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

THIRD SECTION

DECISION

Application no. 54140/21
Saúl JORGE LÓPEZ
against Spain

The European Court of Human Rights (Third Section), sitting on 20 Septembre 2022 as a Committee composed of:

Peeter Roosma*, President,*
María Elósegui*,*
Frédéric Krenc*, judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 54140/21) 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") on 28 October 2021 by a Spanish national, Mr Saúl Jorge López ("the applicant"), who was born in 1997 and lives in Vigo, Pontevedra, and was represented by Ms I. Elbal Sánchez, a lawyer practising in Madrid;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns an alleged breach of the applicant's freedom of expression under Article 10 of the Convention, and of the right of access to a court under Article 6 § 1 of the Convention.

2. The applicant is a rapper in group "*la Insurgencia"* ("Insurgency"), also known as *"Saúl Zaitsev"* or *"Shahid"*.

3. The group' songs were performed at concerts and freely available on its YouTube channel which had more than 1,900 followers and garnered 400,000 views. The group also had a Facebook profile with their songs and videos.

4. The songs conveyed messages of extreme left-wing politics. Notably, they praised the actions and members of a Spanish terrorist group GRAPO ("Antifascist Resistance Groups October First"), which appeared during the

Spanish transition to democracy and followed Marxist–Leninist ideology. The first GRAPO's violent action happened on 1 October 1975 (considered as its starting point) when four Spanish policemen were killed. Since 1975, 84 people have fallen victims to its bombings and shootings, including police and military personnel, judges and civilians. Its militants also committed bank robberies and kidnappings. Its last deadly attack was in February 2006 when the owner of a temporary work agency in Zaragoza was shot dead; followed by a bank robbery in 2006 in Santiago de Compostela. Several members of the group were detained in Spain in 2007. To date, the terrorist group has not made any statement declaring its dissolution and several criminal proceedings against its members are still pending in Spain. Furthermore, in 2018 there were 18 members of GRAPO still in prison.

5. Some songs evoked ETA, an armed Basque nationalist and separatist terrorist organization. Between 1968 and 2010 its actions have claimed 829 lives (including 340 civilians) and injured thousands. ETA was classified as a terrorist organisation by Spain, France, the United Kingdom, the United States, Canada and the European Union. In 2011 ETA announced a "definitive cessation of its armed activity" and in 2017 that it had given up all its weapons and explosives (see *Erkizia Almandoz v. Spain*, no. 5869/17, §§ 18-19, 22 June 2021)[1]. In 2018 there were 234 members of ETA in Spanish prisons. One song said "Let's see if they can go without eating, like [an imprisoned member of ETA's] hunger strike in 2006, that's fighting for your rights".

6. The songs written and published between 2014 and 2016 "called for action" using armed struggle against politicians, judges, security forces, rich and the royal family. For example, the lyrics contained the following passages:

> - [During a concert] "*When I speak about hip-hop I'm talking about armed fight"*, accompanied by the image of a graffiti reading *"Let the GRAPO come back!";*
>
> - *"Enjoy imagining a terrorist attack in the Congress";*
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> - *"I'm back but I had not left, I was planning to blow up the Valle de los Caídos [Franco's grave]";*
>
> - *"Beat up the Students Union, friends of police, with a bat";*
>
> - *"My heroes are not the capos [mafia bosses], my heroes are the GRAPOs";*
>
> - *"It's legitimate as expropriating at Carrefour / entering the Popular Party headquarters with a gun and [sound of a shot]";*
>
> - *"Gun-wielding commandos are needed";*

[1] Report commissioned by the Government of the Basque Country, quoting the *Informe sobre la injusticia padecida por las personas amenazadas por ETA (1990-2011). José Ramón Intxaurbe, Vitorica Eduardo J. Ruiz Vieytez, Gorka Urrutia Asua. Instituto de Derechos Humanos Pedro Arrupe / Eusko Jaurlaritza Universidad de Deusto 31 de marzo de 2016.*

- *"Ropes and guillotines are needed for the police chiefs' pigs";*

- *"It's surprising that the Bourbons [the royal family] have not yet suffered from bomb explosions";*

- *"Three gunshots for Frente Atletico [right-wing football hooligans' group]";*

- *"We'll soon see the blood of our rulers";*

- *"I would like to fire seven shots at a rich as [a GRAPO's member] did with a judge".*

