



Inadequate review by the Supreme Court of Justice of disciplinary decisions of the High Council of the Judiciary

In today's two **Chamber** judgments¹ in the cases of [Ramos Nunes de Carvalho E Sá v. Portugal](#) (applications nos. 55391/13, 57728/13 and 74041/13) and [Tato Marinho Dos Santos Costa Alves Dos Santos and Figueiredo v. Portugal](#) (applications nos. 9023/13 and 78077/13), the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights in respect of three judges.

The cases concerned disciplinary proceedings brought against three judges on conclusion of which the High Council of the Judiciary (HCJ) imposed disciplinary penalties, and the review carried out by the Supreme Court of Justice as an appeal body.

Observing that within the HCJ, apart from a few exceptions, judges formed a minority of the members of the formation having examined Ms Ramos Nunes de Carvalho E Sá's case the Court found this situation to be problematical with regard to Article 6 § 1 of the Convention and that the independence and impartiality of the HCJ could be open to doubt.

The Court also held that, with regard to the three judges, the review carried out by the Supreme Court of Justice of the disciplinary decisions of the HCJ had been insufficient, the Supreme Court having failed to review the facts disputed by the applicants despite these being substantial arguments that were important for the outcome of the proceedings.

The Court held, lastly, that in the case of Ms Ramos Nunes de Carvalho E Sá, the domestic authorities had failed to secure the guarantees of a public hearing, thus hindering her ability to defend her case and call a witness and failing to ensure the safeguards of a fair hearing.

Principal facts

The applicants, Paula Cristina Ramos Nunes de Carvalho e Sá, Sofia Tato Marinho dos Santos Costa Alves dos Santos and Maria da Luz Figueiredo, are Portuguese nationals who were born in 1972, 1975 and 1963 respectively and live in Barcelos, Loures and Lisbon (Portugal). They are judges in Portugal.

Three sets of disciplinary proceedings were instituted against Ms **Paula Cristina Ramos Nunes de Carvalho e Sá**, who was a judge at the Vila Nova de Famalicão Court of First Instance at the material time. In November 2010 the High Council of the Judiciary (HCJ) decided to institute an initial set of proceedings against her in the context of which the judicial inspector F.M.J. proposed that she be ordered to pay 20 day-fines for having called another judicial inspector a "liar" during a telephone conversation, thereby acting in breach of her duty of propriety. He also found that she had accused the inspector responsible for conducting her performance appraisal of "inertia and lack of diligence". In March 2011 the applicant submitted a request to the HCJ for F.M.J. to be withdrawn from her case on the grounds that he had breached her right to be presumed innocent and had close ties to

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.

the judicial inspector whom she had allegedly insulted. F.M.J. requested leave from the HCJ to withdraw from the case, saying that he was the applicant's "sworn enemy" following the accusations she had made against him. In a decision of 10 January 2012 the HCJ, sitting in plenary, ordered Ms Paula Cristina Ramos Nunes de Carvalho e Sá to pay 20 day-fines, corresponding to 20 days' salary, for acting in breach of her duty of propriety. The applicant appealed on points of law, requesting a review of the establishment of the facts. On 21 March 2013 the Judicial Division of the Supreme Court of Justice unanimously upheld the ruling of the HCJ, finding 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.

A second set of disciplinary proceedings was opened for the use of false testimony in the earlier proceedings. On 11 October 2011 the HCJ, sitting in plenary, ordered that the applicant be suspended from her duties for 100 days for acting in breach of her duty of honesty. It found that the applicant had given false testimony by asking a witness to make false statements concerning the allegations against her. She lodged an appeal with the Judicial Division of the Supreme Court of Justice disputing the facts. The Supreme Court of Justice upheld the HCJ's decision on 26 June 2013, finding among other things that its powers were limited with regard to reviewing the facts.

