



## The Grand Chamber upholds a refusal to reopen criminal proceedings following a Court judgment finding a violation of the Convention

In today's **Grand Chamber** judgment<sup>1</sup> in the case of [Moreira Ferreira v. Portugal \(no. 2\)](#) (application no. 19867/12) the European Court of Human Rights held, by nine votes to eight, that there had been:

**no violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights.

The case concerned the rejection by the Supreme Court of a request lodged by the applicant for revision of a criminal judgment following a judgment delivered by the European Court of Human Rights on 5 July 2011.

The Court reiterated its settled case-law to the effect that the Convention did not guarantee the right to the reopening of proceedings, and referred to the lack of a uniform approach among the member States as to the operational procedures of any existing reopening mechanisms.

The Court emphasised that in its judgment of 5 July 2011 the Chamber had held that a retrial or reopening of the proceedings represented "in principle an appropriate way of redressing the violation". A retrial or the reopening of the proceedings had thus been described as an appropriate solution, but not a necessary or exclusive one. The Court had thus refrained from giving binding indications on how to execute its judgment.

The Court could not conclude that the Supreme Court's reading of the Court's 2011 judgment, viewed as a whole, had been the result of a manifest factual or legal error leading to a denial of justice.

Having regard to the principle of subsidiarity and to the wording of the Court's judgment of 5 July 2011, the Court considered that the Supreme Court's refusal to reopen the proceedings as requested by Ms Moreira Ferreira had not distorted the findings of that judgment and that the grounds on which it was based fell within the domestic authorities' room for manoeuvre ("margin of appreciation").

### Principal facts

The applicant, Francelina Moreira Ferreira, is a Portuguese national who was born in 1961 and lives in Matosinhos (Portugal).

Ms Moreira Ferreira was prosecuted for threatening conduct following an altercation. An expert report submitted during the investigation stated that the applicant had limited intellectual and cognitive capacities but that she should be held criminally responsible for her acts.

By a court judgment delivered on 23 March 2007, the applicant was convicted of threatening and insulting conduct and ordered to pay damages to the victims.

Ms Moreira Ferreira appealed against that judgment. She repeated that she had been unaware of the unlawfulness of her acts and sought an acknowledgment of her lack of criminal responsibility. The court of appeal held a hearing, attended by the public prosecutor and counsel for the applicant;

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

however, no examination of the applicant herself took place. By a judgment of 19 December 2007 the court of appeal upheld the applicant's conviction for threatening and insulting conduct, but reduced the sentence. It held that there was no need for a fresh assessment of the facts.

Ms Moreira Ferreira lodged an application with the European Court of Human Rights, complaining that she had not been heard in person by the court of appeal. The European Court declared admissible the complaint and delivered a judgment on 5 July 2011, in which it held that there had been a violation of Article 6 § 1.

Concurrently, on 18 October 2011, Ms Moreira Ferreira lodged an application for review with the Supreme Court. She submitted that the court of appeal's judgment of 19 December 2007 was incompatible with the Court's judgment of 5 July 2011. The Supreme Court refused to grant a review. It considered that the lack of a hearing for the applicant in the Court of Appeal had constituted a procedural irregularity that was not amenable to review. It held that, under national law, a review could not be authorised since the applicant's conviction was not irreconcilable with the European Court's judgment and there were no serious doubts regarding the merits of that conviction.

## Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), the applicant complained that the Supreme Court had dismissed her application for a review of the criminal judgment delivered against her. She submitted that the Supreme Court had incorrectly interpreted and applied the relevant provisions of the Code of Criminal Procedure and the conclusions of the Court's 2011 judgment, thus depriving her of the right to have her conviction reviewed. The applicant further submitted that the Supreme Court's dismissal of her application for review had been in breach of Article 46 (binding force and execution of judgments).

The application was lodged with the European Court of Human Rights on 30 March 2012. On 12 January 2016 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A hearing took place on 1 June 2016.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *President*,  
 Işıl **Karakaş** (Turkey),  
 Angelika **Nußberger** (Germany),  
 Luis **López Guerra** (Spain),  
 András **Sajó** (Hungary),  
 Mirjana **Lazarova Trajkovska** ("the former Yugoslav Republic of Macedonia"),  
 Nona **Tsotsoria** (Georgia),  
 Vincent A. **De Gaetano** (Malta),  
 Paulo **Pinto de Albuquerque** (Portugal),  
 Helen **Keller** (Switzerland),  
 Paul **Mahoney** (the United Kingdom),  
 Krzysztof **Wojtyczek** (Poland),  
 Faris **Vehabović** (Bosnia and Herzegovina),  
 Egidijus **Kūris** (Lithuania),  
 Jon Fridrik **Kjølbro** (Denmark),  
 Síofra **O'Leary** (Ireland),  
 Marko **Bošnjak** (Slovenia),

and also Françoise **Elens-Passos**, *Deputy Registrar*.

