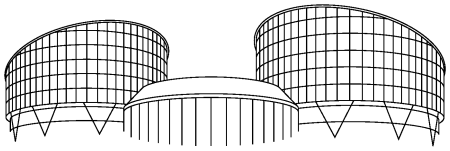

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GÓMEZ OLMEDA v. SPAIN

(Application no. 61112/12)

JUDGMENT

STRASBOURG

29 March 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gómez Olmeda v. Spain,

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

Helena Jäderblom, *President,*
Luis López Guerra,
George Nicolaou,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková, *judges*,
and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 8 March 2016,

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

PROCEDURE

1. The case originated in an application (no. 61112/12) 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") by a Spanish national, Mr Jorge Gómez Olmeda ("the applicant"), on 11 September 2012.

2. The applicant was represented by Mr J.J. Bravo Iglesias, a lawyer practising in Plasencia. The Spanish Government ("the Government") were represented by their Agents, Mr F.A. Sanz Gandasegui and Mr R.A. León Clavero, State Attorneys.

3. The applicant alleged that his conviction for false accusation of a crime on appeal without being able to defend himself in open court amounted to a violation of his right to a fair hearing under Article 6 § 1 of the Convention.

4. On 19 March 2013 the application was communicated to the Government. The Government and the applicant filed written observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1967 and lives in Plasencia.

6. On 3 January 2011 following a trial, the Plasencia criminal judge (*juez de lo penal)* no. 1 sentenced the applicant to six months' imprisonment for serious disobedience to public authority (*desobediencia grave a la*

autoridad). The applicant was acquitted of other charges against him, namely false accusation of a crime (*calumnias*), defamation (*injurias*) and concealment (*encubrimiento*).

7. The judge established that the applicant was the webmaster of an Internet forum on which defamatory messages against the complainants in the proceedings had been published, and that he had deliberately disregarded the request made to him by a police officer within the framework of the criminal investigation not to alter the messages in question. In fact, the applicant had proceeded to have the forum webpage removed altogether, despite the police officer's request to leave it unchanged. As regards the charges for defamation and false accusation of a crime, the judge held that there were reasonable doubts as to whether the applicant had been aware of the messages in question before his police interview and that he should therefore be acquitted in that regard. It was also alleged that he had protected the individuals who had made the defamatory statements; however, the judge considered that he could not be found guilty of concealment as it had not been proved that he had been aware at the time of his police interview that it had been possible for him to have access to the Internet Protocol (IP) numbers of the participants on the forum.

8. Both the prosecution and defence appealed against the judgment before the Cáceres *Audiencia Provincial*. The applicant did not request a hearing, nor did the *Audiencia Provincial* order one. Instead, the court watched a video-recording of the trial.

9. On 16 May 2011 the *Audiencia Provincial* upheld the applicant's conviction for serious disobedience to public authority and, unlike the first-instance judge, found him guilty of continuous and false accusation of a crime (*delito continuado de calumnias*). His punishment was a daily fine of 15 euros (EUR) for a period of eighteen months. He was also required to pay damages. In finding the applicant guilty, the appellate court stated that it had relied on the facts established by the first-instance judge and on the testimony given by the complainants, the applicant and the witnesses in the earlier trial. The court stated:

> "Fourth. The facts declared proved in the first-instance judgment constitute continuous and false accusation of a crime and defamation regulated and punished by section 205 and seq. of the Criminal Code in relation to section 74 of the same Code for which the defendant Jorge Gómez Olmeda should be declared guilty as a principal pursuant to sections 28 and 30 of the Code with the mitigating factor of undue delays pursuant to section 21 paragraph six of the Code.
>
> ...
>
> It is undisputed that documentary evidence does not require judicial immediacy for its assessment because it is written down and can be read and interpreted in the light of the circumstances of the case, which had been perfectly outlined in the complainants' brief and proved in the hearing, both with respect to what was written on the forum and the people against whom those expressions were directed. Those expressions imputed the commission of crimes to the complainants (sexual assault,

sexual slavery of a person) and were detrimental to their fame and reputation to the extent that it is obvious that the imputations were serious in themselves and related to public understanding, which is an open-ended concept of which interpretation depends on the particular facts of the case. It is worth remembering that we are speaking here of a small town where everybody knows each other, where everybody runs into each other, where everybody attends the same places, where everyday life is routine and there is little room for novelties, where anything breaking the monotony is something which attracts public attention, where the genealogy of every inhabitant is known to the rest. For these reasons we find the applicant guilty of the crime of continuous and false accusation of a crime ...which he had been acquitted of at first instance.