A third set of disciplinary proceedings was brought against her for allegedly asking the judicial inspector F.M.J., in the course of a private conversation, not to take disciplinary action against the witness on her behalf who had been called during the first set of proceedings. In a decision of 10 April 2012 the HCJ, sitting in plenary, ordered that the applicant be suspended from her duties for 180 days for acting in breach of her duties of loyalty and propriety. The Judicial Division of the Supreme Court of Justice unanimously upheld that decision.

On 30 September 2014 the HCJ, sitting in plenary, after grouping together the penalties imposed in the three sets of disciplinary proceedings, imposed on Ms Paula Cristina Ramos Nunes de Carvalho e Sá a single penalty of 240 days' suspension from her duties.

In July 2010 disciplinary proceedings were brought against **Ms Tato Marinho dos Santos Costa Alves dos Santos**, who was a judge at the Lisbon Labour Court at that time. She was accused of failing to comply with the duty to act in furtherance of the general interest and the duty of diligence. On 20 September 2011 the HCJ, acting in plenary, imposed a disciplinary penalty of 25 day-fines on her, corresponding to 25 days' salary, on the grounds that she had breached her duty to convene hearings in her cases promptly and was unproductive. She appealed to the Judicial Division of the Supreme Court of Justice, asking for the case to be examined by the Supreme Court of Justice in plenary and requesting a review of the facts, but the Supreme Court of Justice rejected her appeal on the grounds that it did not have the task of reviewing the facts.

Disciplinary proceedings were brought against **Ms Figueiredo**, who was a judge at the Lisbon Labour Court at that time. These resulted in the imposition of a disciplinary penalty of 50 day-fines on her on 7 June 2011 by the HCJ, sitting in plenary, for failure to comply with the duty to act in furtherance of the general interest and the duty of diligence, loyalty and information. Ms Figueiredo appealed, disputing the establishment of the facts before the Judicial Division of the Supreme Court of Justice. She also alleged that conferring power on the Supreme Court of Justice to examine appeals challenging the decisions of the HCJ called into question her right of access to an impartial court because the judges of that court were also subject to the disciplinary jurisdiction of the HCJ. The Judicial Division of the Supreme Court of Justice upheld the decision of 7 June 2011. Ms Figueiredo lodged a constitutional appeal with the Constitutional Court, arguing that parts of the Status of Judges Act were unconstitutional. The Constitutional Court dismissed her appeal.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing), Ms Ramos Nunes de Carvalho e Sá alleged a breach of her right to an independent and impartial tribunal, her right to obtain a review of the facts established by the HCJ and her right to a public hearing. She further complained that, in view of the reclassification of the facts by the HCJ, 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.

Relying on Article 6 § 1 (right to a fair hearing), Ms Tato Marinho Dos Santos Costa Alves Dos Santos and Ms Figueiredo alleged that the domestic courts had violated their rights to obtain a review of the facts established by the HCJ and to a decision by an independent and impartial tribunal.

The applications were lodged with the European Court of Human Rights on 16 August 2013 and 8 November 2013 (Ms Ramos Nunes de Carvalho E Sá), on 9 January 2013 (Ms Tato Marinho Dos Santos Costa Alves Dos Santos) and on 5 December 2013 (Ms Figueiredo).

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

András **Sajó** (Hungary), *President*,
 Vincent A. **de Gaetano** (Malta),
 Nona **Tsotsoria** (Georgia),
 Paulo **Pinto de Albuquerque** (Portugal),
 Krzysztof **Wojtyczek** (Poland),
 Egidijus **Kūris** (Lithuania),
 Gabriele **Kucsko-Stadlmayer** (Austria),

and also Marialena **Tsirli**, *Section Registrar*.

