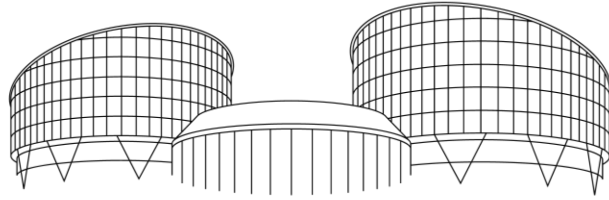

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

**CASE OF EPNERS-GEFNERS v. LATVIA**

*(Application no. 37862/02)*

JUDGMENT

STRASBOURG

29 May 2012

**FINAL**

*29/08/2012*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

**In the case of Epners-Gefners v. Latvia,**

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Ineta Ziemele,
Luis López Guerra,
Nona Tsotsoria,
Kristina Pardalos, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 10 May 2012,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 37862/02) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Mr Aivars Epners-Gefners ("the applicant"), on 2 October 2002.

2. The applicant, who had been granted legal aid, was represented by Ms I. Ļeņova, a lawyer practising in Rīga. The Latvian Government ("the Government") were represented by their Agent, Mrs I. Reine.

3. The applicant alleged that he had not received appropriate dental treatment and had not been able to receive long-term family visits in detention.

4. On 29 November 2006 the application was communicated to the Government. On 17 June 2009 the Government submitted a unilateral declaration with a view to having the application struck out of the Court's list of cases as concerns the applicant's complaint under Article 5 § 3 of the Convention, admitting that the length of his pre-trial detention had violated that Article. By a decision of 25 May 2010 the Court accepted the Government's unilateral declaration and struck the application out of its list of cases in so far as it related to that complaint, in accordance with Article 37 § 1 (c) of the Convention. As for the remaining complaints mentioned in paragraph 3 above, the Court declared them admissible and joined the Government's preliminary objection in so far as the scope of domestic law was concerned to the merits of the case. The remainder of the application was declared inadmissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1964 and lives in Liepāja.

### A. Proceedings against the applicant

7. On 1 October 1999 the applicant was arrested on suspicion of aggravated robbery.

8. On 11 April 2002 the Kurzeme Regional Court (*Kurzemes apgabaltiesa*) convicted the applicant of aggravated robbery and sentenced him to six years and one month's imprisonment.

9. On 5 June 2002, on the applicant's appeal, the Criminal Chamber of the Supreme Court (*Augstākās tiesas Krimināllietu lietu palāta*) upheld in substance the judgment of the first-instance court.

10. On 20 September 2002 the Senate of the Supreme Court (*Augstākās tiesas Senāts*) dismissed the applicant's appeal on points of law in a preparatory meeting (*rīcības sēde*).

11. On 23 August 2004 the Jelgava Court (*Jelgavas tiesa*) decided to apply a pre-release scheme to the applicant and ordered his release before the end of his sentence.

### B. Family visits during the applicant's detention

12. On 18 May 2000 the applicant's wife gave birth to their son.

13. On 16 November 2000 and 20 November 2001 the applicant received two short-term visits from his wife. He also received four short-term visits from his aunt during his pre-trial detention.

14. The applicant was able to receive long-term visits while serving his sentence, starting from 5 October 2002. Until his release on 23 August 2004 the applicant received six long-term visits from his wife; each of these visits lasted for about sixteen hours.

### C. Dental treatment during the applicant's detention

15. According to the Government, the applicant first complained about his dental care on 29 June 2000. A prison doctor prescribed pain relieving medication (Ibuprofen) and advised him to consult a dentist.

16. On 16 August 2000 the applicant complained of toothache to the prison doctor, who prescribed other pain relieving medication (Analgin) and advised him to consult a dentist.

17. On 18 August 2000 the applicant saw a dentist, who discovered that he had dental caries in one tooth. During his examination, the dentist noted that the applicant had two missing teeth and the remains of twenty-one damaged teeth. All in all, he had eight just healthy teeth. The applicant refused the recommended treatment.

18. On 10 August 2001 the applicant again complained of toothache to the prison doctor, who prescribed pain relieving medication (Analgin).

19. On 19 September 2001 the applicant was examined by a psychiatrist, who considered that the applicant's complaints of headaches were related to his dental cavity problems. The doctor advised him to consult a dentist.

20. On 25 October 2001 the applicant saw the dentist, who diagnosed him as suffering from periodontal disease (loose teeth). Subsequently, four teeth were extracted.

