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

FIFTH SECTION

DECISION

Application no. 9982/24
Carlos CUADRADO SANTOS
against Spain

The European Court of Human Rights (Fifth Section), sitting on 24 April 2025 as a Committee composed of:

Stéphanie Mourou-Vikström*, President*,
María Elósegui,
Diana Sârcu*, judges*,

and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 9982/24) 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") on 22 March 2024 by a Spanish national, Mr Carlos Cuadrado Santos, who was born in 1993 and is detained in Monterroso Prison ("the applicant") and was represented by Mr Blanco Fernandez, a lawyer practising in Madrid;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The issue in the case is whether the Supreme Court's evolving interpretation of a provision of the Criminal Code was unforeseeable or arbitrary. The applicant relies on Article 6 § 1 of the Convention read alone and in conjunction with its Article 14 and/or Article 1 of Protocol No. 12 as well as on Article 7 of the Convention.

2. On 11 December 2019 the Burgos *Audiencia Provincial* found the applicant guilty of a sexual offence. At the time of the incriminated events the Criminal Code distinguished the crime of sexual abuse from that of sexual aggression, the latter requiring the additional element of violence or intimidation. The *Audiencia Provincial* found that the applicant, along with two other adults, had created a situation of circumstantial intimidation *(intimidación ambiental)* with regard to a 15-year-old victim. This situation

had compelled her to have sexual intercourse with them. The applicant was 24 years old when the events occurred, in November 2017. In his defence plea he argued for the application of section 183 *quater* of the Criminal Code, which excludes criminal liability for consensual sexual activities between peers who are close in age and degree of development or maturity.

3. The *Audiencia Provincial* found the applicant guilty of sexual aggression against a minor committed by way of circumstantial intimidation and sentenced him to twenty years of imprisonment. It rejected the exculpatory plea, relying on a psycho-social report indicating that the applicant's psychological maturity was substantially higher than that of the victim.

4. The applicant sought acquittal in his appeal before the Castilla and León High Court of Justice ("the High Court"). He denied any intimidation and asked again for the application of the exculpatory clause.

5. On 18 March 2020 the High Court partially granted the applicant's appeal. First, it found that there had been no circumstantial intimidation and reclassified the facts as sexual abuse, punishable by 10 to 12 years' imprisonment.

6. Further, while the High Court felt unable to apply section 183 *quater* as an exculpatory clause because of the age gap, it found that the applicant might avail himself of a mitigating circumstance based on that same provision. The court found that the age of the applicant (24) could be considered as "relatively close" to that of the victim (15) and that there was a similar, though quite low, degree of maturity and development both in the applicant's and the victim's perception of sexual relationships. Observing that section 183 *quater* included an undetermined legal concept (*concepto jurídico indeterminado)*, namely the degree of maturity, it held that section 183 *quater* could be the basis for recognising a mitigating circumstance if applied in conjunction with section 21 (7) of the Criminal Code. This latter expressly allows the use of a so-called analogy (*analogía*) to create a mitigating circumstance. Consequently, although the minimum sentence for sexual abuse was 10 years' imprisonment (see paragraph 5 above), the applicant's sentence was reduced to 4 years.

7. The applicant appealed on points of law before the Supreme Court. He maintained that the provision in section 183 *quater* should have been applied as an exculpatory clause, leading to his acquittal, and not only as a mitigating circumstance. Both the victim and the prosecutor objected, in their respective appeals on points of law, to the applicability of section 183 *quater* either as an exculpatory clause or as a mitigating circumstance.

8. While the appeal on points of law was pending, Institutional Law 10/2022, of 6 September, on the integral guarantee for sexual freedom (*Ley Orgánica 10/2022, de 6 de septiembre, de garantía integral de la libertad* sexual) entered into force. The new law merged sexual aggression and sexual abuse into the single notion of sexual aggression – a crime in

respect of which lack of consent, rather than violence or intimidation, is the determining element. Minor changes occurred in the wording of section 183 *quater* and the provision was renumbered as section 183 *bis*. Section 183 *quater* established that: "The free consent of a minor under sixteen years of age excludes criminal liability for the crimes defined in this chapter, if the perpetrator is a person close, in age and degree of development or maturity, to the victim". After Institutional Law 10/2022 entered into force the provision, which was renumbered as 183 *bis*, read: "Except when any of the circumstances of section 178 (2) apply, the free consent of a minor under sixteen years of age shall exclude criminal liability for the crimes defined in this chapter if the perpetrator is a person close, in age and degree of development of physical or psychological maturity, to the victim".

9. The Supreme Court, in its judgment of 30 November 2022, upheld the High Court's refusal to apply the provision in its exculpatory meaning, considering the nine-year age difference significant.

