived of their liberty except in compliance with the provisions of this article and in the cases and manner provided by law.

2. Preventive detention may not last longer than is strictly necessary for the investigations aimed at clarifying the facts, and in any case, within a maximum period of seventy-two hours, the detainee must be released or brought before a judicial authority.

3. Any detained person must be immediately informed, in a comprehensible manner, of their rights and the reasons for their detention, and may not be compelled to testify. The assistance of a lawyer to the detainee during police and judicial proceedings is guaranteed under the terms established by law.

4. The law will regulate a "habeas corpus" procedure to ensure the immediate judicial oversight of any person illegally detained. Moreover, the maximum duration of provisional imprisonment shall be determined by law”.

2. This provision is enshrined in the Spanish Constitution within the block of fundamental rights, which, due to their nature and relevance, are afforded heightened legal protection. Accordingly, their legislative development must be carried out through Organic Law, which requires a higher standard for its enactment, modification, or repeal. Furthermore, constitutional guarantees and

requirements take precedence over legal guarantees. Consequently, it is the Constitutional Court which, through its doctrine, establishes the requirements and guarantees for any interference with a fundamental right to be considered constitutional, and thus in accordance with the right in question. In this regard, the doctrine developed by the Constitutional Court in the interpretation of fundamental rights and aimed at determining their specific content and limits binds all three branches of the State: legislative, executive, and judicial.

3. According to the consolidated doctrine of the Spanish Constitutional Court, the constitutional legitimacy of any interference by public authorities with the protected content of the fundamental right to liberty, as set forth in Article 17, Section 1, of the Spanish Constitution, depends on the fulfilment of a series of essential minimum guarantees:
 - a) The measure or action limiting the fundamental right in question must be provided for by law (i.e., there must be legal authorization);
 - b) It must be adopted through a specifically reasoned judicial decision;
 - c) The measure agreed upon in the judicial decision must comply with the principle of proportionality, meaning that it must be aimed at achieving a constitutionally legitimate goal, it must be indispensable for the protection of that goal because there are no alternative measures, and it must be strictly proportional so that the interests sacrificed are not greater than those sought to be protected.

4. Firstly, several scenarios are provided in the Spanish legal system in which the existing legislation authorizes public authorities to carry out a deprivation of liberty (legal authorization):
 - a) **Detention based on indications of a crime**, regulated in Articles 489 and following of the Criminal Procedure Law, Royal Decree of September 14, 1882 (hereinafter, LECrim). These articles regulate the circumstances in which detention may be ordered to investigate the circumstances of the crime and the identity of the possible perpetrator, as well as the requirements and guarantees of such detention and its duration, with the possibility of extension.
 - b) **Preventive detention ordered in a criminal case for an offense**, regulated in Articles 502 and following of the LECrim. These articles allow for preventive detention while a complete investigation of the case is being conducted, provided that a reasoned judicial decision finds that

the legal requirements are met, and no less burdensome measure is available that would ensure the trial or prevent the possible perpetrator from destroying evidence or reoffending. This applies in very specific cases.

- c) **Administrative detention for identification purposes**, regulated in Article 17 of Organic Law 4/2015, of March 30, on the protection of public safety. This is a detention for a specific purpose that will last only as long as necessary in cases where a person's identity cannot be established without minimal inquiries.
- d) **Involuntary confinement due to psychiatric disorder**, regulated in Article 763 of Law 1/2000, of January 7, on Civil Procedure (hereinafter, LEC). This type of confinement in a psychiatric facility is ordered based on a medical decision, which must be immediately notified to the duty judge, who must ratify or revoke the confinement through a reasoned decision within a maximum period, following a report from the forensic doctor and the public prosecutor, and after a hearing with the confined individual.
- e) **Detention of foreigners in an irregular situation**, regulated in Article 62 of Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration (hereinafter, LOEX), in connection with Articles 54.1, 53.1, and 57.2 of the same law. This case regulates detention in a foreign detention centre for a specified period not exceeding 60 days while the corresponding sanctioning process, which may result in expulsion from Spanish territory, is conducted. This detention is ordered by a reasoned and proportionate judicial decision following a hearing with the detainee and the public prosecutor.
- f) **Confinement of minors with behavioural disorders in specific protection centres**, regulated by Article 26 of Organic Law 1/1996, of January 15, on the legal protection of minors. This is adopted by a reasoned judicial decision following a report from the psychosocial team and a request from the public prosecutor or the public entity responsible for the custody or guardianship of the minor.
- g) **Hospitalization for public health reasons**, regulated by Organic Law 3/1986 of April 14 on special measures in public health, Article 2. This is intended for cases of exceptional danger to public health in a health emergency.

