



The Court delivers its Grand Chamber judgment in a case concerning the disciplinary penalties imposed on a judge

The case concerned disciplinary proceedings brought against a judge, resulting in the imposition of disciplinary penalties by the High Council of the Judiciary (CSM), and the review conducted by the Supreme Court on appeal.

In today's **Grand Chamber** judgment¹ in the case of [Ramos Nunes de Carvalho e Sá v. Portugal](#) (applications nos. 55391/13, 57728/13 and 74041/13) the European Court of Human Rights:

- held by a majority (eleven votes to six) that there had been **no violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights with regard to the complaint alleging a lack of independence and impartiality on the part of the Judicial Division of the Supreme Court;
- held unanimously that there had been a **violation of Article 6 § 1 (right to a fair trial)** on account of the shortcomings in the conduct of the proceedings against the applicant;
- declared unanimously that, as the applicant had not complied with the six-month time-limit, the Court was unable to examine on the merits the complaint alleging a lack of independence and impartiality on the part of the CSM;
- declared unanimously that the applicant's complaint concerning **Article 6 § 3 (a) and (b) (right to be informed in detail of the accusation against her and to have adequate time and facilities for the preparation of her defence)** was inadmissible;

In particular, the Court found no evidence of a lack of independence or impartiality on the part of the Judicial Division of the Supreme Court. The Court further found that – in view, among other considerations, of the specific context of disciplinary proceedings conducted against a judge, the seriousness of the penalties, the fact that the procedural guarantees before the CSM had been limited, and the need to assess factual evidence going to the applicant's credibility and that of the witnesses and constituting a decisive aspect of the case – the combined effect of two factors, namely the insufficiency of the judicial review performed by the Judicial Division of the Supreme Court and the lack of a hearing either at the stage of the disciplinary proceedings or at the judicial review stage, meant that the applicant's case had not been heard in accordance with the requirements of Article 6 § 1 of the Convention.

Principal facts

The applicant, Paula Cristina Ramos Nunes de Carvalho e Sá, is a Portuguese national who was born in 1972 and lives in Barcelos (Portugal).

In 2010 and 2011 three sets of disciplinary proceedings were brought against the applicant, who was a judge at the Vila Nova de Famalicão Court of First Instance: firstly, for calling the judicial inspector responsible for her performance appraisal a "liar" during a telephone conversation and accusing him of "inertia and lack of diligence"; secondly, for the use of false testimony in the earlier proceedings; and thirdly, for asking the judicial investigator, in the course of a private conversation, not to take

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.

disciplinary action against the witness on her behalf who had been called during the first set of proceedings.

Between 2011 and 2012 the plenary CSM, ruling in the three sets of proceedings, respectively ordered the applicant to pay 20 day-fines (20 days without pay) for acting in breach of her duty of propriety; suspended her from duty for 100 days for acting in breach of her duty of honesty; and suspended her for 180 days for acting in breach of her duties of loyalty and propriety. In 2013 the Judicial Division of the Supreme Court unanimously dismissed the three appeals lodged by the applicant against the CSM's decisions, without holding a hearing. The Supreme Court found, among other things, that its task was not to review the facts but only to examine whether the establishment of the facts had been reasonable and coherent. In 2014 the plenary CSM grouped together the penalties imposed in the three sets of disciplinary proceedings and imposed a single penalty of 240 days' suspension on the applicant. She was actually suspended from duty for only 100 days, as enforcement of the remainder of the penalty had become time-barred.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), Ms Ramos Nunes de Carvalho E Sá alleged a breach of her right to an independent and impartial tribunal with full jurisdiction and of her right to a public hearing. She further complained that, in view of the reclassification of the facts by the CSM, she had not been informed in detail of the nature of the accusations against her and accordingly had not had adequate time and facilities for the preparation of her defence.