10. The Supreme Court further dismissed the High Court's approach in applying section 183 *quater* as a mitigating circumstance. It notably observed that: (i) the victim had consented to the sexual acts; (ii) even if there had been no intimidation, the events constituted a crime because the victim had not reached the age of sexual consent; (iii) the applicability of section 183 *quater* (new *bis*) had to be analysed considering the new wording given to the text after the introduction of Institutional Law 10/2022; (iv) even if the General Prosecutor's Office (*Fiscalía General)* had published guidelines in 2017 concluding that the provision could produce a mitigating circumstance, this interpretation had no legal basis (*sin anclaje legal*); (v) the provision could only lead to acquittal by its exculpatory meaning or, if inapplicable, to conviction, but no 'intermediate' options such as mitigation were allowed under its wording.

11. The Supreme Court also clarified that: (vi) the free consent of the victim was not sufficient to avoid the punishment because there should be a closeness between peers based on medical and psychological evidence; (vii) even between such peers, the mitigating circumstance in question could not apply to a 'sexual orgy' (*orgía sexual*) between adults and a minor. The Supreme Court added that the mitigating circumstance could potentially apply in other situations such as in a relationship between young peers close to the consent age limits or in a couple, but not in the context of group sex (*relación sexual grupal*).

12. The Supreme Court concluded that the case before it was significantly different from cases where the possibility to mitigate the perpetrator's criminal liability could be considered. It then went on to sentence the applicant afresh. It noted that the High Court had contemplated a general sentencing range between 10 and 12 years of prison. However, it observed that under the new law (see paragraph 8 above) the facts and their legal qualification were subject to a more favourable punishment, between 9 and

12 years' imprisonment and sentenced the applicant to 9 years and one day in prison.

13. One judge dissented. Stressing that the relevant case-law was not settled, he disagreed with the finding that section 183 *quater* (new *bis*) of the Criminal Code could not lead to mitigation and referred to some judgments in which the Supreme Court had upheld rulings of different *Audiencias Provinciales* or High Courts of Justice in that sense.

14. The cases the dissenting opinion referred to concerned charges of sexual activities with minors under the age limit of sexual consent; none of them dealt with the particular situation of group sex. In four cases (nos. 699/2020, 672/2022, 326/2020 and 446/2022), the lower courts had applied section 183 *quater* but the Supreme Court did not address the matter, apparently because none of the parties had raised this point before it. In another case (no. 700/2020), the existence of facts of mitigating nature was denied at every stage of the proceedings.

15. The applicant lodged an *amparo* appeal relying on the right to a fair trial and the prohibition of discrimination and referring to the above-mentioned dissenting opinion and the rulings referenced in it. The Constitutional Court declared the *amparo* appeal inadmissible on 15 November 2023 for lack of constitutional importance.

16. Independently from the present procedure, on 26 January 2024 the Supreme Court issued a plenary judgment settling the relevant case-law, explaining that section 183 *quater* (new *bis*) cannot produce a mitigating circumstance.

THE COURT'S ASSESSMENT

A. Alleged violation of Article 6 § 1 of the Convention

17. The applicant complained under Article 6 § 1 that the Supreme Court's judgment in his case was arbitrary and inconsistent with the previous case-law which recognised mitigating circumstances.

18. The Court notes that the mitigating circumstance in question was not defined as such in the Criminal Code and that in the applicant's case the Supreme Court expressly stated that the High Court had created a mitigating circumstance that had no legal basis (see paragraph 10 above). It observes that the possibility of interpreting section 183 *quater* (read in conjunction with the "analogy" clause in section 21 (7)) as the legal basis for mitigating circumstances had been mentioned in certain judgments of the *Audiencias Provinciales* or the High Courts of Justice, which were upheld by the Supreme Court (see paragraph 13 above).

19. However, having regard to the Supreme Court's reasoning, along with the arguments contained in the dissenting opinion (see paragraph 13 above) as well as the plenary judgment of 26 January 2024, which was adopted later

precisely with the aim to harmonise the case-law, it is clear that, at the time when the applicant's case was pending, the applicability of section 183 *quater* (new *bis*) as a mitigating circumstance "by analogy" was not settled in the case-law and different interpretations were deemed legitimate.

20. The Court recalls that one of the fundamental aspects of the rule of law is the principle of legal certainty, which, *inter alia*, guarantees a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Borg v. Malta*, no. 37537/13, § 107, 12 January 2016).

21. However, the Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. It is not in principle the Court's function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (see *Melgarejo Martinez de Abellanosa v. Spain*, no. 11200/19, § 29, 14 December 2021).

22. In addition, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law and case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Borg*, cited above, § 107).

