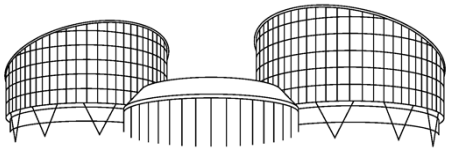

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF RAMOS NUNES DE CARVALHO E SÁ v. PORTUGAL

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

JUDGMENT

STRASBOURG

6 November 2018

This judgment is final but it may be subject to editorial revision.

In the case of Ramos Nunes de Carvalho e Sá v. Portugal,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Ganna Yudkivska,
Helena Jäderblom,
Işıl Karakaş,
Nebojša Vučinić,
Paulo Pinto de Albuquerque,
Erik Møse,
Ksenija Turković,
Dmitry Dedov,
Branko Lubarda,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Alena Poláčková,
Pauliine Koskelo,
Lətif Hüseynov, *judges,*

and Françoise Elens-Passos, *Deputy Registrar,*

Having deliberated in private on 22 March 2017, 7 February and 4 July 2018,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in three applications (nos. 55391/13, 57728/13 and 74041/13) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Ms Paula Cristina Ramos Nunes de Carvalho e Sá ("the applicant"), on 16 August and 8 November 2013.

2. The applicant was represented by Mr J. Ribeiro, a lawyer practising in Oporto. For the purposes of the Grand Chamber hearing, the applicant was given leave by the President of the Court to present her own case (Rules 71 and 36 §§ 2 and 3 of the Rules of Court). The Portuguese Government ("the Government") were represented by their Agent, Ms M.F. da Graça Carvalho.

3. The applicant alleged in particular, under Article 6 § 1 of the Convention, a breach of her right of access to an independent and impartial tribunal with full jurisdiction and to a public hearing.

4. Under Rule 52 § 1 of the Rules of Court, the applications were allocated to the First Section of the Court and subsequently to the Fourth Section. On 21 June 2016 a Chamber of the Fourth Section composed of András Sajó, President, Vincent A. De Gaetano, Nona Tsotsoria, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek, Egidijus Kūris, Gabriele Kucsko-Stadlmayer, judges, and Marialena Tsirli, Section Registrar, decided to join the applications and declared them admissible. It further held unanimously that it was not necessary to examine the complaints to the effect that the applicant had not been informed of the nature and cause of the accusation against her and had not had adequate time and facilities for the preparation of her defence, and found that there had been a violation of Article 6 of the Convention. The partly dissenting opinion of Judge Kūris was annexed to the judgment.

5. On 13 September 2016 the judgment thus adopted was rectified at the Government's request, under Rule 81.

6. On 20 September 2016 the Government requested the referral of the case to the Grand Chamber under Article 43 of the Convention. On 17 October 2016 the panel of the Grand Chamber granted that request.

7. The composition of the Grand Chamber was determined in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicant and the Government each filed observations on the admissibility and merits of the case (Rule 59 § 1).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 22 March 2017 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government

Ms M.F. DA GRAÇA CARVALHO, Deputy Attorney-General, Agent,
Mr R. DIAS JOSÉ, judge of the Administrative Supreme Court,
Ms A. GARCIA MARQUES, lawyer in the Agent's Office, Advisers;

(b) for the applicant

Ms P. RAMOS NUNES DE CARVALHO E SÁ, Applicant,
Mr J. RIBEIRO, LAWYER, Counsel,
Mr P. RODRIGUES, INTERPRETER, Adviser.

The Court heard addresses by Ms Ramos Nunes de Carvalho e Sá and Ms da Graça Carvalho, and their replies to judges' questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1972 and lives in Barcelos.

11. The High Council of the Judiciary (*Conselho Superior da Magistratura*, hereafter "the CSM") decided to open three sets of disciplinary proceedings against the applicant, who at the time was a judge at the Vila Nova de Famalicão Court of First Instance.

A. Proceedings concerning insulting remarks about judicial inspector H.G. (application no. 57728/13)

12. On 8 October 2009 Judge H.G. was instructed by the CSM, in his capacity as a judicial inspector (*inspetor judicial*), to conduct the applicant's performance appraisal. As the applicant was due to start maternity leave at the end of June 2010, she asked him to carry out the appraisal before her departure so that she would be in a position to apply for vacant posts in 2010 (*movimento judicial*).

On 13 September 2010, while she was on maternity leave, the applicant telephoned H.G. to ask him again to conduct her performance appraisal, which had still not been carried out. The following day she sent a request to the same effect to the CSM. The same day, H.G. asked to be relieved of responsibility for the applicant's appraisal, stating that she had made disrespectful remarks about him during the telephone conversation.