21. On 26 November 2001 the applicant lodged a complaint with the General Inspectorate (Ģenerālinspektora birojs), which at the material time was the institution in charge of organising the execution of criminal sentences and the probation system and was supervised by the Ministry of Justice. His complaint was that he had not been receiving appropriate dental care and that he needed dental prosthetics. The applicant's complaint was transferred to the Prisons Administration (Ieslodzījuma vietu pārvalde) for examination.

22. On 11 December 2001 the Prisons Administration informed the applicant that, following his requests, a dentist had made several extractions. This service had been free of charge. It had been established that the applicant had eight teeth left. It was presumed that he had not taken appropriate care of his teeth prior to his detention. The applicant was informed that dental prosthetics could be provided only at his own expense and that the Ministry of Finance did not allocate any funds to the Prisons Administration or prisons for this purpose.

23. On 27 December 2001 the applicant submitted a complaint to the Chancery of the President of Latvia (*Latvijas Valsts prezidenta kanceleja*) about his dental care. The applicant's complaint was transferred to the Ministry of Justice and from there to the General Inspectorate for examination, which transferred the complaint to the Prisons Administration.

24. On 12 February 2002 the Prisons Administration informed the applicant that he had already received an answer on 11 December 2001 as regards his complaint of 26 November 2001. It reiterated that dental prosthetics could not be provided free of charge in prisons.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Instructions on remand prisons

#### 1. *Instruction of the Minister of the Interior*

25. Until 14 May 2001 the detention of persons in remand prisons was governed by an instruction, which had been approved by the Minister of the Interior on 30 April 1994.

26. Rule 26 of that instruction provided that detainees placed in remand prisons were allowed to receive short-term visits upon approval from the authority conducting the criminal proceedings (that is, either from the investigating authorities or the court, depending on the stage reached in the proceedings).

27. Rule 32 of that instruction stipulated that detainees placed in remand prisons could receive one short-term visit (up to one hour) per month from family members and other persons only with written permission from the person or body dealing with the particular criminal case.

28. In 2001 the Ministry of Justice took over the supervision of penitentiary institutions from the Ministry of the Interior.

#### 2. *Transitional instruction of the Minister of Justice*

29. On 9 May 2001 the Minister of Justice issued an order enacting a transitional instruction on the detention of persons in remand prisons. The instruction entered into force on 14 May 2001.

30. Rule 25 of the transitional instruction provided that detainees could receive one short-term visit per month with written permission from the authority dealing with the particular criminal case.

#### 3. *Subsequent regulation by normative acts*

31. The transitional instruction of the Minister of Justice remained applicable until 1 May 2003, when Cabinet Regulation no. 211 (2003) took effect. Subsequently, Cabinet Regulation no. 288 (2006) replaced it as of 20 April 2006. Finally, the Law on Custody Procedure (*Apcietinājumā turēšanas kārtības likums*) took effect on 18 July 2006.

### B. Case-law concerning the nature of instructions

32. On 19 December 2001 the Constitutional Court (*Satversmes tiesa*) delivered its judgment in case no. 2001-05-03 on the compliance of the internal regulations on remand prisons (issued under the authority of the transitional instruction of the Minister of Justice) with the Constitution (*Satversme*). The Constitutional Court found, among other things, that the transitional instruction as well as the internal regulations on remand prisons

had not been made public and that they were internal normative acts (*iekšējie normatīvie akti*). As a result, it concluded that some of the rules contained in the internal regulations on remand prisons were unconstitutional, but not those concerning short-term visits.

### C. Case-law concerning visits while in a remand prison

33. On 23 April 2009 the Constitutional Court delivered its judgment in case no. 2008-42-01 on whether the restriction of the duration of short-term visits to one hour for detainees, which emanated from the Law on Custody Procedure (in effect since 18 July 2006), was in compliance with the Constitution.

34. Having examined the Court's case-law, the practice of several member States of the Council of Europe, and the European Prison Rules, the Constitutional Court found, on the one hand, that there was no obligation for States to ensure long-term visits for detainees and that the restriction to receive such visits was compatible with the Constitution, namely, with the right to private and family life contained therein. On the other hand, the Constitutional Court held that the blanket one-hour restriction on monthly short-term visits was not proportionate and thus not compatible with the Constitution. The restriction was abrogated as of 1 December 2009 and, since 11 August 2011, the relevant provision reads: "detainees have the right to receive visits lasting at least one hour from their relatives or other persons at least once a month".

