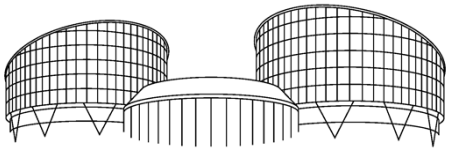

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF CENTELLES MAS AND OTHERS v. SPAIN

(Application no. 44799/19)

JUDGMENT

STRASBOURG

7 June 2022

This judgment is final but it may be subject to editorial revision.

In the case of Centelles Mas and Others v. Spain,

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

Andreas Zünd, *President,*
María Elósegui,
Frédéric Krenc, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 44799/19) 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 14 August 2019, by three Spanish nationals ("the applicants"), whose details are summarised in the Appendix and who were represented before the Court by Mr S. Miquel Roe and by Mr R. Forteza Colomé, lawyers practising in Lleida;

the decision to give notice of the application to the Spanish Government ("the Government"); represented by their Agent, Mr. L.E. Vacas Chalfoun, State Attorney;

the parties' observations;

the decision to reject the Government's objection to the examination of the application by a Committee;

Having deliberated in private on 17 May 2022,

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

SUBJECT MATTER OF THE CASE

1. The application concerns the fairness of the applicants' criminal conviction by the Tarragona Court of Appeal (*Audiencia Provincial*).

2. The applicants were employed by the same company. They were in charge of occupational risk prevention, namely that employees carried out their activities safely with the appropriate health and safety measures in place.

3. On 21 December 2012 F., while carrying out some maintenance work assigned by the applicants, fell from a height and died as a result of an industrial accident.

4. Although F. had received occupational risk prevention training and despite having harnesses at his disposal, he was not wearing a harness or any other safety equipment when the accident occurred. In the space where F. was working there were beams where a harness could have been hooked in order to prevent him from falling. On the other hand, the trapdoor through which F. fell was not marked, and the space was poorly illuminated. Additionally, no safety nets had been deployed under the site of the work. Subsequently, a blood test showed that F. had drunk alcohol that day.

5. F.'s widow, together with the prosecutor, brought criminal proceedings against the applicants, who were accused of an offence against the rights of workers and of involuntary manslaughter.

6. On 22 December 2017 the first-instance court acquitted the applicants, finding that they had complied with their occupational risk prevention duties. The court reached that conclusion after having heard the applicants, nine witnesses and six experts. Four of the experts were medical experts who gave statements regarding F.'s alcohol intake; the other two were technical experts who gave statements concerning the safety measures that should have prevented the accident.

7. The court found that the applicants had not been negligent. It established that the cause of the accident had not been the lack of protective measures, but the fact that F. had, negligently, not made proper use of those measures, despite their being at his disposal. Additionally, the court, endorsing one of the experts' findings, noted that the applicants were not supposed to continually verify whether F. was using the protective measures, since not only had such measures been at his disposal, but he had also received training concerning how to use them. Having assessed the experts' statements, the court concluded that, in any event, general measures, such as a safety net or trapdoor signalling, could not have been put into practice on account of the special nature of the task. Even if such measures had been deployed, they would not have prevented the accident.

8. The first-instance court assessed two technical experts' statements, whose conclusions were in direct opposition. While one of the experts stated that a safety net or trapdoor signage would have been feasible, the other stated that on account of the specificity of the task, such measures would have been neither feasible nor effective. The experts also disagreed how often the applicants should have verified that F. was using a harness while working.

9. Moreover, after assessing various evidence concerning F.'s alcohol intake, the court found that F. had not shown any obvious signs of drunkenness and, accordingly, the applicants could not have been expected to prevent F. from climbing to a height.

10. F.'s widow lodged an appeal with the Court of Appeal. At the hearing, the applicants' representatives and the prosecution were present and confined themselves to reiterating the content of their respective briefs. No fresh examination of any evidence took place.

11. On 29 June 2018 the Court of Appeal, by a majority with one dissenting opinion, overturned the applicants' acquittal and sentenced them to six months' imprisonment.

12. The Court of Appeal pointed out that, from the very same facts considered proven by the first-instance court, different conclusions could be reached. Accordingly, the appellate court left the proven facts untouched; however, it concluded that the applicants had performed their supervisory duties negligently.

13. The appellate court, contrary to the first-instance court's findings, considered that general protective measures, such as a safety net or trapdoor signage, could have easily been deployed in the circumstances. Even if such

general protective measures could not have been used, the applicants should have verified that F. had been using a harness. Additionally, the applicants should have verified whether F. was in an appropriate state to perform the tasks assigned since he was under the influence of alcohol to the point where he should have been prevented from doing works at a height. The Court of Appeal thus considered that the applicants had acted negligently since they had not provided the necessary resources for F. to carry out his activity with the appropriate safety measures. The Court of Appeal reached its conclusions without any further analysis of the experts' and witnesses' statements, concerning either their credibility or their content.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

14. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 § 3 (a) of the Convention. It must therefore be declared admissible.

15. The applicants alleged that the question of whether general preventive measures had been feasible or not in the circumstances of the case was a factual question. They contended that the same reasoning was applicable to the question of whether they should have supervised F. more closely. They submitted that the first-instance court had reached the conclusion that such measures could not have been adopted after it had heard the submissions by the defendants, the witnesses and the experts. Only after such direct assessment of evidence the first-instance judge had concluded that such measures had not been feasible and that, therefore, they had not behaved negligently. Accordingly, the applicants alleged that the Court of Appeal had not only indirectly modified the proven facts, but it had also reassessed the subjective element of their guilt in the finding that they had behaved negligently.

16. The Government claimed that the issues assessed by the Court of Appeal had been of a prevailing legal nature. They also stressed that the parties had participated in the new hearing.

