



The dismissal, on procedural grounds, of a constitutional appeal by a judge who was challenging a disciplinary penalty did not violate the right of access to a court

In today's **Chamber judgment**¹ in the case of [Albuquerque Fernandes v. Portugal](#) (application no. 50160/13) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights.

The case concerned disciplinary proceedings brought against Ms Albuquerque Fernandes, at the close of which the High Council of the Judiciary (HCJ) decided to impose compulsory retirement, and the ensuing judicial proceedings.

Ms Albuquerque Fernandes accused the Constitutional Court of showing excessive formalism when it rejected her constitutional appeal on the basis that she had not complied with a statutory requirement laid down in section 79–C of the Constitutional Court Act: in her appeal, the applicant had referred to the HCJ's decision rather than to the Supreme Court's judgment.

The Court found in particular that the inadmissibility decisions delivered by the Constitutional Court had not reflected excessive formalism in this case. On the contrary, it considered that these decisions had ensured legal certainty and the proper administration of justice. Thus, the Constitutional Court had restored the rule of law in connection with an erroneous procedural step taken by Ms Albuquerque Fernandes. The restrictions placed on the applicant had not therefore impaired the essence of her right of access to a court.

Principal facts

The applicant, Cristina Maria Albuquerque Fernandes, is a Portuguese national who was born in 1963 and lives in Coimbra (Portugal). At the relevant time she was a judge.

In February 2011 the HCJ opened disciplinary proceedings against Ms Albuquerque Fernandes. In particular, she was accused of having taken with her case files from the Alcobaça Court for which she had been responsible on her transfer to the Leiria Court in September 2010, and of failing to return them.

In April 2011 the judicial investigator invited Ms Albuquerque Fernandes to return the case files in question. Having received no positive response, the judicial investigator informed the HCJ, which decided to impose a 30-day temporary suspension measure.

In July 2011 the judicial investigator drew up an indictment, accusing Ms Albuquerque Fernandes of breaching her duty to act with zeal and to obey the HCJ's instructions, of preventing the administration of justice and of irretrievably damaging the prestige of the judiciary and the image of the Alcobaça Court. Among other charges, Ms Albuquerque Fernandes was accused of: falling behind in dealing with files, including urgent ones; failing to give rulings in 210 cases; having taken 19 sets of files when she left the Alcobaça Court, without requesting authorisation from the HCJ and without informing the

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

president or the registrars of that court; and having returned these files only after the HCJ had suspended her from her functions and without having ruled on the cases in question.

In September 2011 Ms Albuquerque Fernandes submitted her defence and denied the charges. She alleged, among other points, that she had informed the registrars of the court that she was taking with her certain files when she left that court; she added that she was suffering from health problems and from anxiety.

In December 2011 the HCJ, sitting in plenary, gave its decision and imposed the penalty suggested by the judicial investigator, namely the compulsory retirement of Ms Albuquerque Fernandes.

Between 2012 and 2013 Ms Albuquerque Fernandes lodged appeals before the Judicial Division of the Supreme Court and before the Constitutional Court, without success.

In January 2012 Ms Albuquerque Fernandes appealed to the Judicial Division of the Supreme Court. She alleged, among other points, that she had been unable to anticipate the penalty that might be imposed on her and that, in consequence, she had been taken unawares by the HCJ's decision. She considered that this had infringed her right to defend herself, as guaranteed by the Constitution, and also her right to be heard, as guaranteed by section 110 § 2 of the Status of Judges Act (the "Status Act")². The Supreme Court dismissed this appeal on 19 September 2002.

Lastly, Ms Albuquerque Fernandes lodged an appeal with the Constitutional Court, arguing that the indictment in respect of which she had submitted her defence was geared towards the imposition of a fine or a transfer, as indicated by the provisions cited in it. She considered, in consequence, that she had been taken unawares by the HCJ's decision to impose the penalty of compulsory retirement, arguing that section 117 § 1 of the Status Act was unconstitutional in the light of Article 13, Article 20 § 4, Article 32 §§ 1, 2 and 10 and Article 269 § 3 of the Constitution

Ruling in a single-judge formation, the Constitutional Court declared this appeal inadmissible in a summary decision on 28 November 2012, on the grounds that the HCJ's decision had not applied section 117 § 1 of the Status Act within the meaning alleged by the applicant, as required by section 79-C of the Constitutional Court Act ("the LOTC"). Ms Albuquerque Fernandes appealed against this decision before a three-judge committee of the Constitutional Court, on the grounds that it was excessively formalistic. The committee confirmed the single judge's decision.

Complaints, procedure and composition of the Court

Ms Albuquerque Fernandes submitted that the Constitutional Court had been excessively formalistic, and that this had resulted in the inadmissibility of her constitutional appeal. The Court decided to examine this complaint under Article 6 § 1 (right of access to a court).

Relying on Article 6 (right to a fair hearing), Ms Albuquerque Fernandes complained that she had learned of the penalty applicable in the disciplinary proceedings against her only when the HCJ issued its decision, and that she was unable to defend herself in this regard.

The application was lodged with the European Court of Human Rights on 2 August 2013.

Judgment was given by a Chamber of seven judges, composed as follows:

Yonko **Grozev** (Bulgaria), *President*,
 Faris **Vehabović** (Bosnia and Herzegovina),
 Iulia Antoanella **Motoc** (Romania),
 Armen **Harutyunyan** (Armenia),
 Gabriele **Kucsko-Stadlmayer** (Austria),
 Lorraine **Schembri Orland** (Malta) and,

² Status of Judges Act (Law no. 21/85 of 30 July 1985) (*Estatuto dos Magistrados Judiciais*).