The applicant states that he was the administrator of the forum; that he did not log onto it very often; that he lacked computer skills and that he had removed some phrases and messages which in his view might be considered insulting for the purposes of the case now before us. We disagree with the accused when he states that he was unaware of what was written on the forum, the argument on which the first-instance judge relied to acquit him of false accusation of a crime and defamation. And we disagree for the following two reasons. Firstly, because it was part of his duties as the administrator of the forum to be aware of what was written on it, to the extent that he was its 'censor', so to speak, on account of the fact that he had created it; and secondly, because it is untrue that he was unaware of what was written on it, since he had removed some phrases and messages which were insulting to the complainants, thus proving that he had read what was written on the forum in question and demonstrating that he had regarded what was written there as insulting to a specific individual or individuals, which led him to the decision to remove what he regarded as defamatory or insulting."

10. The applicant applied to the *Audiencia Provincial* to have the previous proceedings before it declared void. His application was dismissed on 29 September 2011 on the grounds that no legal provision had been infringed and none of his rights had been breached in those proceedings.

11. The applicant lodged an *amparo* appeal with the Constitutional Court. He cited Article 24 of the Constitution (right to a fair hearing), complaining that the *Audiencia Provincial* had convicted him on appeal without giving him the opportunity to plead his case in open court.

12. By a decision served on 13 March 2012 the Constitutional Court declared the applicant's *amparo* appeal inadmissible as it had no special constitutional significance.

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. The relevant provision of the Spanish Constitution reads as follows:

Article 24

"1. Everyone has the right to obtain the effective protection of judges and the courts in the exercise of his or her legitimate rights and interests, and in no event may he or she go undefended.

2. Likewise, everyone has the right of access to the ordinary courts as predetermined by law; to the defence and assistance of a lawyer; to be informed of the

charges brought against him or her; to a public hearing without undue delays and with full guarantees; to the use of evidence appropriate to his or her defence; not to make self-incriminating statements; not to declare himself or herself guilty; and to be presumed innocent."

14. The relevant provisions of the Spanish Criminal Code read as follows:

Section 21

The following are mitigating circumstances:

...

6. Extraordinary or undue delay of the proceedings, as long as this is not due to the accused, where such delay is disproportionate to the complexity of the cause.

Section 28

"Principals are those who perpetrate the act themselves, alone, jointly, or by means of another used to aid and abet.

The following shall also be deemed principals:

(a) Whoever directly induces another or others to commit a crime;

(b) Whoever co-operates in the commission thereof by an act without which a crime could not have been committed."

Section 30

"1. In the case of both serious and minor offences committed by the use of media or mechanical means of dissemination, neither accomplices nor those who have personally and actually facilitated the commission of such offences shall be held criminally liable.

2. The principals to whom section 28 refers shall be held criminally liable in a series of stages, in an exclusive and subsidiary fashion, in the following order:

(1) Those who actually wrote the text or produced the symbol in question and those inducing the commission of those acts.

(2) The directors of the publication or broadcast through which the material has been disseminated.

(3) The directors of the publishing, issuing or broadcasting company.

(4) The directors of the recording, production or printing company.

..."

Section 74

1. (...) whoever perpetrates multiple acts or omissions in the execution of a preconceived plan or by taking advantage of an identical occasion and where these acts or omissions offend one or several subjects and infringe the same criminal provision or provisions that are equal to or of a similar nature, shall be punished as the principal of a continued serious or minor offence (...).

...

3. What is set forth in the previous sections does not include offences against eminently personal property, except offences against honour and sexual freedom and indemnity that affect the same victim. In these cases, criminal continuity shall be determined, or otherwise, by the nature of the fact and the provision infringed.

Section 205

"False accusation of a crime means accusing someone of committing a criminal offence while being aware that the accusation is false or with reckless disregard for the truth."

Section 208

"Acts or expressions which undermine another's dignity by attacking his or her reputation or self-esteem shall constitute insults.

Only insults which, by virtue of their nature, effects and context are generally acknowledged to be serious shall constitute an offence ..."

Section 211

"Defamatory statements and insults shall be regarded as made public when they are circulated by printing, broadcasting or by any other media having a similar effect."