7. On 4 December 2017 the Fourth Section of the Criminal Division of the *Audiencia Nacional* convicted the applicant of public praise or justification of terrorism under Article 578 of the Criminal Code and sentenced him to two years' imprisonment and a fine of 4,800 euros (EUR). Article 578 reads:

> "1. Public praise or justification of the [terrorist] criminal offences or of those who have participated in the perpetration thereof ... shall be punished with a penalty of one to three years' imprisonment and a fine ... The judge may also order ... any or some of the [additional] prohibitions...
>
> 2. The penalties foreseen in the previous Section shall be imposed in the upper half when the deeds have been carried out through the dissemination of services or contents accessible to the public through the media or the Internet..."

8. On 18 September 2018 the Appeals Division of the *Audiencia Nacional* reduced the applicant's sentence to six months' imprisonment and a fine of EUR 1,200. Regarding the expressions used in the songs, the judgement stated:

> "...the content of the songs is unequivocally aimed at praising terrorist organisation GRAPO, its members and activities, indirectly inciting terrorist violence, like that perpetrated by ETA, identifying musical performance with the language of hatred, and as the judgment under appeal rightly states, the attempt to frame their musical performance in a more metaphorical sense of emotions and thoughts only detracts ... from the highly inciting content, which is reinforced by certain images that accompany the music... to accentuate the incitement to violence ... As the judgement stated, ...the message of praise and justification for ... GRAPO permeates the production in large and obvious doses... We understand that the lyrics ... go beyond the expression of support to political objectives or ideological statements, being undoubtedly a justification of violent means and an invitation to the use of terrorist methods, representing terrorism as deserving of praise ... [The songs] have no qualms about highlighting these criminal activities, even inviting to reproduce them ... The defendant's texts exude a message of elimination of the ideological adversary in a clear setting of hostility and ... violence, conveyed in typical hate speech, in which terrorism is, on the one hand, proposed as a solution and, on the other hand, justified."

Concerning the incitement to violence the judgement recalled that the domestic case-law required that "the author's intent to create a situation of risk to persons or the rights of third parties or to the system of freedoms itself must be objectively established". Such intent could be objectively established in the case at hand, given the nature of the statements, the author's personality, target audience and other relevant circumstances. It considered that the lyrics were intended to "trigger an emotional reflex of hostility, incite

and promote hatred and intolerance ... towards individuals, representatives of the state or a part of the population, the national authorities". This incentive was accentuated by highly aggressive images, sometimes accompanied by the GRAPO's flag and inscription "Political prisoners". The judgment pointed to the dangers in disseminating such message to young audiences, who due to "their lack of full knowledge of the [past] terrorist events, in situations of ... economic precariousness, or for similar reasons" could find it appealing and fall to the incitement. The court referred to examples from the songs, calling for violent actions against bankers, political parties, burning ATMs, etc. It noted that the texts singled out segments of population as being responsible for the creation of an unjust society, proposing violent methods as solutions. Such lyrics were not mere allegories or symbolic representations, they openly praised and justified terrorist organisations and their actions as an appropriate method of social struggle, and thus indirectly incited, encouraged and instigated terrorist violence, creating a risk of violent acts being committed. Condemned members of terrorist organisations were portrayed "as authentic popular heroes, ... victims of an unjust system keeping them in prison." The impact on public opinion was significant, as thousands of users accessed the YouTube channel. The court recalled that terrorist activity was a reality which provoked suffering in Spain and concerned terrorism of different nature (ETA, GRAPO, jihadism, anarchist, etc). It also mentioned that it shouldn't be forgotten that [ETA and GRAPO] had not disappeared and that some of the crimes committed were still pending to be judged. The suffering of many victims and their relatives should also be taken into account.

The court concluded that the interference with the applicant's freedom of expression was necessary and proportionate in the instant case. Nevertheless, considering mitigating circumstances, the Appeals Division reduced the sentence on the basis of Article 579 *bis* § 4 of the Criminal Code which allowed imposition of a smaller sentence "if the deed was objectively of lesser importance, in view of the method employed or the result produced".

9. On 10 June 2020 the Supreme Court dismissed a cassation appeal by the applicant, recalling that the traces of ETA and GRAPO acts were still active in many victims and they were remembered as a traumatic experience in the Spanish society. A plea of nullity was dismissed on 28 July 2020.