### D. Medical assistance in custody

35. Cabinet Regulation no. 358 (1999), in force at the material time and effective until 28 March 2007, provided as follows:

> "2. Convicted persons shall receive the minimum standard of health care free of charge up to the amount established by the Cabinet of Ministers. In addition, the Prisons Administration, within its budgetary means, shall provide the convicted persons with:
> 2.1. primary, secondary and tertiary (in part) medical care;
> 2.2. emergency dental care;
> 2.3. examination of health conditions;
> 2.4. preventive and anti-epidemic measures;
> 2.5. medication and injections prescribed by a doctor of the institution;
> 2.6. medical accessories.
>
> 3. Detained persons shall receive medical care in accordance with Article 2 of these regulations, excluding planned in-patient treatment.... Detained persons shall be sent to receive in-patient treatment only in acute circumstances."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

36. The applicant complained of the domestic authorities' refusal to provide him with dental prosthetics, as well as a lack of proper dental treatment in that regard.

37. The Court will examine this complaint under Article 3 of the Convention, which provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

### A. Parties' submissions

38. The applicant submitted that prior to detention his dental health had been satisfactory. Conversely, while in detention his teeth had started to crumble; the only treatment that had been offered was extraction. The applicant considered that it had not been sufficient or appropriate treatment for his medical condition. In October 2001, however, extraction had been the only possible treatment.

39. The Government disagreed. They submitted that at the time of the applicant's detention his teeth had been in a catastrophic condition (see paragraph 17 above). They maintained that the applicant's dental problems had not begun in detention.

40. In their view, the fact that the applicant had not received dental prosthetics free of charge did not contravene Article 3 of the Convention. They noted that the Convention did not guarantee a right to receive medical care which would exceed the standard level of healthcare available to the population generally. The Government pointed out that dental prosthetics for the general population had not been provided free of charge at the material time in Latvia. The applicable Cabinet Regulation (see paragraph 35 above) provided for free emergency dental care to detainees; it did not include dental prosthetics.

41. Lastly, the Government argued that in the circumstances of the present case it could not be considered that dental prosthetics were so crucial to the applicant's well-being that to deny him them would attain the minimum level of severity required for Article 3 of the Convention to apply.

### B. Court's assessment

42. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of

severity is relative; it depends on all the circumstances of the case (see, among many others, *Farbtuhs v. Latvia*, no. 4672/02, § 49, 2 December 2004, and *Bazjaks v. Latvia*, no. 71572/01, § 105, 19 October 2010).

43. The Court further recalls that Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty by, among other things, providing them with the requisite medical assistance (see *Farbtuhs v. Latvia*, cited above, § 51).

44. First of all, the Court notes that there is no indication in the applicant's medical documents that his condition was of such a nature as to require constant medical supervision, in the absence of which he would face major health risks. Indeed, he had dental problems and these were addressed by the prison's medical staff whenever he complained about them. The applicant did not show any interest in addressing these problems himself as he did not follow through the recommendations to consult a dentist on several occasions. Furthermore, when he saw the dentist for the first time in 2000, the applicant expressly refused any treatment (see paragraph 17 above). Nor did he have any further complaints in that regard for over one year. The Court is thus unable to conclude that the national authorities did not ensure proper medical supervision of the applicant's condition. Secondly, the Court points out that the applicant himself admitted that in October 2001 extraction had been the only option. It was only after those extractions that he applied to the domestic authorities with a request for free-of-charge dental prosthetics.

45. Lastly, with regard to the possibility of obtaining dental prosthetics, it is important to note that the doctors who saw the applicant in the present case never recommended that he have dental prosthetics of any kind (see, on the contrary, *V.D. v. Romania*, no. 7078/02, §§ 21 and 97, 16 February 2010). Thus it cannot be said that dental prosthetics were a necessary treatment for the applicant's condition. Furthermore, according to the Government's submissions, which were not contested by the applicant, dental prosthetics were not available free of charge to the population generally in Latvia (see, on the contrary *V.D. v. Romania*, cited above, §§ 95 to 97). Nor is there any medical evidence that he had been starved or otherwise unable to receive sufficient sustenance while in custody (see *mutatis mutandis Stojanović v. Serbia*, no. 34425/04, § 80, 19 May 2009). Accordingly, the applicant's suffering did not reach the minimum threshold of severity required under Article 3 of the Convention.

46. It follows that there has been no violation of that provision.

## II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

47. The applicant complained that he had not been able to have long-term family visits while being held in custody, in particular, from his wife and newborn son, for more than two years.