5. In cases of compulsory hospitalization for childbirth, even when deemed risky for the life of the foetus, the first constitutional requirement is lacking, as proclaimed by the Spanish Constitutional Court Judgment nº 66/2022 of June 2, 2022. This judgment maintains in its Legal Ground 6, Section B, that "the judicial decision to order compulsory hospitalization for the performance of childbirth deemed risky for the life of a foetus has no specific legal provision", since the invocation of legal provisions such as Law 41/2002, of November 14, the Basic Law on Patient Autonomy and Rights and Obligations regarding Information and Clinical Documentation, or the articles of the Spanish Civil Code related to the unborn child (*nasciturus*) are inadequate to provide legal coverage for a judicial order of compulsory hospitalization, and there is no legal provision in our legal system that could provide sufficient and appropriate coverage for such a measure, as we have previously analysed.
6. Therefore, this would be a deprivation of liberty lacking clear legal authorization, which would neutralise, or at least substantially weaken, the express mandate set out in Article 17.1 of the Spanish Constitution, clearly contrary to the position that the Constitutional Court itself has maintained to date (SSTC 179/2000, FJ 2; 141/2012, FJ 3; 21/2018, FJ 5; and 180/2020, FJ 2).
7. Further, given that the requirements under review are cumulative, the absence of the first of such constitutional requirements – that is, legal authorisation – results in the judicial action lacking the necessary basis, rendering it inappropriate from this point onwards.
8. Secondly, with respect to the second requirement for a deprivation of liberty to be deemed constitutional, and therefore lawful, it must be ordered by a reasoned judicial decision. Typically, this will take the form of an “Auto” (a judicial decree), which by its nature must contain reasoning that addresses both the factual scenario and the legal grounds on which it is based, concluding with the dispositive part.
9. For the decision to be properly reasoned, it is necessary to consider the factual scenario that provides the legal basis for requiring judicial intervention – in other words, there must be legal authorisation to adopt the decision. Secondly, the legal requirements applicable to the specific type of deprivation of liberty must be meticulously analysed in the decision. Furthermore, the decision must include an analysis of the particular circumstances of the case and the proportionality of the measure to the legitimate objective it seeks to achieve,

and, where relevant, whether there is no less restrictive alternative measure that could equally serve the same purpose.

10. To that end, it is essential that any detention or deprivation of liberty complies with certain safeguards throughout the decision-making process and during the proceedings from the moment the application is made.
11. It is indisputable that the adoption of a decision involving an obvious restriction of liberty must be accompanied by a series of minimum safeguards, clearly and unequivocally required by all legal provisions that govern cases of deprivation of liberty (Article 763 of the Civil Procedure Law for involuntary confinement due to psychiatric disorder, Article 505 of the Criminal Procedure Law in the case of preventive detention, Article 62 of the Foreigners' Law for the detention of foreigners in an irregular situation, Article 26 of Organic Law 1/1996 of 15 January on the Legal Protection of Minors regarding the detention of minors with behavioural problems, among others), and the consistent jurisprudence of the Spanish Constitutional Court (STC 207/1996, FJ 4; STC 141/2012, FJ 5; STC 13/2016, FJ 4; STC 22/2016, FJ 4), specifically:
 - a) the prior hearing of the person affected by the measure limiting their right to liberty or personal privacy;
 - b) the verification of specific circumstances that in the particular case justify the adoption of the measure;
 - c) the conduct of a proportionality test, in which the statements of the individual and those specific circumstances that justify the adoption of the measure for the achievement of the legitimate objective must be taken into consideration and weighed, with various reports being sought depending on the particular case.
12. Thus, a compulsory hospitalisation ordered through an "auto" would meet the formal requirement. However, in addition to this formal requirement, the decision must also comply with the substantive requirement of proper reasoning.
13. A violation occurs with judicial decisions issued in the preliminary stages if compulsory hospitalisation is ordered *inaudita parte* – that is, if no hearing is held with the detained individual, either before the decision ordering their forced transfer and hospitalisation, or after both have been carried out and while they remain in hospital custody.

