



Requirement to be represented by a lawyer in criminal proceedings compatible with defence rights

In today's **Grand Chamber** judgment¹ in the case of **Correia de Matos v. Portugal** (application no. 56402/12) the European Court of Human Rights held, by nine votes to eight, that there had been:

no violation of Article 6 §§ 1 and 3 (c) (right to a fair trial/right to defend oneself in person) of the European Convention on Human Rights.

The case concerned the criminal proceedings against the applicant, a lawyer by training, for insulting a judge, and the fact that he was not permitted to conduct his own defence in those proceedings because the domestic courts required him to be represented by a lawyer.

The Court observed that the decision of the Portuguese courts requiring the applicant to be represented by counsel had been the result of comprehensive legislation seeking to protect accused persons by securing an effective defence in cases where a custodial sentence was possible. The essential aim of the Portuguese rule of mandatory legal representation in criminal proceedings was to ensure the proper administration of justice and a fair trial respecting the right of the accused to equality of arms.

With regard to the overall fairness of the trial, the Court did not discern any cogent reasons to doubt that the applicant's defence by court-appointed counsel had been conducted properly or to consider that the conduct of the proceedings by the domestic courts had been in any way unfair.

Principal facts

The applicant, Carlos Correia de Matos, is a Portuguese national who was born in 1944 and lives in Viana do Castelo (Portugal). He is a lawyer by training and an auditor by profession. In September 1993 the Bar Council suspended the applicant from the roll, finding that the exercise of the profession of lawyer was incompatible with practising as an auditor.

On 28 February 2008, in the context of a set of civil proceedings in which he was nevertheless acting as a lawyer, Mr Correia de Matos criticised the decisions taken by the judge. The latter lodged a complaint with the public prosecutor's office alleging that he had been insulted.

On 10 February 2010 the public prosecutor's office filed the prosecution's submissions against the applicant on a charge of insulting a judge. It appointed counsel on the basis of Article 64 of the Code of Criminal Procedure (CCP) to conduct the applicant's defence. On 12 March 2010 Mr Correia de Matos requested the District Court to open adversarial investigation proceedings and sought leave to replace his officially appointed defence counsel and represent himself. The District Court agreed to open the investigation but refused the applicant's request to conduct his own defence. Referring to the case-law of the Constitutional Court, the District Court found that a defendant who was a lawyer could not act as his or her own counsel in criminal proceedings. The applicant appealed. The Coimbra Court of Appeal dismissed the appeal, observing that Portuguese law on criminal procedure did not allow the status of defendant to be combined with that of defence counsel in the same proceedings. It added that the defendant had to be assisted by defence counsel at the hearing

1. Grand Chamber judgments are final (Article 44 of the Convention).

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before the investigating judge and at the trial in all cases liable to give rise to a custodial sentence or a detention order.

On 11 May 2012 the Constitutional Court ruled that it was not necessary to adjudicate on the constitutional appeal lodged by the applicant, as it had been neither signed nor endorsed by his court-appointed defence counsel in the criminal proceedings. On 20 September 2012 the Baixo-Vouga investigating judge held a hearing which was attended by the court-appointed lawyer but not by Mr Correia de Matos himself. The investigating judge confirmed the charge and referred the case for trial before the Criminal Court. On 12 December 2013, following another hearing at which only the court-appointed defence lawyer was present, the Criminal Court found Mr Correia de Matos guilty of aggravated insult and ordered him to pay 140 day-fines of nine euros (EUR) each as well as the costs of the proceedings, including an amount of EUR 150 for his representation by court-appointed counsel.

On 1 May 2014 the Baixo-Vouga Criminal Court rejected an appeal by the applicant against that judgment as being inadmissible, on the ground that it had not been signed by court-appointed defence counsel or by a lawyer instructed by the applicant. On 18 November 2014 the Porto Court of Appeal dismissed an appeal by the applicant against that decision. The Court of Appeal reiterated that defendants in criminal proceedings, even if they were lawyers, could not represent themselves but had to be assisted by defence counsel. It stressed that the provision of a criminal defence constituted a public-order interest. The Court of Appeal concluded that the right to a defence could not be waived; moreover, the powers vested by law in the defence were incompatible in many situations with the position of the defendant. The court noted that the Constitutional Court had repeatedly confirmed that this interpretation and the corresponding legislation were in keeping with the Constitution. Likewise, this approach was not in breach of the International Covenant on Civil and Political Rights (ICCPR) or of the European Convention on Human Rights. As the applicant had not appointed counsel following his appeal against the decision of 18 November 2014, the judgment of 12 December 2013 became final on 6 January 2015.

Complaints, procedure and composition of the Court

Relying on Article 6 § 3 (c) (right to defend oneself in person), the applicant complained of the decisions of the domestic courts refusing him leave to conduct his own defence in the criminal proceedings against him and requiring that he be represented by a lawyer.

The application was lodged with the European Court of Human Rights on 4 August 2012.

On 13 September 2016 the Chamber relinquished jurisdiction in favour of the Grand Chamber.