15. The relevant provision of the Spanish Criminal Procedural Law in force at the time the appeal proceedings took place reads as follows:

Section 791

"1. If the ratification or submissions brief include a request for the production of evidence or for the watching or hearing of the evidence recorded, the court shall rule on its admission within three days and shall, if appropriate, order the court clerk to set a date for the hearing. A hearing can also be held, ex officio or at a party's request, where the court deems it necessary to reach a sound decision."

16. The Constitutional Court has had the opportunity to rule on whether, where a defendant has been acquitted by the first-instance court of committing an offence but has been subsequently convicted on appeal, the viewing by the appellate court of a video-recording of the hearing at first instance satisfies the requirements of Article 24 of the Constitution. In its judgment no. 120/2009 of 18 May 2009 it stated that:

"6. ... we must now examine the issue which singularises the instant *amparo* appeal, namely whether the guarantees of immediacy and adversarial procedure have been duly safeguarded or not by the appellate court's viewing of the video-recording of the hearing held before the first-instance judge.

...

In this connection, an examination of the aforementioned case law of the European Court of Human Rights makes it clear that in cases where the requirements to which this case-law refers are fulfilled, it is necessary for the appellate court to conduct a 'direct and personal' examination of the accused and of the statements given by him or her in person, at a new hearing in the presence of other interested persons or complainants.

...

7. ... The *Audiencia Provincial* considered [in the instant case] that after having watched the video-recording of the criminal trial, it was entitled to conduct a new assessment of the oral evidence produced at that hearing. The appellate court found that the judge of the lower court had made a mistake in the assessment of that evidence and accordingly it proceeded to establish a new account of the facts which led to the conviction of those who had been initially acquitted.

However, the truth is that that court was not entitled to assess that oral evidence - which concerned the credibility of the witnesses – in a different way from the first-instance judge insofar as it had not held a public hearing at which the witnesses at the hearing at first instance had been heard in person and directly by the court and there were no legal grounds precluding the appearance of those witnesses before the court. Accordingly, as the appellate court did not comply with that requirement, it violated the appellant's right to a fair hearing under Article 24 § 2 of the Spanish Constitution."

17. The Constitutional Court reached similar conclusions in their subsequent judgments no. 2/2010 of 11 January 2010, no. 30/2010 of 17 May 2010 and no. 105/2014 of 23 June 2014.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

18. The applicant complained that he had been convicted on appeal without being heard in person by the appellate court for an offence he had been acquitted of at first instance, which in his view constituted a violation of his right to a fair hearing as provided in Article 6 § 1 of the Convention, which reads as follows:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

19. The Government contested that argument.

A. Admissibility

20. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

21. The applicant considered that his conviction meant that the *Audiencia Provincial* had reviewed evidence against him without having heard him in person. He explained that he had not requested a hearing by the fact that as he had been acquitted of false accusation of a crime by the criminal judge he had not had any particular reason to ask to be heard.

22. The applicant alleged that the screening of a video during the appeal proceedings was not the equivalent of a hearing at second instance, given that the *Audiencia Provincial* carried out a new assessment of the facts which went beyond strictly legal questions.

23. The Government firstly stated that the instant case was restricted to determining whether the applicant's conviction on appeal by the Cáceres *Audiencia Provincial* for false accusation of a crime, the only crime he had been acquitted of by the criminal judge and convicted of on appeal, amounted to a violation of his right to a fair hearing. The case did not concern his conviction for serious disobedience to public authority imposed on him by the criminal judge, which the *Audiencia Provincial* had merely upheld.

24. Relying on the Court's case-law in the cases of *Sakhnovskiy v. Russia* ([GC], no. 21272/03, § 96, 2 November 2010) and *Bazo González v. Spain* (no. 30643/04, § 38, 16 December 2008), the Government argued that even where an appellate court had full jurisdiction to review the case on questions of both fact and law, Article 6 did not always entail a right to be present in person, and that in order to determine whether a hearing should have been held on appeal attention should be paid to the nature of the issues examined on appeal by the appellate court and to whether the applicant had been able to make written submissions throughout the entire proceedings.

25. Turning to the circumstances of the present case, the Government referred to section 791(1) of the Criminal Procedural Law to highlight that it was illogical for the applicant to complain of no hearing on appeal when he could have requested one under that provision (see paragraph 15 above) but had failed to do so. They stressed in this regard that the applicant had been fully aware that the complainants had lodged an appeal to have his acquittal reversed and have him convicted of false accusation of a crime.

