Ramos Nunes de Carvalho e Sá v. Portugal, European Court of Human Rights, 6 November 2018

Member State

Portugal

Topic

Accountability and independence

Deciding Court Original Language

Tribunal Europeu dos Direitos Humanos

Deciding Court English translation

European Court of Human Rights

Registration N

Applications nos. 55391/13, 57728/13 and 74041/13

Date Decision

6 November 2018

ECtHR Jurisprudence

- Baka v. Hungary, 27 May 2014;
- Denison v. Ukraine, 25 September 2018.

Subject Matter

Accountability; Independence; Fair trial

National Law Sources

- Portuguese Constitution: articles 2, 203, 212 § 3, 215 § 4, 216, 217, 218, 266 and 268 § 4

- Status of Judges Act (Law no. 21/85 of 30 July 1985).

Facts of the case

Paula Cristina Ramos Nunes de Carvalho e Sá was a first instance judge in Vila Nova de Famalicão in 2010. During a phone call with an inspector of the High Council of the Judiciary (HCJ), she called him a "liar", and a second judicial inspector considered this a breach of the duty of correction. Days later, this same inspector discovered that the judge had accused him of working with inertia and lack of diligence. Consequently, the Plenary of the HCJ condemned the judge to pay a fine equivalent to 20 days of salary.

The judge appealed to the Judicial Division of the Supreme Court of Justice which unanimously upheld the HCJ's decision and stated that its task was not to review the facts, but only to verify that the account of the facts was reasonable.

During the proceedings before the European Court, the applicant claimed that her right to a case was violated by an independent and impartial court, to review the facts of the case established by the Supreme Council of Justice, as well as to an oral hearing. On 21 June 2016, the Chamber of the European Court unanimously decided that in the present case there had been a violation of Article 6 of the Convention. On October 17, 2016, at the request of the Portuguese authorities, the case was referred for review to the Grand Chamber of the European Court.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

1. **On the independence and impartiality of the Judicial Division of the Supreme Court**

The applicant submitted that there were objective reasons to doubt the independence and impartiality of the Judicial Division of the Supreme Court. She argued, firstly, that the President of the HCJ was also the President of the Supreme Court and that in the latter capacity, under section 168(2) of the Status of Judges Act (Law no. 21/85 of 30 July 1985), he or she appointed each year the members of the ad hoc division that examined appeals against the HCJ's decisions in disciplinary cases. In such circumstances, in the applicant's submission, the aforementioned ad hoc division was not, and could not appear to the public to be, separate from the HCJ.

Regarding these arguments, the ECHR stated 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, and the President of the Supreme Court did not sit in that ad hoc division. In practice, 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 been influenced by the latter, or that

they had otherwise demonstrated bias. In particular, it was not established that those judges had been specially appointed with a view to adjudicating her case. 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.

Furthermore, the fact that judges were subject to the law in general, and to the rules of professional discipline and ethics in particular, could not cast doubt on their impartiality. The judges of the Supreme Court, who were highly qualified and often in the final stages of their careers, were no longer subject to performance appraisals or in search of promotion, and the HCJ's disciplinary authority over them was in reality rather theoretical. Nor was there any specific evidence of a lack of impartiality. Hence, the fact that judges hearing cases were themselves still subject to a set of disciplinary rules and might at some point be in a similar position to one of the parties was not in itself a sufficient basis for finding a breach of the requirements of impartiality.

Consequently, regard being had to all the specific circumstances of the case and to the guarantees aimed at shielding the Judicial Division of the Supreme Court from outside pressures, the applicant's fears could not be regarded as objectively justified.

2. **On the review performed by the Judicial Division of the Supreme Court and the lack of a public hearing**

For the ECHR, given the seriousness of the accusations made against the defendant and the sanctions that could be imposed on her in advance, the defendant should have been given a public hearing by the HCJ, in order to give her the opportunity to rebut what she was accused of, to defend herself and, if appropriate, to present possible defence witnesses.