10. On 26 April 2021 the Constitutional Court declared an *amparo* appeal by the applicant inadmissible for lack of constitutional relevance.

11. On 11 January 2021 the execution of the applicant's six-month prison sentence was suspended and the applicant did not enter prison. Indeed, according to Article 80 of the Spanish Criminal Code, sentences not exceeding two years of imprisonment may be suspended by the judge through a motivated decision, when it is reasonable to believe that the serving of the sentence is not necessary to avoid the future perpetration by the convict of new criminal offences. To adopt this decision, the judge (...) shall consider the circumstances of the criminal offence perpetrated, the personal

circumstances of the convict, his record, his personal behaviour after the deed, in particular the effort made to repair the damage done, his family and special circumstances and the effects to be expected from the suspension of the serving itself and of complying with the measures handed down.

12. The applicant complained under Article 10 of the Convention that his freedom of expression had been violated because the interference with that right had not been necessary. He highlighted that the essence of rap was to provoke the public opinion ("protest songs") and that in any event the GRAPO terrorist group had ceased to exist in 2007.

13. The applicant also relied on Article 6 § 1 of the Convention, arguing that his right to an effective remedy had not been respected because the Constitutional Court, on the basis of formal admissibility criteria, had refused to give a judgment on the merits of his case.

THE COURT'S ASSESSMENT

A. Complaint under Article 10 of the Convention

14. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. It is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (see, for example, *Otegi Mondragon v. Spain*, no. 2034/07, § 48, ECHR 2011, *Erkizia Almandoz*, cited above, § 37, and *Z.B. v. France*, no. 46883/15, § 52, 2 September 2021).

15. The conviction in issue clearly constituted an interference with the applicant's right to freedom of expression as guaranteed by Article 10 § 1 of the Convention. The Court is further satisfied that the interference was prescribed by law (see paragraph 7 above) and pursued a legitimate aim, namely the prevention of disorder and crime, within the meaning of Article 10 § 2 of the Convention. The main question in the present case is therefore whether the interference was "necessary in a democratic society" (see, for example, *Otegi Mondragon*, cited above, § 49; and *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 196-97, ECHR 2015).

16. In exercising its supervisory jurisdiction, the Court's task is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. The Court has to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether it was "proportionate to the legitimate aim pursued". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that

they relied on an acceptable assessment of the relevant facts (see, among many other authorities, *Yavuz and Yaylalı v. Turkey*, no. 12606/11, § 44, 17 December 2013, *Erkizia Almandoz,* cited above, §§ 37-40, and *Z.B. v. France*, cited above, §§ 53-54). The Contracting States have, under Article 10, a certain margin of appreciation in judging the necessity and extent of an interference with the freedom of expression protected by that provision (see *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 59, ECHR 2012, and *Z.B. v. France*, cited above, § 58). Regarding statements that may constitute a call to violence, the Court has had regard to the following factors: (i) whether the statements were made against a tense political or social background, (ii) whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance, and (iii) the manner in which the statements were made, and their capacity – direct or indirect – to lead to harmful consequences (see *Perinçek*, cited above, §§ 204-207, and *Erkizia Almandoz,* cited above, §§ 40-41).

17. The applicant's conviction was based on the findings that his songs and videos justified and glorified terrorism, in particular, the GRAPO terrorist group, individuals convicted of being its members, and crimes committed by it. The songs were also found to incite hatred and enmity on various grounds. The domestic courts found that the songs had openly called for violent acts, communicated to the audience the idea that recourse to violence and terrorism was justified, approved of terrorist methods and acts, and praised attacks that had claimed many lives (see paragraphs 7-8 above). The Court also observes that those songs were easily and freely available online and had been performed at concerts, and thus had the potential to reach a large number of people, including those of a young age.

18. Recalling the principles summarised above in paragraph 16, in relation to the social background existing when the songs were published, the Court recalls domestic decisions (see paragraphs 8 and 9 above) and notes that while the latest terrorist actions of GRAPO and ETA dated back some years prior to the events, one could not ignore that both had carried out terrorist activities in Spain for decades, causing numerous deaths and injuries (see paragraphs 4 and 5 above). Criminal proceedings against the members of both terrorist organizations were pending before the Spanish courts and remained in the focus of attention of the society and the media. These traumatic events were therefore still fresh in the country's collective mind, justifying an enhanced degree of regulation of statements relating to them (see *Perinçek*, cited above, § 250, and *Z.B. v. France*, cited above, § 59).