48. The Court will examine this complaint under Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

### A. Preliminary considerations

49. In their observations on the merits of the case, the Government reiterated the preliminary objection that they had raised at the admissibility stage of the proceedings and maintained that this complaint was manifestly ill-founded on the ground that the applicant had failed to show his wish to exercise the right to family life. Furthermore, they argued that the applicant had failed to use domestic remedies on the same ground (that he had failed to show his wish to exercise the right to family life). Had he expressed the wish to exercise the right to family life at the domestic level, he could have subsequently lodged a complaint with the Constitutional Court about the compliance of the applicable instructions with the provisions of superior force, a remedy which had been available since 1 July 2001.

50. The applicant considered that his complaint should be examined on the merits.

51. The Court reiterates that, in accordance with Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *Moisejevs v. Latvia*, no. 64846/01, § 86, 15 June 2006). The Court notes that the Chamber rejected the Government's preliminary objection at the admissibility stage (see *Epners-Gefners* (dec.), no. 37862/02, § 52, 25 May 2010).

52. It is true that the Government may be dispensed from the obligation to raise their preliminary objections at the admissibility stage in exceptional circumstances (see, for example, *Assanidze v. Georgia* [GC], no. 71503/01, §§ 126 et seq., ECHR 2004-II), however the Court sees no exceptional circumstances in the present case. Thus, the Court concludes that the Government is estopped from raising a new preliminary objection.

### B. Parties' submissions

53. The applicant's main concern under Article 8 was that the domestic law did not provide for a right to receive long-term family visits while he was being held in custody, in particular, from his wife and newborn son. He further alleged that on an unspecified date a short-term visit by his wife and son had been denied for lack of suitable premises for a child.

54. The Government argued that Article 8 of the Convention did not guarantee a right to receive long-term visits for detainees. They relied on, most notably, the cases of *Messina v. Italy (no. 2)* (no. 25498/94, ECHR 2000-X), *Klamecki v. Poland (no. 2)* (no. 31583/96, 3 April 2003), and *Aliev v. Ukraine* (no. 41220/98, 29 April 2003) to argue that such a right could not be derived from the Court's case-law.

55. They further submitted that there was no common practice among the Council of Europe member States as regards the right to receive long-term visits for detainees. They noted that several member States did not provide for such a right in their domestic law given the temporary nature of detention. Other member States had laid down rules concerning the general or minimum number, frequency, length and manner of such visits.

56. As concerns Latvia, the Government submitted that the domestic law did not allow detainees to receive long-term visits for the reason that detention, unlike imprisonment, was a more temporary situation, which should not continue for prolonged periods of time and which was aimed at preventing manipulation of evidence in pending criminal proceedings and ensuring an impartial investigation and an objective decision-making process. They further relied on the Constitutional Court's ruling (see paragraph 33 above), in which that court accepted that the restrictions on visiting rights emanating from subsequent legislation were in pursuance of a legitimate aim, namely, the protection of public safety.

57. The Government maintained that the applicant had not, in practice, been prevented from exercising his right to family life. Even though long-term visits had not been allowed, the applicant had been entitled to receive short-term visits. According to the Government, that right was never denied or restricted by the State authorities, yet it was never effectively exercised by the present applicant. In this regard they noted that he had never asked for more short-term visits than the two he had received from his wife. Nor had he demonstrated a wish to receive longer or more frequent visits than those provided by law. Thus he could not claim to have been denied the right to family life, including long-term visits.

58. The Government relied on the Court's case-law in cases against Latvia to argue that the circumstances of the present case were different from cases where the Court found a violation of Article 8 of the Convention (*Lavents v. Latvia*, no. 58442/00, 28 November 2002; *Moisejevs*, cited above; and *Kornakovs v. Latvia*, no. 61005/00, 15 June 2006), and were

instead comparable to those where no violation was found (see *Nazarenko v. Latvia*, no. 76843/01, 1 February 2007, and *Čistiakov v. Latvia*, no. 67275/01, 8 February 2007).

59. Lastly, as concerns the applicant's allegation of having been denied short-term visits, the Government pointed out that the scope of the present case, as determined by the admissibility decision, did not include the alleged restrictions on short-term family visits. In any event, the applicant had previously never raised this issue and the Government had not been given an opportunity to comment on it.

### C. Court's assessment

60. The Court notes at the outset that in his observations on the merits of the case the applicant claimed that he had not been able to receive short-term visits from his wife and son during his pre-trial detention, a complaint that he had not raised before. As it has decided in previous cases, the Court need not rule on complaints raised after communication of an application to the Government (see *Ruža v. Latvia* (dec.), no. 33798/05, § 30, 11 May 2010 and the case-law cited therein). Moreover, the Court's decision on the admissibility of the present application determines the scope of the case currently before it; under Article 8 of the Convention it is limited to the question of long-term visits (see paragraphs 3 and 4 above).