Decision of the Court

Article 6 (right to a fair trial)

Independence and impartiality of the reviewing authorities²

The Court held that in the present case the questions of independence and impartiality should be examined jointly. It observed, first of all, that it had already found that where at least half of the membership of a tribunal was composed of judges, including the chairman with a casting vote, this would be a strong indicator of impartiality. It also stated that with regard to disciplinary proceedings against judges the need for substantial representation of judges on the relevant disciplinary body had been recognised in the European Charter on the statute for judges and the opinions of the Venice Commission. It also pointed out that in its Recommendation of 17 November 2010³ the Committee of Ministers recommended that the authority taking decisions on the selection and career of judges be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers. It noted, further, recommendation no. 6 of the Evaluation Report Portugal of the Group of States against Corruption (GRECO), adopted on 4 December 2015, to provide in law that not less than half of the members of the HCJ should be judges chosen by their peers. It indicated, lastly, that the Consultative Council of European Judges had adopted, at its 11th plenary meeting, a *Magna Carta* of Judges, providing among other things that the Council should be

² The Court examined this complaint in its judgment *Paula Cristina Ramos Nunes de Carvalho e Sá v. Portugal*.

³ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states of the Council of Europe on judges.

composed either exclusively of judges, or at least a substantial majority of judges elected by their peers.

The Court therefore decided to examine the complaints of Ms Paula Cristina Ramos Nunes de Carvalho e Sá concerning the independence and impartiality of the HCJ in the light of the above-mentioned principles. It noted that the HCJ was composed of 17 members, two of whom were appointed by the President of the Republic, seven by the Assembly, and seven others by the judges from among their peers. In its normal composition, the HCJ was thus composed of eight judges, including the president who had a casting vote, and nine non-judicial members. The Court observed that the council could therefore be composed of a majority of non-judicial members appointed directly by the executive and legislative authorities.

In the case of Ms Paula Cristina Ramos Nunes de Carvalho e Sá, the Court noted that during the deliberations of 10 January 2012, among the 15 members of the HCJ who adjudicated her case only six had been judges. It observed that the HCJ's deliberation of 11 October 2011 had also been conducted with a minority of judges. It went on to note that the deliberation of 10 April 2012 had been conducted with a majority of judges participating on account of the absence of a large number of non-judicial members of the HCJ; that the decision of 30 September 2014 had been taken with 12 of the 17 members of the HCJ present, including seven who were judges and five who were non-judicial members, the majority of judges again being due to the absence of four non-judicial members.

Consequently, the Court noted that, apart from a few exceptions, judges formed a minority of the members of the formation having examined the case. It found this situation, within the Portuguese HCJ, to be problematical with regard to Article 6 § 1 of the Convention. It noted, moreover, with concern that, in the Portuguese legal system, the law did not provide for any particular requirement regarding the qualifications of non-judicial members of the HCJ. Consequently, **the Court considered that the independence and impartiality of the High Council of the Judiciary could be open to doubt.**

Scope of the scrutiny exercised by the Supreme Court of Justice⁴

Domestic law provided for the possibility of obtaining judicial review of the lawfulness of the HCJ's decision imposing a disciplinary penalty on a judge. In the present case the Supreme Court of Justice had had power to review the lawfulness of the HCJ's decision imposing disciplinary penalties on three judges. In carrying out that review the Supreme Court of Justice could review the validity of the evidence, whether the facts had been adequately and coherently established, and whether the decision imposing the penalty was reasonable and proportionate. It could thus set the decision aside on a number of grounds of unlawfulness relating to the procedural requirements or to the substance. However, the Supreme Court of Justice did not have power to review the establishment of the facts by the HCJ; nor could it review the penalty that had been imposed, but only decide whether or not it was proportionate to the offence.

The Court considered that it should therefore address the question whether the Supreme Court of Justice had carried out a sufficiently broad review regarding the disciplinary power exercised by the HCJ. In the present case it noted that the three judges had disputed the facts established by the HCJ before the Supreme Court of Justice. In particular, Ms Paula Cristina Ramos Nunes de Carvalho e Sá asserted that she had not called Judge H.G. a "liar" and had not asked for the disciplinary action against the witness whom she had mentioned to Judge F.M.J. to be dropped; Ms Tato Marinho dos Santos Costa Alves dos Santos claimed that her productivity figures had been higher than those retained by the disciplinary body. In the Court's view, those were decisive facts for the outcome of

⁴ The Court examined this complaint in the two judgments: *Ramos Nunes de Carvalho E Sá c. Portugal* and *Tato Marinho Dos Santos Costa Alves Dos Santos and Figueiredo v. Portugal*.

the disciplinary proceedings which the Supreme Court of Justice had not reviewed, confining itself to merely reviewing the lawfulness in terms of establishment of the facts. The Court considered that in reaching its decision the Supreme Court of Justice had not duly examined substantial arguments submitted by the three judges.