26. The Government further contended that the nature of the issues the *Audiencia Provincial* had ultimately decided had not required that a new hearing be held. The appellate court had not changed the facts of the case as established by the criminal judge at first instance but rather had limited itself to redefining them from a legal point of view. The appellate court had concluded, in the light of the evidence produced at first instance, that the facts had been false accusation of a crime.

27. Lastly, the Government argued that the viewing of the video-recording by the judges of the *Audiencia Provincial* equated to holding a

hearing for the purposes of Article 6 § 1 of the Convention. They conceded that a public hearing was not exactly the same as a viewing of a video-recording but stressed that this viewing had provided the judges with full access to all the evidence produced to the criminal judge. In the Government's opinion, the viewing of the video-recording had placed the judges of the *Audiencia Provincial* in a better position to take a sound decision on the case than if a new hearing had been held, since the former had allowed them to have full and personal access to all the evidence produced to the criminal judge. The Government accordingly submitted that there had not been a violation of Article 6 § 1 of the Convention.

28. The Court notes at the outset that the facts giving rise to the present application are similar to those in the cases of *Valbuena Redondo v. Spain* (no. 21460/08, 13 December 2011); *Almenara Alvarez v. Spain* (no. 16096/08, 25 October 2011); *García Hernández v. Spain* (no. 15256/07, 16 November 2010); *Marcos Barrios v. Spain* (no. 17122/07, 21 September 2010); *Igual Coll v. Spain* (no. 37496/04, 10 March 2009); and *Bazo González* (cited above), in which the applicants, acquitted of criminal charges at first instance, were convicted on these charges without being heard in a public hearing. In the present case, however, the Government have contended that the viewing of the video-recording by the members of the *Audiencia* amounted to holding a hearing for the purposes of Article 6 § 1 of the Convention.

29. As to the relevant general principles applicable to the present case, the Court refers to those stated in the case of *Lacadena Calero v. Spain* (no. 23002/07, §§ 36-38, 22 November 2011).

30. In the instant case, it is undisputed that the applicant was convicted by the *Audiencia Provincial* for an offence of which he had been acquitted at first instance without being heard in person.

31. In order to determine whether there has been a violation of Article 6 of the Convention, therefore, it is necessary to examine the role of the *Audiencia* and the nature of the issues before it.

32. The Court does not share the Government's argument that the applicant could not reproach the fact that a hearing had not been held since he had failed to request one. The Court reiterates its findings in the case of *Igual Coll* (cited above, § 32), where it found that there had been no particular reason for the applicant to request a public hearing as he had been acquitted at first instance after a public hearing during which different evidence had been taken and he had been heard. The Court therefore considers that the appellate court was under a duty to take positive measures to this effect, notwithstanding the fact that the applicant had not expressly requested a hearing to be held (see, *mutatis mutandis*, *Dănilă v. Romania*, no. 53897/00, § 41, 8 March 2007, and *mutatis mutandis*, *Botten v. Norway*, 19 February 1996, § 53, *Reports of Judgments and Decisions* 1996-I).

33. The Court reiterates that a public hearing is necessary where the appellate court is called upon to examine anew facts taken to have been established at first instance and reassess them, going beyond strictly legal considerations (see *Igual Coll*, cited above, § 36).

34. The *Audiencia* took into account the objective element of the offence – the existence of messages insulting to the complainants – and also examined the applicant's intentions, conduct and credibility. Specifically, the *Audiencia*, unlike the first-instance judge, found that the applicant had been aware that there were insulting messages. It also imposed, for the first time in respect of this offence, a sentence on him. However, the *Audiencia* examined all this without hearing the applicant in person.

35. The *Audiencia* therefore departed from the first-instance judge's conclusions and made a full assessment of the question of the applicant's guilt after reassessing the case as to the facts and the law (see, among other authorities, *Ekbatani v. Sweden*, 26 May 1988, § 32, Series A no. 134; *Constantinescu v. Romania*, no. 28871/95, § 55, ECHR 2000-VIII; *Lacadena Calero*, cited above, §§ 36 and 38; and *mutatis mutandis*, *Ion Tudor v. Romania*, no. 14364/06, § 21, 17 December 2013). In this regard, the Court has found that where an appellate court is called upon to carry out an assessment of the subjective element of the offence, as has been the case, it would in the circumstances have been necessary for the court to conduct a direct and personal examination of the evidence given in person by the accused who claims that he has not committed the act alleged to constitute a criminal offence (see *Lacadena Calero*, cited above, § 47).