17. The Court has held that where the appeal court has jurisdiction to examine afresh factual issues either as to the question or guilt or as to the sentencing, or both, the right to a fair hearing may, depending on the particular circumstances of the case, bar the appeal court from convicting an accused who has already been acquitted by the lower court. Taking into account what is at stake for the accused, the overall question would be whether the appeal court could, as matter of fair trial, properly examine the issues to be determined without a direct assessment of the evidence given by the accused or the witness in person (see *Júlíus Þór Sigurþórsson v. Iceland*, no. 38797/17, § 32-38, 16 July 2019, with further references).

18. The Court's case-law on this matter draws a distinction between situations in which an appeal court which reversed an acquittal actually proceeded to a fresh evaluation of the facts, and situations in which the appeal court only disagreed with the lower court on the interpretation of the law and/or its application to the established facts, even if it also had jurisdiction in respect of the facts. Accordingly, if direct assessment of the evidence is deemed necessary, the appeal court is under the duty to take positive measures to this effect, or, in the alternative, it must limit itself to quashing the lower court's acquittal and referring the case back for a retrial (*ibid.*). Where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, determination of the person's guilt or innocence is impossible as a matter of fair trial, without a direct assessment of the evidence given in person either by the accused who claims that he has not committed the act alleged to constitute a criminal offence, or by the witness who testified during the proceedings and to whose statements it wishes to give a new interpretation (see *Zirnīte v. Latvia*, no. 69019/11, § 46, 11 June 2020).

19. The Court notes that Section 792 (2) of the Spanish Criminal Procedure Act bars the appeal court from convicting an accused who has already been acquitted by the lower court on the ground that there has been an error in the assessment of the evidence. In those case, the Court of Appeal is required to send the case to the first-instance court in order to be re-tried.

20. In the present case, the Court considers that, contrary to the Government's allegations, the appellate court's assessment of the evidence entailed an implicit alteration of the facts declared proven at first instance, which led to a reassessment of the subjective elements of the applicants ´guilt since it attributed negligent behaviour to the applicants contrary to the findings by the first-instance court (see paras 8 and 13 above). The Court of Appeal did not confine itself to a mere legal reassessment of the facts, but actually carried out a new assessment of the factual elements, both objective and subjective – in this case, the applicants' negligence. In short, the Court of Appeal made a new assessment of the subjective elements of the crime.

21. The Court notes that, even if a hearing took place before the Court of Appeal and the applicants were present and addressed the court, no fresh examination of the relevant evidence took place, and the applicants had no opportunity to personally challenge, by means of an adversarial examination, that new assessment. For example, the Court of Appeal reached the conclusion that the applicants had behaved negligently since they should have realised that F. had not been fit to work on account of the high level of alcohol in his blood (see paragraph 13 above). However, whether or not F. had shown symptoms of drunkenness on that day could only have been perceived by witnesses, however the Court of Appeal did not hear them. Similar considerations would apply to other elements relied in the assessment.

Accordingly, a fresh adversarial examination of such witnesses was required in order to reach a different conclusion.

22. The Court also notes that the first-instance acquittal had relied on the assessment of the credibility of two key experts' statements which were clearly contradictory. The Court of Appeal, without having heard those experts, implicitly reassessed the experts' statements, reaching a different conclusion from that of the first-instance court and finding that the applicants had acted negligently. It did not give any explanation on reassessing the credibility of the expert on whose evidence the first-instance court had mostly based its decision.

23. The Court reiterates that an issue related to the principle of immediacy may arise when an appeal court overturns the decision of a lower court acquitting an applicant of criminal charges without a fresh examination of the evidence, including the hearing of witnesses and their cross-examination by the defence (see *Dan v. the Republic of Moldova (no. 2)*, no. 57575/14, § 52, 10 November 2020; *Roman Zurdo and Others v. Spain*, nos. 28399/09 and 51135/09, § 40, 8 October 2013; *Lacadena Calero v. Spain*, no. 23002/07, § 46-50, 22 November 2011; and the cases cited in paragraphs 17-18 above).

24. Accordingly, the Court notes that, in this case, the disagreement between the first and the second-instance courts did not concern the weight that could be attached to the evidentiary value of an expert report, but rather the reliability and credibility of the two experts who had reached opposite conclusions (see *a contrario*, *Marilena-Carmen Popa v. Romania*, no. 1814/11, § 46, 18 February 2020).

25. There has accordingly been a violation of Article 6 § 1 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

26. Each of the applicants claimed 25,000 euros (EUR) in respect of non-pecuniary damage. Additionally, they jointly claimed 6,413 EUR in respect of costs and expenses incurred before domestic courts and 10,000 EUR for those incurred before the Court.

27. The Government submitted that the finding of a violation by the Court would constitute in itself sufficient compensation for any non-pecuniary damage. Accordingly, no award should be made under this head. They also objected to the applicants' claims in respect of costs and expenses, submitting that the amounts claimed were disproportionate and that the applicants had not proved that they had paid them.

28. The Court considers that the applicants must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards the applicants EUR 6,400 each under that head.

29. Having regard to the documents in its possession, the Court considers it reasonable to award the applicants jointly EUR 9,735 for costs and expenses in the proceedings before domestic courts and before it, plus any tax that may be chargeable to the applicant.

30. The Court further 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 applicants, within three months, 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 9,735 (nine thousand seven hundred and thirty-five euros), plus any tax that may be chargeable to the applicants, 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova Deputy Registrar	Andreas Zünd President

APPENDIX

List of applicants:

Application no. 44799/19

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1.	Ignasi CENTELLES MAS	1972	Spanish	Aldea
2.	Gerard FERRERES GASULLA	1975	Spanish	Els Reguers
3.	Gerard PLA CANALDA	1984	Spanish	Tortosa