19. Answering the question whether the songs could be seen as a direct or indirect call or justification for violence, hatred or intolerance, the domestic courts pointed out explicit references to violent or terrorist methods, mentions in a positive connotation of the use of explosives and other weapons, beating up opponents, and causing material damage such as attacking ATMs or

supermarkets (see paragraphs 6 and 8 above). The lyrics directly suggested injuring or killing politicians, judges, security forces, rich, royal family and those perceived as ideological opponents. To sum up, the songs communicated to listeners the general idea that recourse to violence and terrorism was justified. The Court agrees that these statements went far beyond what could be perceived as "protest songs", as they were described by the applicant, and the acceptable limits of criticism (see *Stomakhin v. Russia*, no. 52273/07, § 103, 9 May 2018).

20. Concerning the manner in which the statements were made, and their capacity to lead to harmful consequences, the domestic judgements highlighted the fact that the messages were especially targeted at young people, and that they were conveyed to the wide audience through a YouTube channel, a Facebook profile or in concerts. The Court also finds reasonable the assessment of the domestic courts of the risk of accentuation of the verbal message by the aggressive videos and use of GRAPO's insignia.

21. The Court concludes that the Appeals Division, convicting the applicant, took care to assess his guilt on the basis of the criteria defined by the Court's case-law, having regard to the requirements of Article 10 § 2 of the Convention, and after weighing up the various interests involved. The Court sees no serious reason to substitute its assessment for that of the national authorities, recalling the importance, in a case such as this, of the reasoning of the national courts. The grounds on which the applicant's conviction was based, namely combating public praise or justification of terrorism, appear to be both "relevant" and "sufficient" to justify the interference at issue, and in that sense met a pressing social need (see *Z.B. v. France*, cited above, §§ 65-66, and, *mutatis mutandis, ROJ TV A/S v. Denmark* (dec.), no. 24683/14, § 47, 17 April 2018).

22. Lastly, an assessment of the nature and severity of the sanctions should be carried out to ascertain whether the interference was proportionate. In the context of Article 10 of the Convention, a criminal conviction constitutes one of the most serious forms of interference with the right to freedom of expression (see *Z.B. v. France*, cited above, § 67, and *Reichman v. France*, no. 50147/11, § 73, 12 July 2016). In the instant case the execution of the prison sentence initially imposed was later suspended and the fine was reduced to EUR 1,200 (see paragraph 11 above). The domestic courts found reasons to apply Article 579 *bis* § 4 of the Criminal Code and reduced the sanction to the lowest level (see paragraph 8 above). The Court concludes that the applicant's criminal conviction cannot be considered disproportionate to the legitimate aim pursued.

23. In the light of the foregoing, the Court considers that the complaint under Article 10 of the Convention is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4 of the Convention.

B. Complaint under Article 6 § 1 of the Convention

24. As regards the applicant's complaint under Article 6 § 1 of the Convention, the Court considers that it should be examined as an issue of access to the Constitutional Court. The Court reiterates that Article 6 § 1 of the Convention embodies the "right to a court", which guarantees not only the right to institute proceedings but also the right to obtain a determination of a complaint on the merits by a court (see, for example, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 86, 29 November 2016). The general principles on access to a superior court were summarised by the Court in *Zubac v. Croatia* ([GC], no. 40160/12, §§ 76-99, 5 April 2018).

25. The Court notes that the applicant was able to lodge an *amparo* appeal with the Constitutional Court, although his appeal was declared inadmissible for lack of constitutional relevance.

26. The decision of the Constitutional Court cannot be considered irrational or arbitrary and, therefore, determining the compliance of the appeal with domestic requirements is a task that falls outside the scope of the Court's jurisdiction. In the present instance, the applicant's case was thoroughly examined by ordinary courts and he was able to lodge an *amparo* appeal with the Constitutional Court. The applicant simply disagrees with the outcome and the fact that it did not favour his interests (see *Arribas Anton v. Spain*, no. 16563/11, § 42, 20 January 2015, and *Zubac*, cited above, § 82).

27. In the light of the foregoing, the Court considers that the complaint under Article 6 § 1 of the Convention is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 13 October 2022.

Olga Chernishova Deputy Registrar	Peeter Roosma President