61. The Court reiterates that detention, like any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a prisoner's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family (see *Messina v. Italy (no. 2)*, no. 25498/94, § 61, ECHR 2000-X; *Lavents*, cited above, § 139; *Estrikh v. Latvia*, no. 73819/01, § 166, 18 January 2007; and *Nazarenko v. Latvia*, no. 76843/01, § 25, 1 February 2007). This principle applies *a fortiori* to detainees not yet convicted, who must be considered innocent by virtue of Article 6 § 2 of the Convention, unless and to the extent that the requirements of the investigation require a different approach (see *Nazarenko*, cited above, § 25).

62. In the instant case, the applicant's complaint under Article 8 of the Convention relates to the State's failure to ensure long-term family visits for the applicant in a remand prison. The Court notes in this regard that, according to the applicable instructions at the time, detainees could only receive short-term visits (see paragraphs 25 to 30 above) while convicted prisoners could receive long-term visits. The Court, like the Commission previously (see *X. v. the Federal Republic of Germany*, no. 3603/68, Commission decision of 4 February 1970; *G.S. and R.S. v. the United Kingdom*, no. 17142/90, Commission decision of 10 July 1991; and *E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96,

Commission decision of 22 October 1997), has noted with approval the reform movements in several European countries to improve prison conditions by facilitating long-term (also called "conjugal") visits. However, the Court has stressed that the refusal of such visits may be regarded as justified for the prevention of disorder and crime within the meaning of Article 8 § 2 of the Convention (see *Aliev v. Ukraine*, no. 41220/98, § 188, 29 April 2003, and *Nazarenko*, cited above, § 26). The Court has recently confirmed that the Convention does not require the Contracting States to make provision for such visits. Accordingly, this is an area in which the Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 81, ECHR 2007-V).

63. The Court observes that previously examined cases against Latvia concerning family visits mostly related to refusals to allow even short-term visits in detention (see *Lavents*, cited above, § 139; *Moisejevs*, cited above, § 153; and *Kornakovs*, cited above, § 134). Another case concerned an applicant who could not prove that any family visits had been refused in the period under consideration and his complaint in that regard was therefore rejected on the ground that there had been no interference with his family life (see *Čistiakov*, cited above, § 33). Only two cases decided so far have concerned the restrictions on receiving long-term family visits in a remand prison (see *Estrikh*, cited above, and *Nazarenko*, cited above). The Court observes that in these cases the applicants had started off by actively requesting permission to receive short-term visits; in *Estrikh* they were constantly refused (see *Estrikh*, cited above, §§ 21, 23-24) and in *Nazarenko* they were granted (see *Nazarenko*, cited above, § 14). The refusals in the *Estrikh* case, coupled with the fact that the applicant was not entitled to receive long-term visits, were sufficient to consider that there had been an interference with the applicant's family life. In *Nazarenko* an express request by the applicant to receive a long-term family visit was first refused, but four months later it was allowed on account of the change in his status. Therefore, in view of the relatively brief waiting period and the fact that no short-term visits had been refused in the meantime, the Court concluded that no issues under Article 8 of the Convention had arisen.

64. Turning to the circumstances of the present case, the Court observes that in contrast to the above-mentioned cases, the current applicant was neither denied any short-term visits (contrast with *Estrikh*) nor did he apply for long-term visits while in a remand prison (contrast with *Nazarenko*). He did not complain to the domestic authorities but brought up this issue for the first time before the Court. In view of such circumstances and leaving aside the question of domestic remedies, especially in view of the Constitutional Court's subsequent intervention on this issue (see paragraphs 33 and 34

above), the Court has to establish whether the facts, as presented to it, constitute an interference with the applicant's family life within the meaning of Article 8 of the Convention.

65. First of all, the applicant received two short-term visits from his wife over a period of three years. No other visits were ever refused and for that reason the domestic authorities cannot be held responsible for the long periods of time between those visits. Nor can it be said that the domestic authorities imposed unreasonable restrictions on the number of family visits the applicant could receive as he did not seek to exercise his right to receive one family visit per month. Secondly, the Court observes that the applicant did not bring his family situation, in particular, the birth of his child, to the attention of the domestic authorities. The Court therefore comes to the conclusion that there has been no "interference by a public authority" within the meaning of Article 8 § 2 of the Convention with the applicant's right to respect for his family life guaranteed by Article 8 § 1.

66. Accordingly, there has been no violation of Article 8 of the Convention.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 29 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada Josep Casadevall
Registrar President