1. Disciplinary proceedings before the CSM

13. On 16 November 2010 the Permanent Council of the CSM decided to open disciplinary proceedings against the applicant (disciplinary case no. 333/10) for insulting a judicial inspector.

14. On 12 January 2011 the judicial investigator (*juiz instrutor*) Judge F.M.J. was placed in charge of the investigation. The applicant was represented by a lawyer.

15. On 27 January 2011 the judicial investigator informed the CSM that he was about to begin the investigation in accordance with section 114(3) of the Status of Judges Act (Law no. 21/85 of 30 July 1985 – hereafter "the Act"). The applicant was also informed.

16. On 8 February 2011, on the basis of the evidence heard from H.G., Judge F.M.J. drew up an indictment against the applicant, of which she was notified on 9 February 2011. The indictment stated, in particular, that in a letter to the CSM dated 9 June 2010 the applicant had accused the judicial inspector H.G. of "inertia and lack of diligence" and that she had called H.G. a "liar" during the telephone conversation of 13 September 2010.

17. On 11 February 2011 the applicant appealed against the indictment, arguing that it was null and void because she had not given evidence before the judicial investigator. In an order of 19 February 2011 the judicial investigator allowed the appeal. He set aside all the steps that had been taken in the investigation and summoned Judge H.G. and the applicant to appear before him to give evidence. They gave evidence on 22 and 23 February 2011 respectively.

18. During the investigation various documents were examined and witnesses were questioned. One witness called by the applicant stated that he had been present during the telephone conversation in question and had not heard the applicant make the alleged remarks. However, he retracted his statement on 21 March 2011.

19. On 13 March 2011 the judicial investigator drew up a fresh indictment against the applicant, again finding the facts set out in the previous indictment to be established. Taking the view that the applicant had acted in breach of her duty of propriety, he proposed a penalty of twenty day-fines.

In accordance with section 118 of the Act, the applicant was given notice of the indictment and had fifteen days to present her defence. As required by section 120 of the Act, the indictment specified where the applicant or her lawyer could consult her disciplinary file.

20. On 29 March 2011 the applicant submitted a request to the CSM for Judge 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 the judicial inspector whom the applicant was accused of insulting.

21. On 30 March 2011 the applicant filed her defence pleadings, contesting the facts and submitting that the disciplinary proceedings were null and void as there had been a breach of the principles of equality and impartiality and of her right to be heard.

With regard to the breach of the principle of equality she observed that she had lodged a complaint with the CSM against the judicial inspector H.G. for making false accusations and that, in an order of 15 February 2011, it had been decided not to institute proceedings in that regard, despite the fact that the complaint concerned the same facts giving rise to the current disciplinary proceedings against her.

As to the facts, the applicant stated as follows:

(a) that she had indeed telephoned the judicial inspector H.G. on 13 September 2010 to ask him to carry out her appraisal while she was on maternity leave. She had explained that she wished to be able to apply for the vacancies arising in 2011 since she had been unable to apply the previous year because her appraisal had not been carried out before she left on maternity leave;

(b) that the inspector had expressed surprise, claiming that she had previously told him that she did not wish her appraisal to be carried out while she was on maternity leave;

(c) that he had then asked her to submit her request in writing given that they were unable to agree;

(d) that she had replied that it was he who had failed to keep his word hitherto; and

(e) that she had at no point accused him of being a liar.

She attached some items of evidence and requested that a further witness be examined.

22. On 10 April 2011 Judge F.M.J. requested leave from the CSM to stand down from the case, saying that he was the applicant's "sworn enemy" following the accusations she had made against him in the context of her request for him to be withdrawn.

23. In an order dated 3 May 2011 the Permanent Council of the CSM granted Judge F.M.J.'s request to stand down and replaced him with another judicial investigator, Judge A.V.N.

24. In his final report dated 23 September 2011 Judge A.V.N. proposed that the applicant be ordered to pay fifteen day-fines for acting in breach of her duty of propriety.

25. In a decision of 10 January 2012 the CSM, sitting in plenary session, found the truth of H.G.'s allegations to be established. It found that the applicant had acted in breach of her duty of propriety and that, given the seriousness of her remarks, a heavy penalty should be imposed. Accordingly, it ordered her to pay twenty day-fines, corresponding to twenty days without pay.

26. The decision of 10 January 2012 was adopted by a majority of the fifteen-member formation, comprising six judges and nine non-judicial members. Four of the non-judicial members issued a joint dissenting opinion expressing the view that it was not possible to establish, solely on the basis of H.G.'s statement, that the applicant had called him a "liar", and finding that the remarks referring to his "inertia" and "lack of diligence" came within the scope of the applicant's freedom of expression.