14. Such a hearing is absolutely essential to carry out an adequate balancing of the fundamental rights and constitutional interests in conflict. It is virtually impossible to properly assess the proportionality of the interference with the affected individual's fundamental rights without knowing their stance on how they intended to exercise those rights and the reasons justifying their position. The complete omission of this procedure constitutes a clear breach of the principle of adversarial proceedings and equality of arms, which are essential guarantees of any fair and balanced assessment. Moreover, it leads to undeniable legal uncertainty in a state governed by the rule of law.
15. While it may be argued that urgency justified the adoption of the measure without a prior hearing of the pregnant woman, it is clear that in legally regulated cases where such urgency is acknowledged, provision is made for the decision to be ratified subsequently by the competent judge, following a hearing of the individual affected by the measure. In other words, there is no legal justification for failing to hold such a hearing in order to maintain or uphold the measure in the hours following the adoption and execution of the judicial decision.
16. Thirdly, for the purposes of examining whether the third and final principle has been respected, a proportionality test must be conducted to ascertain whether the measure in question meets the following three conditions:
 - a) whether such a measure is capable of achieving the intended objective, which is none other than the protection of the constitutional right or interest in question – the suitability or appropriateness test (juicio de idoneidad o adecuación) (SSTC 55/1991 FFJJ 7º and 161/1997 FFJJ 10º);
 - b) whether it is necessary, in the sense that no other less restrictive measure exists that would achieve the same purpose with equal effectiveness – the necessity or indispensability test (juicio de necesidad o indispensabilidad);
 - c) whether it is proportionate or balanced, in that it results in more benefits or advantages for the public interest than harm to other rights or values in conflict – the strict proportionality test (juicio de proporcionalidad en sentido estricto) or the balancing test, considering the existence of a preponderant legal interest and the lack of less restrictive alternative measures (SSTC 66/1995, 55/1996, and 207/1996, of 16 December).
17. This is a sequential assessment, meaning that only a measure deemed suitable can be considered necessary, and only if a positive conclusion is reached

regarding the concurrence of these two elements can its proportionality be further analysed.

18. In light of the above, failure to meet any of these conditions will render the applied measure disproportionate (SSTC 66/1995, 55/1996, and 207/1996, of 16 December).
19. Thus, such decisions by the courts clearly restrict two fundamental rights: the right to liberty under Article 17.1 of the Spanish Constitution (CE) and the right to privacy and personal autonomy under Article 18.1 CE, thereby violating the guarantees required by our constitutional system for the legitimacy of this type of measure.
20. As a result, there is also a breach of the fundamental right to effective judicial protection enshrined in Article 24.2 of the Spanish Constitution, in the aspect of the right to obtain a judicial decision in accordance with the law, and thus with the observance of all constitutional and legal guarantees.

Alternative measures available to judges in such cases, which are less restrictive of fundamental rights than the measure adopted, in accordance with Spanish legislation and judicial practice.

