

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

FOURTH SECTION

DECISION

Application no. 83098/17
Margarida Carmen NAZARÉ MARTINS
against Portugal

The European Court of Human Rights (Fourth Section), sitting on 30 May 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. 83098/17) 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 2 December 2017 by a Portuguese national, Ms Margarida Carmen Nazaré Martins ("the applicant"), who was born in 1953, lives in Lisbon and was represented by Mr R. Sá Fernandes, a lawyer practising in Lisbon;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The applicant was the founder and president of a renowned charity in Portugal and later president of a parish council in the municipality of Lisbon.

2. The case concerns criminal proceedings against her for having forwarded to five recipients in 2013 an email she had received which was part of a chain and to which were attached PDF files containing unauthorised copies of three books by a well-known Portuguese author.

3. On 9 November 2016 the Lisbon District Court convicted her, under Article 199 § 1 of the Copyright Code (*Código dos Direitos de Autor e Direitos Conexos*), of using counterfeit or stolen work (*aproveitamento de obra contrafeita ou usurpada*) and sentenced her to six months' imprisonment, commuted to a fine of 1,260 euros (EUR) and another one of EUR 1,190.

4. By a judgment of 31 May 2017, notified to the applicant on 6 June 2017, the Lisbon Court of Appeal dismissed the appeal lodged by the applicant. It considered that the word "public", within the meaning of the Copyright Code, was inseparable from the action of "distribution" and merely qualified it, and that "distribution to the public" (referring to the PDF files) should be interpreted as "the action of forwarding to individuals who [were] not members of the same household and who therefore might potentially buy the books".

5. On 6 October 2017 the further appeal lodged by the applicant with the Constitutional Court was dismissed in a summary decision. On 13 December 2017 that decision was upheld by a three-judge bench (*conferência*) of the Constitutional Court.

6. The applicant complains under Article 7 of the Convention that Article 199 § 1 of the Copyright Code – which makes the use of counterfeit or stolen work an offence – lacks foreseeability on account of its vagueness and ambiguity. She argues in particular that she forwarded the email at issue to people close to her and therefore could not have foreseen that she would be considered to have "distribut[ed] [the books] to the public" for the purposes of the relevant legal provision (see paragraphs 1-3 above).

7. Relying on Article 6 § 2 of the Convention, the applicant argues that the principle of the presumption of innocence was breached.

8. Relying on Article 6 §§ 1 and 3 (a) and (b) of the Convention, the applicant also alleges that she was not informed of a relevant fact, namely the existence of the chain of emails.

9. Lastly, relying on Article 14 taken in conjunction with Article 6 of the Convention and on Article 1 of Protocol No. 12 to the Convention, the applicant alleges that she was discriminated against in so far as the other participants in the chain email were not prosecuted.

THE COURT'S ASSESSMENT

A. Complaint under Article 7 of the Convention

10. According to the Court's case-law, an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it – what acts and omissions will make him or her criminally liable (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V; *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 145, ECHR 2000-VII; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 140, ECHR 2008; and *Del Río Prada v. Spain* [GC], no. 42750/09, § 79, ECHR 2013).

11. In principle, Article 7 requires a mental link disclosing an element of liability in the conduct of the actual perpetrator of the offence if a penalty is

to be imposed (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 242, 28 June 2018).

12. The Court's function under Article 7 § 1 of the Convention is therefore to assess whether there was a sufficiently clear legal basis, having regard to the applicable law at the material time, for the applicant's conviction. In particular, the Court will examine whether the applicant's conviction was consistent with the essence of that offence and could reasonably have been foreseen by the applicant (compare *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 162, ECHR 2015).

13. In the instant case, the Court notes that Article 199 § 1 of the Copyright Code was introduced into Portuguese law by Law no. 45/85 of 17 September 1985. Therefore, it was sufficiently accessible to the applicant at the material time.

14. As to its foreseeability, the Court notes that it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice (see *Cantoni*, cited above, § 31).

15. When the legislative technique of categorisation is used, there will often be grey areas at the fringes of the definition. This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7 of the Convention, provided that it proves to be sufficiently clear in the large majority of cases (ibid., § 32).