2. Supreme Court proceedings

27. The applicant lodged an appeal against the CSM's decision with the Judicial Division of the Supreme Court (*Secção do Contencioso administrativo do Supremo Tribunal de Justiça*). She submitted in particular:

(a) that the CSM had not taken into consideration a number of facts on which she had relied in her defence and which were corroborated by various items of evidence;

(b) that in its establishment of the facts the CSM had made no reference to the intentional element of the disciplinary offence;

(c) that the disciplinary penalty was based on insufficient or irrelevant evidence;

(d) that the conduct complained of had not amounted to a disciplinary offence, that she had simply been exercising a legitimate right and that the authorities had disregarded the principle of administration in good faith;

(e) that the CSM had failed to give reasons for its decision not to suspend enforcement of the penalty; and

(f) that the penalty imposed had been disproportionate to the acts of which she had been accused.

28. In a final judgment of 21 March 2013 the Judicial Division of the Supreme Court unanimously dismissed the appeal.

29. The Supreme Court began by emphasising that appeals against disciplinary decisions of the CSM were not full appeals on fact and law but concerned only the lawfulness of the decisions in question. It went on to find as follows:

> "Effective protection by the courts of citizens' legally protected rights and interests, which is guaranteed by Article 268 § 4 of the Constitution, affords them, in the specific context of the decisions of the CSM in disciplinary proceedings, the right to a review of lawfulness rather than a review by a body with full jurisdiction. Hence, any appeal will be aimed at obtaining a declaration that the impugned act is null and void or non-existent, rather than a fresh assessment of the criteria employed by the administrative body or of the question whether those criteria were applied correctly, with particular regard to the establishment of the key facts ... The position taken by the Judicial Division is that, although the Supreme Court has the power to assess and sanction a failure to take necessary and relevant steps in disciplinary proceedings, it cannot take the place of the competent administrative body – the CSM – in gathering the evidence (*aquisição da matéria instrutória*) or establishing the key facts. Its task is solely to set aside the impugned decision, if appropriate, in order for that body to carry out or order a particular investigative measure in the proceedings and re-examine the case accordingly ...
>
> According to the case-law of the Supreme Court regarding administrative cases, it may not reassess the evidence examined by the authority [whose decision is contested]. Its sole task is to ascertain, on the basis of the available evidence, whether the establishment of the facts was reasonable, and hence to verify whether the authority [whose decision is contested] examined (or re-examined) the facts set forth in the indictment and those submitted by the defence, [and whether it] gave adequate reasons for the establishment [of the facts], which the Supreme Court has no option but to uphold ...
>
> According to the Supreme Court's case-law, an appeal may relate to the sufficiency or otherwise of the evidence and facts on which the decision to impose a disciplinary penalty was based. However, ascertaining whether these were sufficient does not entail reassessing the factual evidence or drawing a new and different conclusion from the available evidence. The Supreme Court may only assess the reasonable and coherent nature of the relationship between the facts as established by the authority [whose decision is contested] and the evidence on which its decision was based ...
>
> The extent of the Supreme Court's review of the facts is confined to ascertaining that the assessment [made by the authority whose decision is contested] was not defective; it cannot re-examine the evidence relied on and deliver a fresh judgment on

> the basis of that evidence. In other words, it is not the task of the Supreme Court to deliver a fresh judgment after assessing the evidence, but solely to verify whether the evidence was valid and lawful and whether the facts were reasonably and coherently established. It must therefore, against this background, examine any contradictions, inconsistencies and insufficiency in the evidence and any manifest errors in the assessment thereof, in so far as these defects are apparent ..."

30. In the case at hand the Supreme Court dismissed the applicant's arguments regarding the establishment of the facts, finding as follows:

> "There were no errors in the assessment of the facts on which the decision [by the CSM] was based, or in the interpretation of those facts. It is clear from the reasoning that the evidence was examined in a coherent and logical manner. The reasoning was based on facts which, once established in accordance with the principle of the free assessment of evidence, do not preclude the assessment made in the present case ... [the assessment of the facts] was not arbitrary, haphazard, obscure or incoherent."

31. The Supreme Court also dismissed the remainder of the applicant's arguments, to the effect that the conduct complained of did not amount to a disciplinary offence, that she had simply been exercising a legitimate right and that the authorities had disregarded the principle of administration in good faith. The Supreme Court therefore upheld the reasoning leading to the CSM's finding that the applicant had acted in breach of her duty of propriety.

32. With regard to the penalty imposed, the Supreme Court found:

(a) that in contrast to the provisions of criminal law, where a custodial sentence was at stake, the statutory provisions governing disciplinary proceedings did not empower or require the authorities to suspend enforcement of the penalty. In any event, in the present case, suspending enforcement of the penalty would have run counter to its purpose; and

(b) that the penalty had not been disproportionate.

