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

FOURTH SECTION

DECISION

Application no. 21864/14
João Miguel FERNANDES MARTINS
against Portugal

The European Court of Human Rights (Fourth Section), sitting on 11 April 2023 as a Committee composed of:

Armen Harutyunyan*, President*,
Anja Seibert-Fohr,
Ana Maria Guerra Martins*, judges*,
and Crina Kaufman, *Acting Deputy Section Registrar,*

Having regard to:

the application (no. 21864/14) 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 5 March 2014 by a Portuguese national, Mr João Miguel Fernandes Martins ("the applicant"), who was born in 1982, lives in Setúbal and, having been granted legal aid, was represented by Ms R. Guzmán, a lawyer practising in Setúbal;

the decision to give notice of the application to the Portuguese Government ("the Government"), represented by their Agent, at the time Ms M.F. da Graça Carvalho, Deputy Attorney General;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. On 20 September 2012 the applicant was convicted by a judgment of the Setúbal Criminal Court of drug consumption pursuant to Article 40 of Legislative Decree no. 15/93 of 22 January 1993 and sentenced to a fine in the amount of 420 euros. In that judgment, the Setúbal Criminal Court took into account the Supreme Court's judgment no. 8/2008 of 25 June 2008 harmonising contradictory case-law (*Acórdão de Fixação de Jurisprudência*), which had been delivered following the decriminalisation of drug consumption introduced by section 28 of Law no. 30/2000 of 29 November 2000, and had established that notwithstanding the repeal of

Article 40 of Legislative Decree no. 15/93 by Law no. 30/2000, that provision was still applicable to the purchase or possession of drugs for self-consumption in any quantity exceeding that necessary for an average level of consumption over a ten-day period.

2. On 19 March 2013, following an appeal by the applicant alleging, amongst other arguments, "the unconstitutionality of the judgment", the Évora Court of Appeal upheld the lower court's judgment.

3. The applicant lodged a further appeal with the Constitutional Court. He submitted a complaint of unconstitutionality set out as follows:

> "The judgment that applied Article 40 of Legislative Decree no. 15/93 ... was unconstitutional since section 28 of Law no. 30/2000 ... states that Article 40 was repealed except as regards drug cultivation ... The interpretation given by judgment no. 8/2008 harmonising contradictory case-law adds elements to the provision which it does not contain, by interpreting it extensively, in breach of the principle of legality, and treating as an offence conduct that has been expressly decriminalised by section 28 of Law no. 30/2000 ..."

4. On 13 June 2013 the applicant was invited by the Constitutional Court to specify the interpretation which he intended to challenge as unconstitutional. The applicant replied, stating as follows:

> "[I intend to challenge] the constitutionality of the application of Article 40 of Legislative Decree no. 15/93 ..., since that provision breaches the constitutional principle of legality. Its unconstitutionality derives from the repeal of Article 40 of Legislative Decree no. 15/93... by section 28 of Law no. 30/2000 ... The restrictive interpretation of the repeal provision constitutes an ... unacceptable extension. ... It is not possible to resurrect a criminal offence by means of interpretation ..."

5. By a summary decision of 10 July 2013, the Constitutional Court, sitting as a single judge, rejected the constitutional appeal lodged by the applicant on account of its non-compliance with the procedural formalities specified in section 75-A of Law no. 28/82 of 15 November 1982 and in particular on the grounds that the appeal did not concern the unconstitutionality of a specific legal provision or its interpretation, and also in view of the fact that it was not for the Constitutional Court to review the outcome of judicial decisions. On 23 October 2013 that decision was upheld by a three-judge bench (*conferência*) of the Constitutional Court.

6. Under Article 7 of the Convention, the applicant submitted that his conviction had relied on a provision that had been repealed by Law no. 30/2000, adding that at the material time drug consumption had been decriminalised. Relying on Article 13 of the Convention, the applicant also complained of a lack of access to the Constitutional Court.

THE COURT'S ASSESSMENT

A. Complaint under Article 6 of the Convention (access to the Constitutional Court)

7. The Court, being the master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018), will examine under Article 6 of the Convention the complaint raised by the applicant under Article 13 of the Convention (see paragraph 6 above), concerning the lack of access to the Constitutional Court (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 86, 29 November 2016).

8. The relevant principles on access to a court were summarised in *Zubac v. Croatia* ([GC], no. 40160/12, §§ 76-79, 5 April 2018).

9. The Court notes at the outset that according to well-established Portuguese case-law, an appeal to the Constitutional Court must raise an issue relating to the constitutionality of a legal provision or the constitutionality of a court's interpretation of a legal provision; the issue must also have been previously raised during the proceedings. The Constitutional Court does not review the outcome of judicial decisions or base its decisions on the facts of a particular case, but rather carries out a general examination of the constitutionality of legal provisions or their interpretation (see *Dos Santos Calado and Others v. Portugal*, nos. 55997/14 and 3 others, §§ 78, 80 and 135, 31 March 2020, and *Albuquerque Fernandes v. Portugal*, no. 50160/13, §§ 67-70, 12 January 2021).

10. The Court observes that in the present case, the constitutional appeal lodged by the applicant was not immediately rejected. On the contrary, the applicant was given an opportunity to clarify his allegations (see paragraphs 3 and 4 above). Only after that was the constitutional appeal rejected by the Constitutional Court (see paragraph 5 above), because of its non-compliance with the procedural formalities set out in section 75-A of Law no. 28/82 of 15 November 1982 and in particular on the grounds that the appeal did not concern the constitutionality of a specific legal provision or its interpretation, and also in view of the fact that it was not the Constitutional Court's role to review the outcome of judicial decisions. In the Court's view, this practice amounted to a wholly acceptable application of procedural formalities (see *Zubac*, cited above, § 98).

11. In addition, in the present case the applicant was represented by a lawyer who was responsible for the technical aspects of the case. The situation which arose could have been avoided if the applicant had challenged the constitutionality of Article 40 of Legislative Decree no. 15/93 of 22 January 1993 or its interpretation, as required by section 75-A of Law no. 28/82.

12. In the Court's view, the decisions of the Constitutional Court ensured legal certainty and the proper administration of justice and did not amount to excessive formalism involving an unreasonable or particularly strict application of procedural rules leading to an unjustifiable restriction on the applicant's access to a court (see *Zubac*, cited above, §§ 99 and 123, and *Albuquerque Fernandes*, cited above, §§ 75 and 78).

13. Accordingly, this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

B. Complaint under Article 7 of the Convention

14. As regards the complaint brought by the applicant under Article 7 of the Convention, in so far as the present case concerned the constitutionality of the Supreme Court's interpretation of Article 40 of Legislative Decree no. 15/93 in the context of an appeal aimed at harmonising contradictory case-law (see paragraph 1 above), the Court is of the view that the appeal to the Constitutional Court was a remedy to be used for the purposes of Article 35 § 1 of the Convention (see *Dos Santos Calado and Others*, cited above, § 85; *Albuquerque Fernandes*, cited above, § 83; and *Savickis and Others v. Latvia* [GC], no. 49270/11, §§ 134-37, 9 June 2022).

15. Since the applicant failed to lodge his appeal in accordance with the procedural requirements set forth in section 75-A of Law no. 28/82, as described above (see paragraphs 3, 4, 5, 10 and 11 above), the Court concludes that domestic remedies have not been exhausted as required by Article 35 § 1 of the Convention.

16. Accordingly, this complaint must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 11 May 2023.

Crina Kaufman Acting Deputy Registrar	Armen Harutyunyan President