

# Reform of cassation appeals in various fields of law resulting from Royal Decree-Law 5/2023 of 28 June

Royal Decree-Law 5/2023 of 28 June, which was recently published, deals with – among an array of measures – the regulation of important procedural issues. In particular, Title VII (procedural measures) of Book Five represents an exhaustive reform of cassation appeals in the fields of civil, contentious-administrative, labour and criminal law.

## 1. NEW DEVELOPMENTS IN CASSATION APPEALS IN CIVIL LAW

The bulk of the reforms introduced by Royal Decree-Law 5/2023 of 28 June (“RDL 5/2023”) affect cassation appeals in civil law, making significant modifications to the previous framework. The amendments are consistent with those proposed in the Draft Law on Procedural Efficiency Measures; the ordinary parliamentary processing of that Draft Law was interrupted as a result of snap general elections being called.

The main features of the reform of cassation appeals in civil law are the following:

- (i) Extraordinary appeals on the basis of procedural infringements (*recurso extraordinario por infracción procesal*) are eliminated. As such, only cassation appeals are available, which may in turn be based on substantive or procedural infringements, provided that – in both cases – there exists a “reversal interest” (*interés casacional*).
- (ii) The possibility of bringing a cassation appeal for an amount exceeding EUR 600,000 is eliminated. The only available avenues to bring a cassation appeal now are through either “reversal interest” or the judicial civil actions of *amparo* relating to the protection of fundamental rights.
- (iii) The concept of “reversal interest” is maintained, and the only change affects appealed judgments that applied rules on which there is currently no Supreme Court case law, in which case RDL 5/2023 eliminates the time requirement that the corresponding rule not have been in force for more than five years.
- (iv) A new concept of “manifest reversal interest” (*interés casacional notorio*) is introduced, which must be assessed by the First Chamber of the Supreme Court – or, in some cases, by the civil and criminal chambers of the high courts of justice corresponding to their territorial

jurisdiction – only when the appealed decision has been handed down in proceedings involving a legal dispute that is of general interest for the uniform interpretation of the general laws of Spain or those of the autonomous regions.

- (v) Provisions have been legislatively introduced that had previously only been included in interpretative agreements of the Plenary of the First Chamber, particularly agreements of the non-jurisdictional Plenary held on 27 January 2017. This is the case with the impossibility of challenging the examination and probative value of the evidence and the establishment of facts in the course of a cassation appeal, with the exception of a patent factual error that is readily verifiable based on the facts available in the court record.
- (vi) Whether to hold a hearing will now be a matter left to the court's discretion, which is no longer limited to holding a hearing if requested by all parties.
- (vii) The legal authority previously existing in contentious-administrative cassation appeals is transferred to allow the Government Chamber (*Sala de Gobierno*) of the Supreme Court to regulate the length, format and other formalities of appeals, which until now had merely operated as guidelines.
- (viii) Inadmissibility will be decided in a succinctly reasoned ruling, whereas admission of the appeal will occur through a ruling stating the reasons for admission. This represents quite a significant change compared to the system that was in place to date, which required that the ruling on inadmissibility contain an exhaustive explanation of the basis for inadmissibility, while the order admitting the cassation appeal need not cite any reasons for admitting the appeal.
- (ix) The need for a ruling informing the parties of the potential grounds for inadmissibility, which had until now been established in article 483.3 of the Law on Civil Procedure ("LEC"), is removed, therefore implying that there is no procedure for possible reconsideration by the Admission Chamber of the Supreme Court in the event of potential errors of assessment.
- (x) Judgments finding that the lower court has contravened existing Supreme Court case law on the question raised will be resolved by means of an order (*auto*), which will result in the case being remanded to the lower court in order to ensure that the lower court's decision accurately reflects the position according to the Supreme Court case law.
- (xi) Paragraph 4 of the Tenth Transitional Provision establishes the rules according to which cassation appeals and extraordinary appeals for procedural infringements filed prior to the entry into force of RDL 5/2023 must be resolved.

In general they will be governed by the former legislation, irrespective of the notification date of the decisions. If, however, appeals are inadmissible for the reasons enumerated in the

rules that had until now been in force, they will be dismissed through a succinctly reasoned ruling after the parties have been heard.

Similarly, if the requirements under article 487.1 of the LEC are met – i.e. if case law already exists on the issue (or issues) raised and the judgment contravenes that case law – the cassation appeal and, where appropriate, the extraordinary appeal for procedural infringement, may be resolved by means of an order (*auto*) reversing the judgment and remanding the case to the lower court so that it can hand down a new decision based on the corresponding case law.

- (xii) Pursuant to the Ninth Final Provision, the entry into force of all these provisions will occur on 29 July 2023, i.e. one month after publication of RDL 5/2023 in the BOE.