A hearing was held on 8 February 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),
Helena **Jäderblom** (Sweden),
András **Sajó** (Hungary),
Nona **Tsotsoria** (Georgia),
Işıl **Karakaş** (Turkey),
Vincent A. **De Gaetano** (Malta),
Paulo **Pinto de Albuquerque** (Portugal),
Aleš **Pejchal** (the Czech Republic),
Krzysztof **Wojtyczek** (Poland),
Iulia **Motoc** (Romania),

Síofra O’Leary (Ireland),
Mārtiņš Mits (Latvia),
Gabriele Kucsko-Stadlmayer (Austria),
Marko Bošnjak (Slovenia),
Lətif Hüseynov (Azerbaijan),

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

Decision of the Court

Article 6 § 3 (c)

With regard to the relevance and sufficiency of the grounds supporting the legislation applied, the Court attached considerable weight to the quality of the parliamentary and judicial review of the impugned measure. The Court observed that the legislature had repeatedly decided to maintain the requirement of compulsory assistance for the accused in criminal proceedings. The courts, notably the Supreme Court and the Constitutional Court, had given very thorough reasons in their case-law why they considered the strict rule of mandatory legal representation to be constitutional and necessary both in the accused’s and the public interest.

The Court observed that the domestic courts had reflected faithfully the reasoning followed by the Portuguese Constitutional Court, Supreme Court and Courts of Appeal for many years. They had stressed that the rules on compulsory assistance applied by them were designed not to limit the defence’s action but to protect the accused by securing an effective defence. They had further found that the accused’s defence in criminal proceedings was in the public interest and that the right to defence by counsel could not therefore be waived. In the domestic courts’ view, the relevant provisions of the CCP reflected the premise that an accused was better defended by a legal professional trained in advocacy who was unencumbered by the emotional burden weighing on the defendant and could offer a lucid, dispassionate and effective defence.

The decision of the Portuguese courts requiring the applicant to be represented by counsel had thus been the result of comprehensive legislation seeking to protect accused persons by securing an effective defence in cases where a custodial sentence was possible.

The Court also acknowledged that even a defendant trained in advocacy like the applicant might be unable, as a result of being personally affected by the charges, to conduct an effective defence in his or her own case. In the present case the defendant was a lawyer who had been suspended from the roll and was therefore excluded from providing legal assistance to third persons. Furthermore, it was clear from the case file that the applicant had acted as defence counsel despite his suspension and had already been charged with insulting a judge in those proceedings. There were therefore reasonable grounds to consider that the applicant might have lacked the objective and dispassionate approach considered necessary under Portuguese law to conduct his own defence effectively.

The Court further observed that, although under Portuguese law on criminal procedure the technical legal defence was reserved for counsel, the legislation conferred on an accused several means by which to participate and intervene in person in the proceedings. For instance, the accused had the right to be present at all stages of the proceedings, to make statements or remain silent and to submit observations, statements and requests in which he or she could address questions of law and fact. Furthermore, he or she could revoke any measure carried out on his or her behalf, under the circumstances set out in the Code of Criminal Procedure. Portuguese law also provided that the accused was the last person who could address the court after oral pleadings had ended and prior to the delivery of the judgment. Lastly, if the accused was not satisfied with court-appointed defence counsel, he or she could request a change of counsel on a valid ground. Accused persons were also free under the relevant provisions of Portuguese law to instruct a lawyer of their own choosing. It

was true that accused persons, if convicted, had to bear the costs of mandatory representation; however, they could request legal aid.

The Court observed that the essential aim of the Portuguese rule of mandatory legal representation in criminal proceedings was to ensure the proper administration of justice and a fair trial respecting the right of the accused to equality of arms.

Bearing in mind the margin of appreciation enjoyed by the member States with regard to the choice of means by which to ensure that an accused's defence was secured, the Court considered that the reasons provided by the Government for the requirement to be assisted had been both relevant and sufficient.

Lastly, with regard to the overall fairness of the trial, the Court observed that the applicant's defence had been assured by a court-appointed lawyer. It did not discern any cogent reasons to doubt that the applicant's defence by that lawyer had been conducted properly in the circumstances of the case or to consider that the conduct of the proceedings by the domestic courts had been in any way unfair. Moreover, the applicant had not put forward any valid argument to suggest that the criminal proceedings against him had been unfair.

The Court therefore concluded that there was no basis on which to hold that the criminal proceedings involving the applicant, in which the domestic courts had applied the impugned requirement of compulsory legal assistance, had been unfair.

Separate opinions

Judge Sajó expressed a dissenting opinion; Judges Tsotsoria, Motoc and Mits expressed a joint dissenting opinion; Judge Pinto de Albuquerque expressed a dissenting opinion, joined by Judge Sajó; Judges Pejchal and Wojtyczek expressed a joint dissenting opinion; finally, Judge Bošnjak expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

Denis Lambert (tel: + 33 3 90 21 41 09)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Inci Ertekin (tel: + 33 3 90 21 55 30)

Patrick Lannin (tel: + 33 3 90 21 44 18)

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.