

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

FOURTH SECTION

DECISION

Application no. 44561/18
Julieta DA CUNHA GONÇALVES
against Portugal

The European Court of Human Rights (Fourth Section), sitting on 30 January 2024 as a Committee composed of:

Tim Eicke, *President*,
Branko Lubarda,
Ana Maria Guerra Martins*, judges*,
and Ilse Freiwirth*, Section Registrar*,

Having regard to:

the application (no. 44561/18) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 17 September 2018 by a Portuguese national, Ms Julieta da Cunha Gonçalves, who was born in 1935 and lives in Lisbon ("the applicant");

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns a civil dispute brought on 15 July 2004 by the applicant against a private bank.

2. On 27 January 2015 the case was dismissed by the Lisbon Court.

3. On 16 March 2015 the applicant appealed against the decision to the Lisbon Court of Appeal.

4. On 19 September 2015 the applicant requested that one of the judges of the Lisbon Court of Appeal sitting on the panel of judges, to which her case had been allocated, be removed (*incidente de suspeição)*.

5. On 10 February 2016 the President of the Lisbon Court of Appeal dismissed the applicant's request and invited her to present her arguments concerning the application of a fine for bad faith litigation on the grounds that she had made quibbling and manifestly ill-founded allegations against one of the panel judges.

6. On 22 April 2016 the President of the Lisbon Court of Appeal imposed a fine of 1,530 euros (EUR) on the applicant for bad faith litigation pursuant to Article 542 §§ 1 and 2 (a) and (d) of the Code of Civil Procedure (hereinafter referred to as "CCP") and Article 27 § 3 of the Regulation on the Fees of Legal Proceedings (*Regulamento das Custas Processuais*- hereinafter referred to as "RCJ").

7. On 18 May 2016 the applicant sought leave to appeal against this decision to the Supreme Court. The President of the Lisbon Court of Appeal refused leave on the grounds that the decision at issue was not subject to appeal pursuant to Article 123 § 3 of the CCP.

8. By a final judgment of 22 February 2017, the appeal lodged by the applicant against the decision of the President of the Lisbon Court of Appeal was rejected.

9. By a judgment of 5 April 2018, the Constitutional Court dismissed the constitutional appeal lodged by the applicant. It stated that, in civil proceedings, a double degree of jurisdiction was not guaranteed. Consequently, the decision of the President of the Court of Appeal to impose a fine on the applicant for bad faith litigation without her being able to appeal did not amount to a breach of the Constitution.

10. Under Article 6 § 1 and Article 13 of the Convention, the applicant complained of the fact that she was not able to have her conviction as a bad faith litigant reviewed by a higher court.

THE COURT'S ASSESSMENT

11. The Court being the master of the characterisation to be given in law to the facts of a case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018) considers that the applicant's complaint should be examined solely from the standpoint of Article 6 § 1 of the Convention (access to an appeal procedure).

12. In the present case the President of the Lisbon Court of Appeal ordered the applicant to pay a fine of EUR 1,530 for bad faith litigation (see paragraph 6 above) within the civil proceedings to which she was a party.

13. The applicant complains that she was not able to appeal against this decision (paragraph 10 above). In this respect, the Court notes that the domestic courts considered that according to Article 123 § 3 of the CPC, such a decision was not subject to appeal. The Constitutional Court considered that this provision was not unconstitutional (paragraphs 8-9 above)

14. The Court will examine whether Article 6 applies to the proceedings complained of.

15. The Court refers to its established case-law to the effect that in ascertaining whether there was a "criminal charge", regard must be had to three criteria commonly known as the "Engel criteria" – the legal classification of the offence under national law, the very nature of the offence,

and the nature and degree of severity of the penalty that the person concerned risks incurring (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22; and *Gestur Jónsson and Ragnar Halldór Hall v. Island* [GC], nos 68273/14 and 68271/14, §§ 75-83, 22 December 2020).

16. In the present case, the Court notes that the applicant was fined for bad faith litigation pursuant to Article 542 §§ 1 and 2 (a) and (d) of the CCP (see paragraph 6 above), a sanction which is not classified as criminal in domestic law.

17. As to the nature of the offence, the Court observes that the applicant was sanctioned on the grounds that she had made quibbling and manifestly ill-founded allegations against one of the panel judges (see paragraph 5 above). The sanction at issue derived from the indispensable power of a court to ensure the proper and orderly functioning of its own proceedings, it is therefore more akin to a disciplinary measure that to a criminal sanction (see, *Gestur Jónsson and Ragnar Halldór Hall*, cited above, § 89).

18. With regard to the nature and degree of severity of the penalty that the person concerned risks incurring, the Court notes that, at the material time, according to Article 27 § 3 of the RCJ, the fine for bad faith litigation could range from EUR 204 to EUR 10,200. In the present case, the fine applied to the applicant was EUR 1,530. Albeit not negligible, the amount of the fine imposed on the applicant does not suffice to deem the severity and nature of the sanction as "criminal" in the autonomous sense of Article 6 of the Convention (see *Gestur Jónsson and Ragnar Halldór Hall,* cited above, § 96). Finally, the Court notes that the impugned fine could not in any circumstances be substituted by a custodial sentence (ibid., § 94); in the event of non-payment, enforcement proceedings would, in fact, be initiated in accordance with Article 35 § 1 of the RCJ.

19. In conclusion, taking all the above aspects into consideration, the Court considers that the proceedings in which the applicant was fined did not concern the determination of a criminal charge within the meaning of Article 6 § 1 of the Convention. Accordingly, this provision is not applicable under its criminal limb.

20. Turning to the civil head of Article 6, the Court notes that the impugned fine was applied within the scope of procedural duties that ensure the parties follow the principles of loyalty, good faith, and the responsibility of collaboration with the court in the administration of justice. Thus, the decision of the President of the Lisbon Court of Lisbon Appeal was taken to ensure the proper administration of justice. Accordingly, the proceedings concerning the removal of the judge of the Court of Appeal and the imposition of a fine on the applicant for bad faith litigation in that context were an ancillary action, independent of the main civil proceedings and they did not entail the determination of the applicant's civil rights (see, *mutatis mutandis*, *Micallef v. Malta* [GC], no. 17056/06, §§ 74-75, ECHR 2009; and compare *Schreiber and Boetsch v. France* (dec.), no. 58751/00, ECHR 2003-XII).

21. Accordingly, the application is inadmissible *ratione materiae* within the meaning of Article 35 § 3 (a) of the Convention 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 22 February 2024.

Ilse Freiwirth Section Registrar	Tim Eicke President