23. The criteria that guides the Court's assessment to examine cases concerning conflicting court decisions consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied, and if appropriate to what effect (see *Borg*, cited above, § 108). The Court has reiterated on many occasions the importance of setting mechanisms in place to ensure consistency in court practice and uniformity of the courts' case-law and it has declared that it is the States' responsibility to organise their legal systems in such a way as to avoid the adoption of discordant judgments (see, albeit in civil context, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 53 and 55, 20 October 2011). The role of a supreme court is precisely to solve such conflicts (see *Beian v. Romania (no. 1)*, no. 30658/05, § 37, ECHR 2007-V (extracts)).

24. In the present case, the Court observes that the Supreme Court did not reverse the lower courts' use of mitigating circumstances "by analogy" in some cases between 2020 and 2022. However, those cases concerned situations factually different from the applicant's case and, in any event, it appears that the prohibition of *reformatio in peius* prevented the Supreme Court from embarking on the legal basis of mitigation (see paragraph 14 above). The Court therefore considers that those few cases, compared to the stand taken in the applicant's case, do not show a "profound and long-standing difference" in the case-law.

25. While it is true that some divergences appeared, especially since section 183 *quater* of the Criminal Code required a case-by-case analysis of the age gap and the development and maturity of the accused and the victim, the Court observes that the legal system provided for a mechanism to address those divergences. In order to settle the interpretation of the law as to avoid discordant judgments, the plenary judgment of 26 January 2024 was adopted (see paragraph 16 above). What is relevant for the purposes of the present case is that the judgment in the applicant's case can be considered as being part of the evolution of case-law that was finally settled with the plenary judgment and that there is nothing indicating that the solution adopted was arbitrary or otherwise in breach of the principle of legal certainty.

26. In these circumstances, the applicant could not expect that what was ultimately pointed out by the Supreme Court as a misconception of the law would be maintained. Conversely, he could foresee, if necessary with the assistance of a lawyer, that he risked being convicted of the crime in question without any mitigating circumstances applied.

27. In any event, even if the case-law would have been settled by the time when the applicant's case was tried, the Court observes that the factual situations in earlier judgments were different and that no mitigation had ever been recognised in respect of a 'sexual orgy' (see paragraph 14 above). In the instant case, the mitigating circumstance could not be applied to the applicant for several reasons related to the facts of the case, as expounded by the Supreme Court (see paragraph 10 and 11 above). Therefore, it appears that the question whether section 183 *quater* of the Criminal Court could be interpreted as providing for mitigating circumstances did not have any impact on the outcome of the applicant's case.

28. The Court is thus satisfied that the Supreme Court's judgment was based on the factual circumstances of the case as they had been established by the lower courts, that the applicant's arguments were heard in the appeal on points of law and that the ruling cannot be seen as raising an issue of legal certainty.

29. The Court concludes that the applicant's complaints under Article 6 § 1 of the Convention are manifestly ill-founded. They must therefore be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Articles 14 and/or Article 1 of Protocol No. 12

30. The applicant complained that the Supreme Court's interpretation of the applicability of section 183 *quater* (new *bis*) in his case amounted to a breach of Article 1 of Protocol No. 12 and/or Article 14 read in conjunction with Article 6 of the Convention because it was linked to the fact that his trial had attracted considerable media attention.

31. The Court recalls its constant case-law to the effect that Article 14 and/or Article 1 of Protocol No. 12 do not prohibit all differences in treatment but only those based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another (see *Molla Sali v. Greece* [GC], no. 20452/14, § 133-34, 19 December 2018).

32. The Court considers that the applicant failed to substantiate his assertions with *prima facie* evidence that the Supreme Court had modified its interpretation because of the media exposure. In addition, it has already found under Article 6 that the factual situation in the applicant's case was not comparable to the one in the other judgments submitted (see paragraph 27 above).

33. The Court therefore considers that these complaints are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

C. Alleged violation of Article 7 of the Convention

34. The Court observes that the applicant's allegations may be understood to raise in substance a complaint under Article 7 because the new law that changed section 183 *quater* entered into force pending the appeal on points of law (see paragraph 8 above).

35. The Court notes that Institutional Law 10/2022 re-codified the entire legal framework of sexual offences and that section 183 *quater*, around which the applicant's complaints revolve, underwent only inconsequential changes in its wording and was renumbered as section 183 *bis* (see paragraph 8 above). The applicant has not shown that the fact that the domestic court mentioned section 183 *bis* had any impact whatsoever on his situation in so far as the applicability of the mitigating circumstance was concerned. In fact, the reason why Institutional Law 10/2022 was mentioned lay in the fact that it served as basis to lower the applicant's sentence to 9 years and one day in prison instead of 10 years, because of the changes in the sentencing framework (see paragraph 12 above).

36. The Court therefore considers that these complaints, largely overlapping with those examined under Article 6, are likewise manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 15 May 2025.

Martina Keller Deputy Registrar	Stéphanie Mourou-Vikström President