With regard to reviewing questions of law, the Supreme Court of Justice considered that the powers of the HCJ fell outside the scope of the court's review where the disciplinary body ruled on conduct allegedly incompatible with a judge's duty of diligence. The Supreme Court of Justice reviewed, on the basis of lawfulness in the broad sense of the term, compliance with Article 266 § 2 of the Constitution according to which the authorities must exercise their powers in compliance with, among other things, the principle of disproportionate rulings.

Accordingly, the Court concluded that the Supreme Court of Justice had a limited conception of the scope of its own powers of review of the disciplinary activity of the HCJ, **and considered that the review carried out by the Supreme Court in the case of the three judges had been insufficient.**

Lack of a public hearing⁵

Ms Paula Cristina Ramos Nunes de Carvalho e Sá had requested a public hearing before the Supreme Court of Justice in order to call a witness and produce documents. The Supreme Court had refused her request on the grounds that hearing a witness would go against the confidentiality of the proceedings and that the documents produced by her exceeded the object of the disciplinary proceedings. However, the Court observed that the witness evidence in question was relevant in that it would in all likelihood have supported Ms Paula Cristina Ramos Nunes de Carvalho e Sá's defence. It also noted that the grounds given by the Supreme Court of Justice had been insufficient to justify the refusal to hear the witness, that measure having resulted in hindering the applicant's ability to defend her case, thus failing to secure the safeguards of a fair trial. In the Court's view, by refusing to hear the witness the Supreme Court of Justice had failed to guarantee the transparency which that procedural measure would have given to the disciplinary proceedings and, furthermore, had not remedied the refusal to hold a public hearing.

The Court also observed that the questions at issue – namely, the disciplinary penalty imposed on a judge for comments infringing her professional obligations – had not been especially technical. Accordingly, it considered that a public hearing, with oral submissions and accessible to the applicant, had been necessary in the present case because the facts had been in dispute and the penalties which were liable to be imposed carried a degree of stigma which was likely to adversely affect the professional honour and reputation of the person concerned.

Having regard to the need to tread the right line between protecting the independence of the HCJ and ensuring scrutiny of its actions by a public authority and avoiding a corporatist mode of administration, the Court considered that the guarantee of a public hearing in disciplinary proceedings against judges contributed to their fairness within the meaning of Article 6 § 1, by means of an adversarial procedure, at the highest level of transparency towards judges and society and the granting of all the safeguards of a fair hearing. **The Court therefore concluded that the domestic authorities had failed to provide the safeguards of a public hearing.**

The Court's conclusions

The Court found that there had been a violation, regarding the three judges, of Article 6 § 1 of the Convention.

⁵ The Court examined this complaint in its judgment *Paula Cristina Ramos Nunes de Carvalho e Sá v. Portugal*.

Article 41 (just satisfaction)

The Court held unanimously that Portugal was to pay Ms Tato Marinho dos Santos Costa Alves dos Santos and Ms Figueiredo 7,800 euros (EUR) each in respect of non-pecuniary damage and Ms Figueiredo EUR 5,876 in respect of costs and expenses. It rejected, by six votes to one, their remaining claim for just satisfaction.

The Court rejected, by six votes to one, the claim for just satisfaction lodged by Ms Ramos Nunes de Carvalho E Sá.

Separate opinion

Judge Kūris expressed a separate, partly dissenting, opinion which is annexed to the judgments.

The judgments are 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.