## 2. NEW DEVELOPMENTS IN CONTENTIOUS-ADMINISTRATIVE CASSATION APPEALS

In the field of contentious-administrative law, article 224 of RDL 5/2023 introduces a series of amendments to the Administrative Procedure Law (the “LJCA”). Although RDL 5/2023 also affects ordinary proceedings (strengthening the pilot case established in article 37.2 of the LJCA), the majority of the changes affect cassation appeals. The following are the most notable changes:

- (i) The possibility of staying the ordinary proceedings is permitted in cases involving a legal issue that is substantially identical to that raised in a cassation appeal that the Supreme Court has already admitted for processing. In these cases, and once the claim and answer to the complaint have been filed, the parties will be heard before deciding on the stay. An additional hearing will be held once the lower court receives a copy of the Supreme Court pilot judgment; at that hearing the parties will be allowed to make pleadings on the ruling’s impact on the proceedings. This legal reform will be applicable to all proceedings pending on the date of RDL 5/2023’s entry into force.
- (ii) The ground for cassation appeals under article 88.3.b) of the LJCA is expanded and will no longer require an express pronouncement in the sense of deliberately departing from previous case law, but will also be admitted when that departure occurs without a reasoned explanation to do so.
- (iii) The deadline to appear before the Supreme Court following the preparation of the cassation appeal is reduced from 30 working days to 15.
- (iv) Similarly, the time limit to hold the hearing that the Admission Section of the Supreme Court may discretionally grant in order to determine whether the cassation appeal has an objective interest has been reduced from 30 working days to 20. This procedure had rarely been used in practice.

- (v) The Admission Section of the Supreme Court is required to give succinct reasons for the ruling dismissing the appeal as inadmissible on the grounds that it does not consider there to exist an objective interest in the appeal.
- (vi) Another new aspect is the pilot cassation. In those cases in which the Admission Section determines that there exist numerous appeals involving a substantially similar legal issue, it may admit one case for processing (without prejudice to the fulfilment of all other admissibility requirements under the LJCA) and order the stay of all other cases rest until a judgment is handed down in the pilot judgment (which the new article 94 LJCA refers to on one occasion as a “reference ruling”).

When the reference ruling is notified to the parties in each of the stayed proceedings, those parties will decide whether to withdraw the corresponding appeal or whether to pursue the claim on the basis that they understand that the reference ruling has no bearing on their specific appeal. The Admission Section of the Supreme Court is obliged to dismiss appeals lodged against lower judgments if the *ratio decidendi* coincides with that of the reference ruling. If it does not coincide, the cassation appeal will continue to be processed, which processing must in all cases comply with the general criteria established in articles 88 and 89 of the LJCA.

Once the appeal has been admitted for processing, the corresponding Section of the Supreme Court will decide whether to continue with its processing or to issue a judgment without further processing by citing the applicable reference ruling.

- (vii) Regard the transitional regime, the new rules are generally applicable to the decisions of the courts and tribunals handed down after the entry into force of RDL 5/2023 (as mentioned, these changes will enter into force on 29 July 2023). The only cases of immediate application are those that raise the possibility of a lawsuit or cassation appeal as a pilot case.

### 3. NEW DEVELOPMENTS IN CASSATION APPEALS IN THE FIELD OF LABOUR LAW

Article 226 of RDL 5/2023 also amends Law 36/2011 of 10 October, which regulates the field of labour law (“LRJS”). As stated in the preliminary recitals to RDL 5/2023, article 226’s most important provisions are aimed at amending the legal framework governing cassation appeals for ensuring uniform case law (“CEUC”) in order to make their processing more flexible. Specifically, the LRJS amends cassation appeals as follows:

- (i) Article 226 eliminates the appeal for reconsideration (*recurso de reposición*) that could previously be lodged against an order (*auto*) of the Third Chamber of the Supreme Court rejecting the CEUC for failing to cure defects when a party had already been warned of the defects and been ordered to cure them and the deadline for doing so expired without the defects having been cured.

- (ii) Article 225 of the LRJS is modified to create a new ground for inadmissibility (*motivo de inadmisión*) of the CEUC, to systematise the grounds for the inadmissibility of cassation appeals and reorganise how the proceedings are processed at this stage. The absence of any discrepancy between the judgments analysed becomes a ground for the inadmissibility of the CEUC.

Likewise, in the event of patent, irremediable non-compliance with the procedural requirements for preparing or lodging the CEUC; a supervening absence of the object of the cassation appeal; or the absence of any discrepancy between the judgments analysed, the only possible procedure that may occur prior to a ruling on its inadmissibility is the forwarding of the matter to the Public Prosecutor's Office, if the CEUC has not been lodged within a five-day period, so that the Public Prosecutor's Office may report on its admissibility or inadmissibility, eliminating the forwarding of the same to the appellant for these purposes.

If the potential cause of the CEUC's inadmissibility is a lack of a reversal ground underlying the claim or the fact that other cassation appeals in substantially similar cases have already been dismissed on the merits, a hearing for the appellant is established in five days and, if the appeal has not been lodged within that time, a subsequent report from the Public Prosecutor's Office will be issued within another five days.

Finally, if the Admissions Chamber finds that it lacks appellate jurisdiction to hear the case, the parties and the Public Prosecutor's Office will be granted three days to be heard. After this period, the Supreme Court will deliberate on the case, vote, and hand down judgment within the following ten days, and the judgment must be handed down within ten days of the vote.

- (iii) RDL 5/2023 adds a new article 225 bis to the LRJS, governing the suspension of pending CEUCs that are of a substantially similar legal nature.