36. Failure to hear the accused in person is even more difficult to reconcile with the requirements of a fair trial in the specific circumstances of this case, where the court of last resort was the first court to convict the applicant in the proceedings brought to determine a criminal charge against him (see *Constantinescu*, cited above, § 59, *Andreescu v. Romania*, no. 19452/02, § 70, 8 June 2010, *Igual Coll*, cited above, § 35, *Marcos Barrios*, cited above, § 40; and *Popa and Tănăsescu v. Romania*, no. 19946/04, § 52, 10 April 2012).

37. Furthermore, contrary to what the Government contended, the Court considers that the viewing of the video-recording by the *Audiencia* did not compensate for the lack of a hearing because rather than responding to the applicant's right to address the *Audiencia*, it merely represented part of the *Audiencia*'s review of the first instance proceedings.

38. The Court notes that the Spanish Constitutional Court, in ruling on similar cases, has found that the viewing of a video-recording of the first-instance trial does not enable an appellate court to assess personal evidence (see paragraphs 16-17 above).

39. Consequently, it may not be considered that the viewing of the video-recording placed the *Audiencia Provincial* in the same position as the first-instance judge for the purposes of Article 6 § 1 of the Convention.

40. In view of the foregoing, the Court concludes that in the instant case, the *Audiencia Provincial* failed to comply with the requirements of a fair trial. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

42. The applicant claimed 23,100 euros (EUR) in respect of pecuniary damage, comprising the fine and damages he was ordered to pay by the *Audiencia Provincial*. He also claimed EUR 25,000 in respect of non-pecuniary damage.

43. The Government submitted that the amounts claimed by the applicant were disproportionate and that there was no causal link between the alleged violations and the damage allegedly sustained.

44. As to the pecuniary damage, the Court does not discern any causal link between the violation found and the damage alleged. Indeed, it cannot speculate what outcome the appellate proceedings would have had if a hearing had been held (see *Igual Coll*, § 51, and *Valbuena Redondo*, § 48, both cited above). It therefore rejects this claim. Instead, it awards the applicant EUR 6,400 in respect of non-pecuniary damage.

B. Costs and expenses

45. The applicant claimed a total amount of EUR 7,777.24 for the following costs and expenses in the domestic proceedings: (i) EUR 6,277.24 for the complainants' legal expenses, which the applicant was ordered to pay by the *Audiencia Provincial*; and (ii) EUR 1,500 for his legal expenses in the proceedings before the Constitutional Court. Lastly, without providing any documentary justification in this regard, the applicant claimed EUR 3,000 for his costs and expenses before the Court.

46. The Government did not agree with the assessment criterion used by the applicant as regards the costs and expenses ordered by the *Audiencia Provincial*. Specifically, the Government alleged that account must be taken to the fact that the costs and expenses incurred by the applicant in the domestic proceedings also comprised those relating to the crime of serious disobedience to public authority, whose first-instance sentence the

Audiencia had limited itself to uphold. As to the legal expenses in the proceedings before the Constitutional Court, the Government left to the Court's discretion the matter of fixing the amount to be granted to the applicant, stating that, in any case, the amount claimed was excessive. As to the costs and expenses for the proceedings before the Court, the Government claimed that the applicant had failed to justify them and that the amounts requested were in any event excessive.

47. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In respect of costs and expenses ordered to pay by the *Audiencia Provincial*, the Court, given that the violation relates only to the conviction on appeal in respect of continuous and false accusation of a crime, while the costs and expenses related also to other charges, awards him EUR 3,138.62. As regards the proceedings before the Constitutional Court, the applicant failed to support by appropriate documentary evidence the amount actually incurred pursuant to the contractual relationship with his lawyer. It follows that no award shall be made for the proceedings before the Constitutional Court. As regards the proceedings before the Court, the applicant failed to provide the Court with any justification of the costs incurred. It therefore rejects this claim.

C. Default interest

48. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 6,400 (six thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,138.62 (three thousand one hundred and thirty-eight euros and sixty-two cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 March 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Helena Jäderblom
President