

**Press release issued by the Registrar
Chamber judgment¹**

[Gurguchiani v. Spain](#) (application no. 16012/06)

**HARSHER SENTENCE IMPOSED RETROACTIVELY ON CONVICTED
ILLEGAL IMMIGRANT**

***Violation of Article 7 (no punishment without law)
of the European Convention on Human Rights***

(The judgment is available only in French)

Principal facts

The applicant, Giorgi Gurguchiani, is a Georgian national who was born in 1975 and was living illegally in Spain at the relevant time. In a judgment of 7 October 2002, upheld on appeal, Barcelona Criminal Court no. 20 sentenced him to 18 months' imprisonment for an attempted burglary in September 2002.

On 8 July 2003 the police administration's Deportation Department, under Article 89 of the Criminal Code as it read at the time, requested that the applicant be deported instead of serving his prison sentence. The Article provided that a criminal court enforcing a judgment in which a foreign national living illegally in Spain was given a prison sentence of up to six years had the possibility (there being no obligation) of replacing that sentence by deportation with exclusion from Spanish territory for between three and ten years. On 11 July 2003 Barcelona Criminal Court no. 21 decided, after Mr Gurguchiani had appeared before it, not to deport him as it found that the enforcement of his prison sentence would be more appropriate. The public prosecutor appealed against that decision.

On 6 April 2004 the Barcelona *Audiencia Provincial* upheld the appeal and ordered that Mr Gurguchiani be deported and prevented from re-entering Spain for ten years. It took the view that, with the new wording of Article 89 of the Criminal Code (since 1 October 2003), there was an obligation (save in exceptional cases not relevant here), where an illegal immigrant in Spain was given a prison sentence of up to six years, to replace that sentence by deportation. In accordance with the new Article 89, the *Audiencia Provincial* took its decision after hearing submissions from the public prosecutor alone. An *amparo* appeal lodged by the applicant against that decision was dismissed by the Constitutional Court.

Complaints, procedure and composition of the Court

Relying on Articles 6 (right to a fair hearing), 13 (right to an effective remedy) and 7 (no punishment without law), Mr Gurguchiani complained that he had been unable to challenge his deportation at the appeal stage as there had been no public hearing, and that there had been a retroactive application of the new Article 89 of the Criminal Code, which, he alleged, was less favourable than the legislation in force at the time of the offence. The application was lodged with the European Court of Human Rights on 19 April 2006.

Judgment was given by a Chamber of seven judges, composed as follows:

Josep **Casadevall** (Andorra), **President**,
Elisabet **Fura** (Sweden),
Boštjan M. **Zupančič** (Slovenia),
Alvina **Gyulumyan** (Armenia),
Egbert **Myjer** (the Netherlands),
Luis **López Guerra** (Spain),
Ann **Power** (Ireland), **judges**,

and also Santiago **Quesada**, **Section Registrar**.

Decision of the Court

As regards the complaint under Article 7 to the effect that in Mr Gurguchiani's case there had been a retroactive application of new criminal legislation that was less favourable than that in force at the time of the offence, the Court first had to verify the sentence he had faced at that time and to determine whether his sentence had been set within the statutory limits. The Court thus noted that the 18-month prison sentence given to him had been consistent with the Criminal Code in force in 2002, at the time of the attempted burglary. For the enforcement of such a prison sentence, the then Article 89 of the Criminal Code had left two possibilities open to the criminal court enforcing the judgment: the convicted person could either be imprisoned and not deported (as the court had decided on 11 July 2003) or be deported and prohibited from re-entering the country for between three and ten years, instead of going to prison.

In the Court's view, the replacement of Mr Gurguchiani's prison sentence by his deportation and his exclusion from Spain for ten years, as decided on appeal on 6 April 2004, meant that he had been given not only a new sentence but one that was harsher than the sentence provided for by law at the time he committed his offence. The decision had been based on a virtually automatic application of the new Article 89 (which had entered into force after the applicant's conviction), which had meant that the enforcing court no longer had a choice between maintaining the prison sentence and deporting the foreign national concerned. The new legislation had also prevented the applicant from being able to appear before the court on the same footing as the public prosecutor, in order to challenge his deportation if he so wished. Lastly, the provision at issue, in its 2003 version, required that the deported foreign national be prohibited from re-entering the country for a period of ten years, thus imposing a much harsher sentence than that provided for by the former Article 89 of the Criminal Code.

The Court thus found, unanimously, that there had been a violation of Article 7, as Mr Gurguchiani had been given a harsher sentence than that which had originally been provided for in respect of the offence for which he was convicted.

Having regard to the reasons for the Court's finding of a violation, it decided that it did not need to examine separately the complaint under Article 6 § 1 concerning the lack of a public hearing on appeal. No separate question was raised under Article 13.

Under Article 41 (just satisfaction) of the Convention, the Court awarded 5,000 euros to the applicant in respect of non-pecuniary damage.

Judge Zupančič expressed a partly dissenting opinion. Judge Myjer expressed a partly concurring, partly dissenting, opinion, joined by Judge Fura for the dissenting part. These separate opinions are annexed to the judgment.

This press release is a document produced by the Registry. It does not bind the Court. The judgments are available on its website (<http://www.echr.coe.int>).

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

¹ Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.