



The excessive formalism of the Constitutional Court deprived the applicants of their right of access to a court

In today's Chamber judgment¹ in the case of [Dos Santos Calado and Others v. Portugal](#) (applications nos. 55997/14, 68143/16, 78841/16 and 3706/17) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights with regard to applications nos. 55997/14 and 68143/16, and

no violation of Article 6 § 1 with regard to application no. 78841/16.

The cases concerned Portuguese nationals who complained about their appeals to the Constitutional Court being declared inadmissible. Applications nos. 55997/14 and 68143/16 also concerned the alleged lack of impartiality of the three-judge committee of the Constitutional Court.

The Court found in particular that in the two cases in which a violation was found, the Constitutional Court had displayed excessive formalism in applying the legislative provisions forming the basis for its jurisdiction to hear appeals. Consequently, that court had deprived the applicants of their right of access to a court.

Principal facts

In the first application the applicant had brought an action in the administrative courts contesting the amount of her retirement pension. Her claims were dismissed. The applicant lodged an appeal with the Constitutional Court which was declared inadmissible. She then lodged an objection with the three-judge committee of the Constitutional Court, which was dismissed.

The applicants in the second application are officials of the Roads Department who were acting as *de facto* inspectors. They complained of the lack of regulations governing their careers. Their complaint was dismissed by the Central Administrative Court for the North region ("the Central Administrative Court") and by the Supreme Administrative Court. The applicants lodged an appeal with the Constitutional Court which was declared inadmissible. That decision was upheld by the three-judge committee.

The applicant in the third application, who had been convicted of aggravated fraud, complained of a breach of the *ne bis in idem* principle. His complaint was dismissed by the courts at first and second instance. He lodged an appeal with the Constitutional Court, which declared it inadmissible. The three-judge committee upheld that decision.

Finally, in the fourth application, the applicant, who had been sentenced to a suspended term of three years and two months' imprisonment for domestic violence, contested, among other things, the establishment of the facts leading to his conviction and the interpretation of the law. He also argued that his prosecution for domestic violence had become statute-barred. Lastly, he alleged that his conviction had breached the prohibition of the retroactive application of the criminal law and 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.

presumption of innocence. The first and second-instance courts dismissed his complaints. He lodged an appeal with the Constitutional Court which was declared inadmissible. He did not submit an objection to the committee of three judges.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 of the Convention, the applicants complained of an infringement of their right of access to a court. In the case of applications nos. 55997/14 and 68143/16, the applicants also alleged a violation of their right to a fair hearing.

The applications were lodged with the European Court of Human Rights on 6 August 2014, 2 November 2016, and 7 and 12 December 2016.

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

Paul Lemmens (Belgium), *President*,
Georgios A. Serghides (Cyprus),
Paulo Pinto de Albuquerque (Portugal),
Alena Poláčková (Slovakia),
María Elósegui (Spain),
Gilberto Felici (San Marino),
Erik Wennerström (Sweden),

and also Milan Blaško, *Section Registrar*.

Decision of the Court

[Article 6 § 1 \(access to a court\)](#)

Application no. 55997/14 (Dos Santos Calado v. Portugal)

The applicant had raised two issues in her appeal to the Constitutional Court; the first concerned the unconstitutionality of a legal rule while the second related to the unlawfulness of the rule in question. In both cases the applicant had relied on the same subsection of section 70(1) of the Institutional Law on the Constitutional Court (“the LOTC”) forming the basis for the Constitutional Court’s jurisdiction to hear appeals.

The Court noted that the Constitutional Court had declared inadmissible the part of the applicant’s appeal relating to the unlawfulness of the legal rule, on the grounds that she had relied in her memorial on the incorrect subsection of the LOTC provision. The Court considered that the requirement to specify which subsection was being relied upon was lawful, as it was provided for by the same Law. Furthermore, it pursued the legitimate aim of ensuring respect for the rule of law and the proper administration of constitutional justice.

The Court therefore had to ascertain whether the restriction had been proportionate in the present case. It noted that the Constitutional Court had been able to identify the two grounds of appeal submitted by the applicant. The inadmissibility decision had thus been based solely on the drafting error, as the ground of appeal had been clear from the applicant’s memorial and had been identified by the judges.

Consequently, and in accordance with its case-law, the Court held that the approach taken by the Constitutional Court had been excessively formalistic, having deprived the applicant of a remedy afforded by domestic law in respect of the matter at issue.

In the alternative, the Court noted that the Constitutional Court could have requested the applicant to rectify the error, as provided for by the LOTC, given that the ground of appeal had been clear from her memorial.

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

Application no. 68143/16 (Amador de Faria e Silva and Others v. Portugal)

The Court noted at the outset that the reason cited for the Constitutional Court's inadmissibility decision had been the applicants' omission to raise the alleged issue of unconstitutionality during the proceedings before the Central Administrative Court.

While the Court acknowledged that this requirement reflected the fact that the Constitutional Court was solely a court of last instance, it nevertheless observed that the applicants had raised an issue of unconstitutionality in their submissions in reply to the Ministries, on account of the difference in treatment between officials in the autonomous regions of Madeira and the Azores and those on the mainland.

The Central Administrative Court had not considered this issue, and had drawn a distinction between different categories of officials rather than addressing the difference in treatment raised by the applicants between inspectors in mainland Portugal and those in the autonomous regions of Madeira and the Azores.

The Court also observed that the Constitutional Court had held that the applicants should have been able to anticipate the decision of the Central Administrative Court, since the issue of unconstitutionality raised by them had been the subject of a recent Supreme Court judgment.

However, the Court noted that this case had not concerned the applicants and that the judgment had been given some months before the first judgment which had found in their favour, and which had made no distinction between different categories of officials. Hence, the applicants might well have been surprised by the decision of the Central Administrative Court.

Consequently, the Court held that the Constitutional Court had displayed excessive formalism and that there had been a violation of Article 6 § 1 of the Convention.

Application no. 78841/16 (Antunes Cardoso)

The Court noted that the applicant had not raised a plea of unconstitutionality based on the interpretation of a legal rule, and that his appeal had therefore fallen outside the jurisdiction of the Constitutional Court.

The Court accepted that, given the specific features of the Constitutional Court, more stringent admissibility requirements might apply. Hence, for the interpretation of a rule to be open to constitutional review, it had to be formulated in quite general and abstract terms.

In the present case the breach of the *ne bis in idem* principle alleged by the applicant related to the application of that principle by the first and second-instance courts to the acts of which he was accused.

Consequently, no rule-based criterion within the meaning of the Constitutional Court's case-law had been at issue. There had thus been no violation of Article 6 § 1.

[Article 6 § 1 \(lack of impartiality of the three-judge committee of the Constitutional Court\)](#)

The applicants in applications nos. 55997/14 and 68143/16 complained that this committee had lacked impartiality owing to the presence of the judge who had given the impugned inadmissibility decision, who had also been the judge rapporteur. The applicants therefore called into question the objective impartiality of the three-judge committee that had ruled on the admissibility of their constitutional appeals.

The Court observed that this committee was the body that delivered the final decision on the admissibility of constitutional appeals; the decision of the judge rapporteur was just a stage in that procedure. Hence, the committee was not a fully fledged autonomous entity called upon to determine the matter at issue.

Accordingly, the Court declared the complaints concerning the impartiality of the three-judge committee inadmissible.

Just satisfaction (Article 41)

The Court held that Portugal was to pay 3,300 euros (EUR) in respect of non-pecuniary damage to each of the applicants in applications nos. 55997/14 and 68143/16.

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.