Under article 225 bis, when the Admissions Section of the Third Chamber of the Supreme Court finds that there numerous cassation appeals that raise a substantially similar legal question, it may decide to admit one or multiple cases for processing and preferential resolution, suspending the admission procedure for all others until a judgment is handed down in the first appeal (or appeals).

Once the judgment on the merits has been handed down, a record will be attached to the suspended cassation appeals and the interested parties affected by the suspension will be notified and granted ten days to request either the continuation of the cassation appeal or its withdrawal.

Once the corresponding pleadings have been made, and provided the parties do not withdraw the appeal, if the judgment challenged in the cassation appeal is substantially the

same in terms of its ruling and reasoning as the ruling or rulings decided by the Supreme Court, the pending cassation appeals will be dismissed through judicial orders.

On the other hand, if the judgment challenged by virtue of the cassation appeal does not coincide –in terms of the ruling and the reasoning underlying the ruling – with what had been decided in the previous judgment or judgments by the Supreme Court, an order granting leave to proceed (*auto de admisión*) will be issued (if the corresponding requirements are met) in which the Third Chamber of the Supreme Court will decide either to continue with the proceedings or issue a judgment without further proceedings, citing the reference judgment and adopting any other supplementary rulings it deems necessary.

- (iv) Paragraph 5 of the Tenth Transitional Provision of RDL 5/2023 establishes that the amendments to the legal framework governing labour cassation appeals will apply to judicial decisions that are issued after its entry into force.

It also states that the amendment of article 225 bis of the LRJS will apply to cassation appeals that, on the date of entry into force of RDL 5/2023, have already been prepared and are pending admission. As such, it will be possible to suspend the admission procedure for other cassation appeals if any of those that had already been admitted for processing on the date of entry into force of RDL 5/2023 are declared to be subject to preferential processing and resolution pursuant to article 225 bis of the LRJS.

#### 4. NEW DEVELOPMENTS IN CASSATION APPEALS IN CRIMINAL LAW

Article 223 of RDL 5/2023 also amends cassation appeals in criminal law in connection with two scenarios allowing leave to lodge a cassation appeal.

The first scenario corresponds to cases involving offences for which a conviction carries a potential sentence of up to five years of imprisonment (article 847.1.b of the Criminal Procedure Law ["CPL"]). The prosecution of such cases is entrusted to criminal courts (or the Central Criminal Court) and the hearing of appeals is assigned to provincial courts (or the Criminal Chamber of the National Court [*Audiencia Nacional*]). Since 2015 (upon the entry into force of Law 41/2015 of 5 October), appeals in these cases have been limited to the goal of ensuring uniform case law (the appeal can only be heard in the event of an infringement of a substantive provision of criminal law, i.e. only for an error of law).

RDL 5/2023 introduces a new formal burden for potential cassation appellants, who must now demonstrate, as clearly and concisely as possible – and in separate paragraphs – the existence of the requirements under the CPL to lodge an appeal, identifying the substantive provision of criminal law they consider to have been infringed and succinctly explaining the infringement.

In line with this new burden on appellants, RDL 5/2023 expands the formal control powers of provincial courts (or the Criminal Chamber of the National Court) at the preparation stage of the cassation appeal: these courts may reject the notice of the cassation appeal through a reasoned decision when grounds

other than an error of law are alleged, when the substantive provision of criminal law allegedly infringed is not identified, when the required explanation of the infringement is not provided, or when the content of the appeal does not fall within the scope of an error of law.

On the other hand, the second scenario allowing leave to lodge a criminal cassation appeal involves crimes for which a conviction carries a potential sentence of more than five years of imprisonment (article 847.1.a of the CPL). These cases are entrusted to provincial courts (or to the Criminal Chamber of the National Court) and the hearing of appeals is assigned to the civil and criminal divisions of the High Courts of Justice (or to the Appeals Chamber of the National Court). In these cases, the cassation appeal can be heard on the basis of any ground enumerated in the CPL (and not merely for ensuring uniform case law grounded on an alleged error of law).

RDL 5/2023 also modifies the cassation appeal for these cases and grants the Criminal Chamber of the Supreme Court the power to rule on the appeal's inadmissibility on grounds of expediency (a sort of certiorari system), which until now had been limited to criminal proceedings that had been tried at first instance by criminal courts (or by the Central Criminal Court). Specifically, the Criminal Chamber may reject the appeal through a "succinctly reasoned", unanimous order of all judges if two requirements are met: (i) the case lacks "relevance for cassation appeal purposes" and (ii) the term of imprisonment actually imposed (or the length of all sentences running consecutively) on those convicted at first instance does not exceed five years, or if penalties other than imprisonment have been imposed (irrespective of their duration).

Therefore, the Criminal Chamber of the Supreme Court's powers to dismiss appeals on the grounds of expediency have been expanded, including in connection with cases that are objectively serious in view of the parties' claims (e.g. cassation appeals may be dismissed if the Public Prosecutor's Office requested a sentence of imprisonment far exceeding five years but the trial court ultimately sentenced the individual to 59 months of imprisonment).