The applications were lodged with the European Court of Human Rights on 16 August and 8 November 2013. In its Chamber judgment of 21 June 2016 the Court held unanimously that there had been a violation of Article 6 of the Convention (right to a fair trial). On 20 September 2016 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 17 October 2016 the panel of the Grand Chamber accepted that request. A hearing took place on 22 March 2017.

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

Guido **Raimondi** (Italy), *President*,
Angelika **Nußberger** (Germany),
Linos-Alexandre **Sicilianos** (Greece),
Ganna **Yudkivska** (Ukraine),
Helena **Jäderblom** (Sweden),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
Paulo **Pinto de Albuquerque** (Portugal),
Erik **Møse** (Norway),
Ksenija **Turković** (Croatia),
Dmitry **Dedov** (Russia),
Branko **Lubarda** (Serbia),
Carlo **Ranzoni** (Liechtenstein),
Stéphanie **Mourou-Vikström** (Monaco),
Alena **Poláčková** (Slovakia),
Pauliine **Koskelo** (Finland),
Lətif **Hüseynov** (Azerbaijan),

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

Decision of the Court

Article 6 (right to a fair trial)

1. The CSM's alleged lack of independence and impartiality

The Court noted that the applicant had not complained of a lack of independence and impartiality on the part of the CSM in her application forms. Moreover, the Court had given notice to the Government only of the complaints concerning the alleged lack of access to a court, the alleged lack of independence and impartiality of the Judicial Division of the Supreme Court, and the lack of a public hearing. The complaint in question was also separate from those in respect of which the Government had been invited to submit observations and was not intrinsically linked to them such that it could not be examined separately. Consequently, the Court concluded that the complaint concerning the CSM's alleged lack of independence and impartiality, which had been made for the first time in the applicant's observations of 30 October 2015, was out of time since the domestic proceedings had ended in 2013, that is, more than six months before the complaint was submitted. Accordingly, the Court rejected this complaint (Article 35 §§ 1 and 4 of the Convention).

2. Applicability of Article 6 of the Convention to the applicant's complaint that she was not informed in detail of the accusation against her, and that she did not have adequate time and facilities for the preparation of her defence

The Court observed that the case concerned disciplinary proceedings applicable to judges, conducted by a management and disciplinary body – the CSM – subject to the subsequent supervision of the Judicial Division of the Supreme Court. Hence, neither the prosecuting authorities nor the criminal courts had been involved in determining the cases, and the offences of which the applicant had been accused were not of a criminal nature. In the present case the offences and the sanctions liable to be imposed had been purely disciplinary. Thus, the disciplinary proceedings against the applicant did not concern the determination of a criminal charge within the meaning of Article 6 § 3 of the Convention, which protected only persons “charged with a criminal offence”. Consequently, the Court rejected the applicant's complaint that she had not been informed in detail of the accusation against her and had therefore not had adequate time and facilities for the preparation of her defence, finding that it was incompatible *ratione materiae* with the provisions of the Convention.

3. Independence and impartiality of the Judicial Division of the Supreme Court

With regard to the dual role of the President of the Supreme Court, the Court observed that the applicant's complaint concerned the highest court in Portugal, which was made up exclusively of professional judges who were independent, had guaranteed tenure and were subject to rules on incompatibility apt to guarantee their independence and impartiality. The Court also noted that the composition of the Judicial Division of the Supreme Court was determined by the Status of Judges Act on the basis of objective criteria such as judges' seniority and their membership of a particular division. Furthermore, the President of the Supreme Court did not sit in that *ad hoc* division and the members of the division were formally appointed by the most senior Vice-President of the Supreme Court. In addition, the applicant did not allege that the judges of the Judicial Division had been acting on the instructions of the President of the Supreme Court or had otherwise demonstrated bias, nor did she claim that the President of the Supreme Court could have influenced the judges of the Judicial Division by any other means. In particular, it was not established that those judges had been specially appointed with a view to adjudicating her case. Thus, no evidence existed capable of arousing objectively justified fears on the part of the applicant. The dual role of the President of the Supreme Court was therefore not such as to cast doubt on the independence and objective impartiality of that court in ruling on the applicant's appeals against the CSM's decisions.