## Decision of the Court

### Article 6 § 1

The Court noted that although the proceedings adjudicated by the Supreme Court incontrovertibly concerned the execution of the Court's 2011 judgment, they were new in relation to the domestic proceedings forming the subject of that judgment, and were subsequent to them.

The Court also noted that Ms Moreira Ferreira's complaint related to the reasons given by the Supreme Court for dismissing the application for review.

Thus, the Court noted that in examining the application for review, the Supreme Court had been dealing with a new issue, namely the validity of the applicant's conviction in the light of the finding of a violation of the right to a fair trial.

The Court considered that the alleged lack of fairness in the procedure followed when examining the application for review, and more specifically the errors which the applicant claimed had vitiated the reasoning of the Supreme Court, constituted new information in relation to the Court's previous judgment.

It considered that Article 46 of the Convention did not preclude its examination of the new complaint under Article 6 of the Convention.

The Court further observed that the Supreme Court had carried out a re-examination on the merits of a number of aspects of the disputed issue of the applicant's absence from the hearing on her appeal and the consequences of that absence for the validity of her conviction and sentence. The Supreme Court had thus found that the judgment of the court of appeal had not been incompatible with the European Court's judgment. Having concluded that the validity of the conviction was not subject to any serious doubts, it had been bound to uphold the conviction and sentence imposed by the court of appeal.

Given the scope of the Supreme Court's scrutiny, the Court considered that the Supreme Court had once again focused on the determination of the criminal charge against Ms Moreira Ferreira. It followed that the safeguards of Article 6 § 1 of the Convention were applicable to the proceedings before the Supreme Court.

The Court noted that in its judgment of 21 March 2012 the Supreme Court had held that the procedural irregularity noted by the European Court not been serious enough for the conviction to be considered incompatible with the Court's judgment. The reasons given for that judicial decision had addressed the main arguments put forward by Ms Moreira Ferreira. According to the Supreme Court's interpretation of Article 449 § 1 (g) of the Code of Criminal Procedure, the procedural irregularities found did not give rise to any automatic right to the reopening of proceedings.

The Court considered that this interpretation of the applicable Portuguese law, which had the effect of limiting the situations that could give rise to the reopening of criminal proceedings that had been terminated with final effect, or making them subject to assessment by the domestic courts, was not arbitrary. That interpretation was supported by the Court's settled case-law to the effect that the Convention did not guarantee the right to the reopening of proceedings, and by the lack of a uniform approach among the member States as to the operational procedures of any existing reopening mechanisms. Moreover, the Court reiterated that a finding of a violation of Article 6 of the Convention did not generally create a continuing situation and did not impose on the respondent State a continuing procedural obligation.

The Court emphasised that in its judgment of 5 July 2011 the Chamber had held that a retrial or reopening of the proceedings represented "in principle an appropriate way of redressing the violation". A retrial or the reopening of the proceedings had thus been described as an appropriate solution, but not a necessary or exclusive one. The Court had thus refrained from giving binding

indications on how to execute its judgment, and had opted to afford the State an extensive margin of manoeuvre in that sphere. Accordingly, the reopening of proceedings did not appear to have been the only way to execute the Court's judgment of 5 July 2011. At best, it had represented the most desirable option, the advisability of which was a matter for assessment by the domestic courts, having regard to national law and to the particular circumstances of the case.

The Court could not conclude that the Supreme Court's reading of the Court's 2011 judgment, viewed as a whole, had been the result of a manifest factual or legal error leading to a denial of justice.

Having regard to the principle of subsidiarity and to the wording of the Court's judgment of 5 July 2011, the Court considered that the Supreme Court's refusal to reopen the proceedings as requested by Ms Moreira Ferreira had not distorted or misrepresented that judgment and that the grounds on which it was based fell within the domestic authorities' room for manoeuvre ("margin of appreciation"). The Supreme Court's judgment had provided a sufficient indication of the grounds on which it was based.

The Court concluded that there had been no violation of Article 6 § 1 of the Convention.

### Article 46

The Court reiterated that the question of compliance by the High Contracting Parties with its judgments fell outside its jurisdiction unless it was raised in the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5.

### Separate opinions

Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjølbro and O'Leary expressed a joint dissenting opinion; Judge Pinto de Albuquerque expressed a dissenting opinion, joined by Judges Karakaş, Sajó, Lazarova Trajkovska, Tsotsoria, Vehabović and Kūris; Judge Kūris expressed a dissenting opinion, joined by Judges Sajó, Tsotsoria and Vehabović; Judge Bošnjak expressed a dissenting opinion. These opinions are annexed to the judgment.

*The judgment is available in English and French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.