16. Moreover, according to the Court's general approach, it does not question the interpretation and application of national law by national courts unless there has been flagrant non-observance or arbitrariness in the application of that law (see, *inter alia*, *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III, and, *mutatis mutandis*, *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002).

17. The scope of the notion of foreseeability also depends on the content of the text in issue, the field it is designed to cover, and the number and status of those to whom it is addressed (see *Cantoni*, cited above, § 35).

18. The Court considers in the instant case that the domestic courts' interpretation was reasonable and sufficiently clear and was also consistent with the essence of the offence concerned. It further finds that the Copyright Code is addressed to all members of society without distinction, and that it does not contain technical or specific language that would require the person concerned to take appropriate legal advice to assess it.

19. Furthermore, it is to be concluded that the applicant (see paragraph 1 above) could understand the meaning of the provision at issue and in particular of the prohibited conduct of "distributing unauthorised copies of

books to others" (as per the wording of the Copyright Code) and the consequences that her action could entail.

20. In the light of the foregoing, the Court finds no basis to conclude that the decision of the domestic courts to convict the applicant was affected by any element of arbitrariness or that it was otherwise manifestly unreasonable (see, *mutatis mutandis*, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 86, ECHR 2007-I).

21. 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. Remaining complaints

22. As regards the alleged breach of the principle of the presumption of innocence (see paragraph 7 above), the Court refers to the principles established in *Barberà, Messegué and Jabardo v. Spain* (6 December 1988, §§ 31, 33, 67-68 and 77, Series A no. 146). In the present case, it notes that the applicant raised a mere suspicion and that her allegation was thus unsubstantiated. In any event, there is nothing to suggest that the domestic courts started with the preconceived idea that the accused had committed the offence at issue, or that the burden of proof was shifted from the prosecution to the defence.

23. As to the complaint that the applicant had not been informed of a relevant fact, namely the existence of a chain email (see paragraph 8 above), the Court refers, *mutatis mutandis*, to *Pélissier and Sassi v. France* ([GC], no. 25444/94, §§ 51-52, ECHR 1999-II). It transpires from the case file that that fact was already mentioned in the referral of the case for trial (*despacho de pronúncia*), by means of the description of the conduct as "forwarded", and that the applicant herself referred in detail to the fact at issue in her statement of defence (*contestação*). Therefore, the Court finds no infringement of the applicant's right to be informed of the nature and cause of the accusation against her.

24. Concerning the alleged discrimination against the applicant on account of the fact that the other participants in the chain email were not prosecuted (see paragraph 9 above), the Court reiterates that Article 14 merely complements the other substantive provisions of the Convention and the Protocols thereto (see, *inter alia*, *Molla Sali v. Greece* [GC], no. 20452/14, § 123, 19 December 2018). Article 1 of Protocol No. 12 introduces a general prohibition of discrimination (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 53, ECHR 2009) and a "free-standing right" not to be discriminated against. In the present case, the applicant was *prima facie* in an analogous or relevantly similar situation when compared with the other participants in the chain email and in principle should have been treated in an equal manner. Nevertheless,

it transpires from the case file (see paragraph 3 above) that the author of the books lodged a criminal complaint only against the applicant. In addition, even considering that the offence provided for in Article 199 of the Copyright Code is subject to public prosecution, the fact remains that the public prosecutor discontinued the proceedings against the applicant. Therefore, it would have been irrational and pointless to have prosecuted the other participants in the chain email in the knowledge that the investigation would be discontinued. Furthermore, it was the author of the books who challenged the public prosecutor's decision concerning the applicant. The investigating judge subsequently referred the case for trial (*despacho de pronúncia*). He was not competent to examine the conduct of the other participants in the chain email.

25. Not all differences in treatment constitute discrimination, only those devoid of "an objective and reasonable justification" (see *Molla Sali*, cited above, § 135; *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013; and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV).

26. Even assuming that there was a difference in treatment of individuals in analogous or relevantly similar situations, it pursued a legitimate aim, namely the administration of justice. Overall, the criminal procedural rules were properly applied and placed the applicant in a different position with a different status (that of defendant), which was justified and proportionate to the aim pursued.

27. It follows that these complaints must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 22 June 2023.

Crina Kaufman Acting Deputy Registrar	Armen Harutyunyan President