As to the CSM's role regarding the careers of Supreme Court judges and disciplinary proceedings against them, the Court referred to its judgment in the case of *Oleksandr Volkov*², concerning a similar issue. It noted that, in the present case, no serious issues had been identified in terms of structural deficiencies or an appearance of bias within the Portuguese CSM. The Court emphasised, among other considerations, the importance of the principle of independence of the judiciary in Portugal, which was protected both by the Constitution and by other provisions of domestic law. It further noted that the judges of the Supreme Court, who were often in the final stages of their careers, were no longer subject to performance appraisals or in search of promotion, and that the CSM's disciplinary authority over them was in reality rather theoretical. The Court also observed the absence of any specific evidence of a lack of impartiality, such as the existence of pending disciplinary proceedings against one of the members of the benches that had examined the applicant's appeals. In more general terms the Court considered it normal that judges, in the performance of their judicial duties and in various contexts, should have to examine a variety of cases in the knowledge that they might themselves, at some point in their careers, be in a similar position to one of the parties, including the defendant. However, a purely abstract risk of this kind could not be regarded as apt to cast doubt on the impartiality of a judge in the absence of specific circumstances pertaining to his or her individual situation.

Accordingly, the Court saw no evidence of a lack of independence and impartiality on the part of the Judicial Division of the Supreme Court, and held that **there had been no violation**.

4. The review performed by the Judicial Division of the Supreme Court and the lack of a public hearing

The Court decided to examine together the applicant's complaint regarding the alleged insufficiency of the review conducted by the Judicial Division of the Supreme Court and her complaint concerning the lack of a hearing, since the two were closely linked.

The Court specified that, in order to determine whether the Judicial Division of the Supreme Court had enjoyed full jurisdiction within the meaning of the Convention institutions' case-law, it would take into account the powers of that body and its case-law. In that connection it observed that in assessing whether, in a given case, the extent of the review carried out by the domestic courts had been sufficient, the Court had previously held that it must have regard to the powers of the judicial body in question and to such factors as: (a) the subject-matter of the decision appealed against, and in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and, if so, to what extent; (b) the manner in which that decision was arrived at and, in particular, the procedural guarantees available in the proceedings before the administrative body; and (c) the content of the dispute, including the desired and actual grounds of appeal (the Court cited, among other authorities, *Bryan v. the United Kingdom*³).

The subject-matter of the impugned decisions of the CSM, which the applicant challenged by means of special administrative actions as they existed under Portuguese law at the relevant time, was the issue whether the applicant had breached her professional obligations. The Court considered, firstly, that the review of a decision imposing a disciplinary penalty differed from that of an administrative decision that did not entail such a punitive element. Secondly, it noted that the disciplinary proceedings in the present case had concerned a judge. In that connection the Court stressed that, even if they did not come within the scope of Article 6 of the Convention under its criminal head, disciplinary penalties could nevertheless entail serious consequences for the lives and careers of judges. The judicial review carried out therefore had to be appropriate to the subject-matter of the dispute, that is to say, in the instant case, to the disciplinary nature of the

² *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013

³ *Bryan v. the United Kingdom*, 22 November 1995, § 45, Series A no. 335-A

administrative decisions in question. This consideration applied with even greater force to disciplinary proceedings against judges, who had to enjoy the respect necessary for the performance of their duties. When a member State initiated such disciplinary proceedings, public confidence in the functioning and independence of the judiciary was at stake; in a democratic State, this confidence guaranteed the very existence of the rule of law.