21. The alternative measures that the Court could adopt, which are less restrictive of fundamental rights than compulsory admission, can be divided into several categories: first, the possibility of adopting protective measures at the affected person's home; second, the obligation to weigh the legitimate interests involved in the specific case; and third, the possibility of granting a prior hearing to the person subject to the measure.
22. Firstly, once the judge is made aware of the situation through communication from the healthcare centre, they have the authority to order the presence of a medical unit at the affected person's home. This unit could be commissioned by the judge, not only to assess the situation on site to determine the specific risks present but also to evaluate whether, despite the supposed risks, it is possible, according to the wishes of the affected person, for the birth to take place at home with the assistance of medical professionals. Alternatively, the judge could grant the mother a period of time to prepare and transfer to the hospital, even accompanied by the medical unit, or could ensure that she is transferred to a healthcare facility where the most analogous birthing modality to the one freely chosen by her is available.

23. Secondly, the judge could adopt measures that ensure their knowledge of the specific case, so as to ensure the proper reasoning behind the judicial decision. In this respect, it is important to note that the forensic doctor's report should not be based solely and exclusively on reproducing the reasons and arguments put forward by the hospital. Two natural measures emerge to remedy such an infringement:
- a) First, the forensic doctor could be instructed to visit the affected person's home and issue a report on the condition of the mother and the newborn, as well as the mother's cognitive ability to understand the risk of the situation and her volitional capacity to give the requisite consent.
 - b) Second, the judge themselves could form a judicial commission and go to the pregnant woman's home to assess the situation.
 - c) In both cases, both the forensic doctor and the judicial commission could be accompanied by the aforementioned mobile medical unit in order to ensure the protection of the affected individuals.
24. Thirdly, the measure can – and must – be adopted following a hearing with the pregnant woman, either through the judge's personal attendance at the home with the relevant judicial commission, or through the use of two-way telecommunication means, and not only before making the decision but also at any moment immediately thereafter.

Possible legal consequences of this case for pregnant women in Spain.

25. Law 41/2002, of 14 November, which regulates patient autonomy and rights and obligations regarding information and clinical documentation, states the following in Article 3:

“Informed consent: the free, voluntary, and conscious agreement of a patient, given in full possession of their faculties after receiving adequate information, so that a medical procedure affecting their health can take place.

Freedom of choice: the right of the patient or user to freely and voluntarily choose between two or more healthcare alternatives, between different healthcare professionals or between healthcare facilities, under the terms and conditions set out by the relevant health services in each case.”

26. Thus, the procedure followed in cases of compulsory admission of a pregnant woman, without fulfilling the legal requirements for such admission, infringes upon the patient's right to self-determination by preventing her from making an informed choice, in line with her own interests and preferences, between the various available options. This, in turn, causes moral harm. The treatment received by the pregnant woman, being forced and coercive in nature, violates her liberty as well as her autonomy, subjecting her to degrading and even humiliating treatment.
27. Spanish legislation guarantees the rights of patients to be informed, to freely choose, and to give free and informed consent, thereby ensuring their autonomy to decide between the available options, knowing the risks and choosing the option most conducive to their health. Pregnant women have the right to physical and mental healthcare and to access health services under the same conditions as everyone else. Therefore, such decisions violate not only the principles and rights legally guaranteed to pregnant women, as mentioned, but also lead to discrimination and degrading treatment towards them.
28. The application of protocols and statistical data without considering the specifics of each case and the surrounding circumstances renders the principles and rights guaranteed to pregnant women under the law meaningless, reducing them to mere statistical considerations, drafted by a healthcare institution with no application to the specific case. Furthermore, such actions are endorsed by the judiciary, which contributes to creating a climate of legal uncertainty for pregnant women.
29. Ultimately, the validation of such a degree of preventive interference by the judiciary significantly weakens women's fundamental rights due to the distinctive factor inherent to maternity and pregnancy. Moreover, it presents a considerable and evident risk that future interferences and intrusions into the lives and rights of pregnant women could be legitimised and justified without due respect for or protection of the essential guarantees safeguarding the dignity of the individual, even preventively (Dissenting Opinion of Justice Inmaculada Montalbán Huertas, STC 66/22 of 2 June 2022).