Alberto Augusto **Andrade de Oliveira** (Portugal), *ad hoc Judge*,

and also **Andrea Tamietti**, *Section Registrar*.

Decision of the Court

Article 6 § 1 (right of access to a court) – complaint concerning the Constitutional Court’s dismissal of the appeal

Ms Albuquerque Fernandes claimed that she had wished to obtain a review of whether the normative interpretation of section 117 § 1 of the Status Act (according to which the indictment did not imply that reference was made therein to the applicable penalties, especially when penalties involving exclusion from the judiciary were at stake) was compatible with Article 32 of the Constitution. She specified that her question, based on the alleged unconstitutionality of the normative interpretation of section 117 § 1 of the Status Act, had been clear and substantiated by all possible arguments. She added that she had referred to all of the relevant legal provisions in the case, in order to prove that the indictment ought to refer to the applicable penalties, so that the accused person could submit his or her defence with full knowledge of the relevant facts and thus a “surprise decision” could be avoided.

The Court noted that under section 75-A of the LOTC, in order for an application to the Constitutional Court to be valid, all appeal pleadings had to specify the sub-paragraph of section 70 § 1 of the LOTC on which the appeal was based and the legal provision whose unconstitutionality or illegality was to be assessed. Section 79-C of the LOTC specified that the provision in question had to have been applied in the decision being contested. The limitation placed in the present case on the applicant’s right of access to the Constitutional Court had therefore been legal. The Court also considered that it had pursued a legitimate aim, namely the observance of the rule of law and the proper administration of constitutional justice. It therefore remained to determine whether this restriction had been proportionate to the legitimate aim pursued in this case.

Having regard to the specific nature of an appeal to the Constitutional Court, the Court accepted that the conditions of access to that court could be stringent, in order to guarantee legal certainty and the proper administration of constitutional justice at the highest level of the judicial hierarchy. The Court also took into account the fact that the Constitutional Court intervened only as a court of last resort, after the constitutional question had been examined by the lower courts in the judicial hierarchy. In the present case, no remedy other than an appeal to the Constitutional Court, within the scope of that court’s powers with regard to review of constitutionality, had been available to the applicant following the Supreme Court’s judgment.

In its judgment of 19 September 2012 the Supreme Court had held that the normative interpretation of section 117 § 1 of the Status Act, according to which it was not necessary to specify the applicable penalty in the indictment, was compatible with the Constitution, in that a judge accused in the context of disciplinary proceedings could anticipate the potential disciplinary penalty on the basis of the facts in issue as these were set out in the indictment. More specifically, it had held that this interpretation did not breach the right to equality as guaranteed by Article 13 of the Constitution, the right to a fair hearing enshrined in Article 20 § 4 of the Constitution and the procedural rights guaranteed by Article 32 §§ 1 and 2 and Article 269 § 3 of the Constitution, thus responding to the merits of the question.

However, it had not been the interpretation given to section 117 § 1 of the Status Act by the Supreme Court in its judgment of 19 September 2012 that the applicant had complained about in her appeal to the Constitutional Court, but rather the interpretation she had derived from the HCJ’s decision of 13 December 2011. Thus, as the Constitutional Court noted, the Supreme Court’s interpretation had been much wider, since it stated that even if the potential penalty was not specified, it could be derived from the statement of contested facts in the indictment.

Thus, by failing to specify the meaning of the normative interpretation complained of as it had been followed by the lower court, namely in this instance the Supreme Court, the applicant had not complied with the requirements of section 79–C of the LOTC, confirmed by the Constitutional Court’s case-law³.

As a secondary consideration, the Court considered that the applicant had had at her disposal the necessary elements to submit this question validly, taking the Supreme Court’s judgment into account. It noted that the Constitutional Court had already ruled on the unconstitutionality of normative interpretations of section 117 § 1 and section 122 of the Status Act. It had therefore been for the applicant to raise the question of the unconstitutionality of the normative interpretation of section 117 § 1 of the Status Act, as applied by the Supreme Court in its judgment of 19 September 2012.

In consequence, it could not be maintained that the inadmissible decisions delivered in this case by the Constitutional Court demonstrated excessive formalism. On the contrary, the Court considered that they had guaranteed legal certainty and the proper administration of justice. The Constitutional Court had thus restored the rule of law in connection with an erroneous procedural step taken by the applicant. It followed that the restrictions placed on the applicant had not impaired the essence of her right of access to a court and **that there had therefore been no violation of Article 6 § 1 of the Convention under this head.**

Article 6 (right to a fair hearing) – complaint concerning the disciplinary proceedings

The Court reiterated its finding that the Constitutional Court had declared the applicant’s appeal inadmissible on the grounds that she had not satisfied the condition laid down by section 79-C of the LOTC. That court had not therefore ruled on the merits of the question based on the alleged unconstitutionality of the normative interpretation of section 117 § 1 of the Status Act. It followed that the applicant had failed to exhaust, in accordance with Article 35 § 1 of the Convention, a remedy that was available to her and that could have provided redress for her complaint. This complaint was therefore rejected in application of Article 35 § 4 of the Convention.

The judgment is available only in 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.

³ Arrêts nos 82/92 du 25 février 1992 et 178/95 du 5 avril 1995.