The proceedings before the CSM – a disciplinary authority and a non-judicial body – had afforded the applicant the opportunity to mount a defence. However, despite the fact that the applicant was liable to incur very serious penalties, the proceedings before the plenary CSM had been in writing and the applicant could not attend its sittings in any of the three sets of proceedings concerning her; under the national legislation, those sittings were not open either to the person concerned by the proceedings or to members of the public, and the CSM was not authorised by law to hold public hearings. Thus, the applicant had not had an opportunity to make oral representations, either on the factual issues and the penalties or on the various legal issues. Furthermore, the plenary formation of the CSM had not heard any evidence from witnesses, although it was not only the applicant's credibility that had been at stake but also that of crucial witnesses. The Court therefore considered that the CSM had not exercised its discretionary powers on an adequate factual basis.

In the proceedings before the Judicial Division of the Supreme Court – a judicial body – the applicant had denied calling the judicial inspector a “liar” and requesting that no proceedings be instituted against the witness whom she had wished to call. These facts were “decisive” and the applicant had faced the possibility of very serious penalties (removal from office or suspension) which carried a significant degree of stigma and were apt to have irreversible repercussions on her life and career.

As to the extent of the review carried out by the Judicial Division of the Supreme Court regarding the establishment of the facts, that division had stated expressly that it did not have full jurisdiction in disciplinary matters but was called upon solely to review the lawfulness of the decisions under challenge. In particular, it had stressed that it did not have jurisdiction when it came to “gathering the evidence or establishing the key facts”. It appeared therefore that, in view of the limits imposed on it by the legislation and by its own case-law, the Judicial Division of the Supreme Court had not been empowered to examine the decisive points in the proceedings, namely the content of the applicant's conversations with the judicial inspector and the judicial investigator.

The Court observed that the assessment of the facts entailed examining issues going to the credibility of the applicant and the witnesses. Having found that it did not have jurisdiction to re-examine the facts and the evidence, even on the basis of the material in the file sent to it, the Judicial Division of the Supreme Court had accordingly refused the applicant's request for a public hearing. In the Court's view, the dispute as to the facts and the repercussions of the disciplinary penalties on the applicant's reputation had made it necessary for the Judicial Division of the Supreme Court to perform a review that was sufficiently thorough to enable it firstly to determine, for instance, whether the applicant had made certain remarks during her telephone conversation with the judicial inspector or her private meeting with the judicial investigator and, secondly, to form its own impression of the applicant by affording her an opportunity to explain her version of the situation orally. The Court reiterated in that regard that no hearing had been held before the CSM and that the Judicial Division of the Supreme Court had been the first and only judicial body to examine the applicant's appeals against the CSM's decisions. In the present case the applicant had requested a public hearing. She should therefore have had the possibility of obtaining a hearing; this would have allowed for an oral confrontation between the parties and a more thorough review of the facts, which were disputed.

Accordingly, the Court concluded that – taking into consideration, in particular, the specific context of disciplinary proceedings conducted against a judge, the seriousness of the penalties, the fact that the procedural guarantees before the CSM had been limited, and the need to assess factual

evidence going to the applicant's credibility and that of the witnesses and constituting a decisive aspect of the case – the combined effect of two factors, namely the insufficiency of the judicial review performed by the Judicial Division of the Supreme Court and the lack of a hearing either at the stage of the disciplinary proceedings or at the judicial review stage, meant that the applicant's case had not been heard in accordance with the requirements of Article 6 § 1 of the Convention. In those circumstances the Court decided to confine itself to examining the issue whether the Supreme Court had conducted a sufficient review of the establishment of the facts; it thus decided not to examine the two remaining aspects of the review performed by the Supreme Court, namely its review of the breach of professional obligations and its review of the disciplinary sanctions imposed.

There had therefore been a violation of Article 6 § 1 of the Convention.

Article 41 (just satisfaction)

The Court *dismissed*, unanimously, the applicant's claim for just satisfaction.

Separate opinions

Judge Pinto de Albuquerque expressed a concurring opinion. Judges Raimondi, Nußberger, Jäderblom, Møse, Poláčková and Koskelo expressed a joint concurring opinion. Judges Yudkivska, Vučinić, Pinto de Albuquerque, Turković, Dedov and Hüseyinov expressed a joint partly 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.