Since this did not happen, the ECHR concluded that the HCJ had not exercised its discretionary powers on an adequate factual basis. As to the Supreme Court, the ECHR considered that even it was not its task to conduct a re-examination of the evidence, the supreme Court had nevertheless had a duty to ascertain whether the factual basis for the decisions taken by the HCJ was sufficient to support the latter's conclusions. 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 to examine issues going to the applicant's credibility and that of the witnesses. It was true that holding disciplinary proceedings in private with the consent of the person concerned was not contrary to the Convention. However, the applicant had requested a public hearing and should therefore have had the possibility of obtaining a public hearing before a body with full jurisdiction. An adversarial hearing of that kind would have allowed for an oral confrontation between the parties and a more thorough review of the facts.

Secondly, given the limits imposed on it by legislation and its own jurisprudence, the Judicial

Division of the Supreme Court was not competent to examine the decisive points of the case, but could only "examine any contradictions, inconsistencies and inadequacies in the evidence and any manifest errors in its assessment, in so far as these defects [were] apparent". According to its own case law definition, a "manifest" error "must not only be serious (a serious error in that [it was] manifestly contrary to reason, common sense or truth, or demonstrate[d] inadequate knowledge); it must also be flagrant (manifest)".

However, the ECHR ascertain that even if that it's true, the Judicial Division of the Supreme was nevertheless empowered to set aside a decision wholly or in part in the event of a "gross, manifest error", and in particular if it had been established that the substantive law or procedural requirements of fairness had not been complied with in the proceedings leading to the adoption of the decision. Thus, it could refer the case back to the HCJ for the latter to give a fresh ruling in conformity with any instructions issued by the Judicial Division regarding possible irregularities, namely the lack of hearing.

Furthermore, and again, if it's true that he Judicial Division of the Supreme Court, ruling within the limits of its jurisdiction as defined by national legislation and its own case-law, had given sufficient reasons for its decisions, replying to each of the applicant's grounds of appeal, the lack of a hearing in respect of the decisive factual evidence, which the Judicial Division had justified by reference to the limited nature of its powers, had prevented it from including in its reasoning considerations relating to the assessment of those issues.

Thus, the ECHR, taking into consideration 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, concluded that the applicant's case had not been heard in accordance with the requirements of Article 6 § 1 of the Convention.

Use of Judicial Interaction technique(s)

Consistent interpretation

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

There is a link between this case and the two cases pointed out above, also from the ECHR.

Concerning **Baka v. Hungary**, the applicant had been elected President of the Hungarian Supreme Court for a six-year term. By a new legislation, the Hungarian government had terminated his term of office three and a half years early. He alleged that he had been denied access to a tribunal to contest the premature termination. He also complained that this termination was due to views and positions that he had expressed publicly, in his official capacity, concerning legislative reforms affecting the judiciary. He relied on Article 6, paragraph 1 and on Article 10 of the Convention. The new legislation, which did not seem compatible with the requirements of the rule of law, prevented the review of the premature termination by any bodies exercising judicial powers. The Grand Chamber held that the respondent State had impaired the very essence of the

applicant's right of access to a court. Thus, this case is important for the purposes of connection with the one under analysis, insofar as, once again, it gives special attention to the situation of a judge's access to a court for the purposes of judicial review of the facts and sanctions imputed to that same judge, with the aim of the judge being able to defend himself.

In Denison v. **Ukraine**, the applicant, Anatoliy Denisov, was dismissed from his post as President of the Kyiv Administrative Court of Appeal in absentia (while on leave seeking medical treatment) for failure to perform his official duties in 2011. He continued to serve as an ordinary judge in the court, at a reduced salary and pension until he retired in 2013. The Kyiv Administrative Court of Appeal reviews cases related to the presidential elections, decisions of government and the Central Election Committee. As President the applicant experienced and resisted numerous instances of direct political interference and intimidation by members of the governing party, including those serving on the High Council of Justice (HCJ), the body that oversees the appointment and dismissal of judges. The applicant challenged under Art. 6(1) ECHR the impartiality and independence of the domestic proceedings concerning his removal from his position.

The Grand Chamber held a violation of Art. 6(1) concerning the impartiality and independence of the domestic proceedings regarding the dismissal of the applicant from his post. It found that the majority of the HCJ consisted of non-judicial staff appointed directly by the executive and the legislative authorities. The Court found that the applicant's allegations regarding personal bias by certain HCJ members were founded, since a member of the HCJ played a role in the preliminary inquiry into the applicant's case and in making the proposal to the HCJ.

The Court ruled that the Higher Administrative Court (HAC) failed to carry out a sufficient review of the proceedings at the HCJ, since it did not attempt to consider the applicant's allegation of the lack of impartiality and independence in those proceedings. Moreover, there were serious mismatches between the advanced and actual grounds of review. While the HAC stated that the applicant had not contested the facts forming the grounds for his dismissal, the applicant had argued that the HCJ had not substantiated its findings since it had not referred to the specific circumstances of his case.

Again, this is an important decision for the one under review, in that, as in the latter, it stresses the importance of a judicial review that meets the fair trial requirements contained in the Convention. In this case, since the HAC failed to carry out a sufficient review of the proceedings at the HCJ, this led to a violation of Article 6(1).

Strategic use of judicial interaction technique (purpose aimed by the national court)

Not applicable

Impact on Legislation / Policy

The **2020 Rule of Law Report regarding Portugal**, from the European Commission, highlighted the discussions currently taking place concerning the HCJ, namely its composition, stating that "As the High Councils are endowed with important powers with respect to judicial appointments and careers, the importance of safeguarding their independence from political influence has been

highlighted” – see here:
https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602579986149&uri=CELEX%3A52020SC0321#footnote6

However, it should be noted that according to the GRECO Second Interim Compliance Report, from 12 april 2021, Portugal has only achieved minor progress in connection with the fulfilment of recommendations found to be not implemented or partly implemented.

For what matters in the present case, GRECO “recommended that i) the role of the judicial councils as guarantors of the independence of judges and of the judiciary is strengthened, in particular, by providing in law that not less than half their members are judges elected by their peers; and ii) information on the outcome of disciplinary procedures within the judicial councils is published in a timely manner. GRECO recalls that this recommendation had not been implemented in previous compliance reports. There had been no tangible measures taken concerning the composition of the Judicial Council. As regards the second part of the recommendation, GRECO noted a suggestion of the Judicial Council to allow for more information to be published regarding its disciplinary actions. It was however unclear whether this suggestion was followed and whether such a provision was included in the Statute adopted by Parliament. The authorities now reiterate the information reported at the previous stages of the compliance procedure. The Statute of Magistrates, in their view, provides for a system of “checks and balances” that ensures the independence of the judiciary. Information on the outcome of disciplinary proceedings conducted by the High Judicial Council and the High Council of the Administrative and Tax Courts is published in a timely manner. The authorities add, as before, that information from disciplinary proceedings is legally considered confidential and sensitive. GRECO underscores the absence of concrete steps to implement both elements of the recommendation; the composition of the Judicial Council in Portugal falls short of European standards. GRECO concludes that recommendation vi remains not implemented” – see here: https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a21605

Notes on the national implementation of the preliminary ruling by the referring court

Of note is the sixteenth amendment to the Statute of Judicial Magistrates, through Law No. 67/2019, of 27 August.

This amendment, in addition to other important aspects, enshrined the right to a public hearing in that Statute, namely in article 120-A:

> Article 120-A
>
> Public hearing

1 - The accused may request a public hearing to present his defence.

2 - The public hearing shall be presided over by the President of the Supreme Judicial Council, or by the Vice President by delegation of the same, and shall be attended by the members of the disciplinary chamber and by the instructor, the accused and his or her counsel or representative.

3 - The public hearing may only be adjourned once due to the absence of the accused or his or her counsel or representative.

4 - Once the hearing is opened, the instructor shall read the final report, after which the accused or his counsel or representative shall be given the floor for oral arguments and the hearing shall be closed.

Based on this (new) right, the HCJ has already held some hearings with judges subject to certain disciplinary proceedings for them to publicly defend themselves and present their allegations. See, by way of example: https://www.csm.org.pt/wp-content/uploads/2021/05/Nota-a-Imprensa-Plenario-de-4-de-maio-de-2021.pdf

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Impact on national case law from the same Member State or other Member States
Not applicable

Connected national caselaw / templates
Not applicable

(Link to) full text

https://www.ejtn.eu/Documents/About%20EJTN/RoL%20Project/RoL_2019_02_Brussels/CASE%20OF%