The Supreme Court ruled as follows:

> "In the context of disciplinary proceedings, it is for the CSM to decide on the severity of the penalty to be imposed, where it is variable in the abstract.
>
> It is not the task of the Supreme Court to reconsider this decision, but merely to verify whether it was appropriate to the offence committed and whether the penalty imposed was proportionate to that offence ...
>
> The determination of the penalty falls within what is known as the technical and administrative [margin of] discretion, which is not subject to judicial scrutiny except in cases of gross and manifest errors and particularly of failure to comply with the principle of proportionality as regards the appropriateness of the penalty ...
>
> Having regard to the foregoing, and since it has been established that a fine, set at twenty days, should be imposed by way of a penalty, there is no basis for finding that the sanction imposed is disproportionate to the disciplinary offence or to the relevant legislative framework."

B. Proceedings concerning the use of false testimony (application no. 55391/13)

1. Disciplinary proceedings before the CSM

33. On 29 March 2011, following information received from the judicial investigator F.M.J., the Permanent Council of the CSM decided to open a second set of disciplinary proceedings against the applicant (case no. 179/11) for the use of false testimony in the first set of disciplinary proceedings. The investigation also concerned the witness in question.

34. On an unspecified date Judge R. was placed in charge of the investigation as judicial investigator.

35. During the investigation evidence was heard from the applicant, F.M.J., the applicant's co-accused and one witness.

36. On 26 May 2011 the judicial investigator drew up the indictment against the applicant. He found that she had acted in breach of her duty of loyalty, but did not specify in what manner she had been involved in committing the offence. Likewise, he did not propose any penalty, taking the view that the applicant's defence arguments should first be examined. He noted in that regard that section 117(1) of the Act, concerning the indictment, did not require a penalty to be proposed at this stage.

37. The applicant was given notice of the indictment and filed defence pleadings. She contested the allegations, submitted documents in support of her arguments and called two witnesses in accordance with section 121 of the Act. She also submitted that she could not be prosecuted as an accomplice to the offence as the law made no provision for that possibility.

38. On 14 July 2011 the judicial investigator submitted his final report under section 122 of the Act. He found that the facts in question had been established and that the applicant had therefore acted in breach of her duty of loyalty. He specified in that connection that she should be regarded as the co-perpetrator of the offence, given that in disciplinary case no. 333/10 she had knowingly called a witness who had not been present during the conversation in question. Accordingly, he proposed by way of a penalty that the applicant be suspended from duty for sixty days.

39. On 19 July 2011 the applicant lodged a complaint against this report with the judicial investigator. She argued, in particular, that the indictment had not proposed this heavy penalty and that her defence rights had therefore been infringed. She requested that the indictment be set aside and that she be given additional time to prepare her defence.

40. In an order of 31 August 2011 the judicial investigator dismissed the complaint on the grounds, in particular, that the applicant had not raised a plea of nullity in respect of the indictment in her defence pleadings (see paragraph 37 above).

41. On 11 October 2011 the CSM, sitting in plenary session, gave its decision, which was adopted unanimously by a twelve-member formation

comprising seven judges, including the President of the CSM, and five non-judicial members. It found that the applicant had acted in breach of her duty of honesty, which it regarded as "a more practical manifestation of the wider duty of loyalty referred to in the indictment" and which should govern judges' personal and professional conduct not just in the strict performance of their duties but also in their relations with society. The CSM noted that in disciplinary case no. 333/10 the applicant had knowingly agreed to use testimony containing false statements concerning the acts of which she had been accused. It observed that those acts had been established on the basis of calls made by the applicant on her mobile phone, the records of which had been obtained with her consent at the request of the judicial investigator F.M.J. In view of the scope of the duty of honesty, which it considered to be a personal duty, the CSM found that the applicant had been the perpetrator of the acts in question, rather than the co-perpetrator as indicated in the judicial investigator's final report, and imposed a disciplinary penalty of 100 days' suspension from duty. Noting that the indictment had conformed to the requirements of section 117(1) of the Act, it dismissed the applicant's argument that it was null and void. The CSM also held that the applicant's defence rights had not been infringed given that, after examining the evidence, the judicial investigator had set out in his final report the facts he considered established and their legal classification, and had proposed a specific penalty under section 122 of the Act.

2. Supreme Court proceedings

42. On an unspecified date the applicant appealed to the Judicial Division of the Supreme Court against the decision of 11 October 2011. She submitted that:

(a) there had been errors in the establishment of the facts. In particular, she had not been acting in the performance of her duties, and a new witness questioned during the investigation had confirmed that she had not made the alleged remarks in the course of the conversation in question, during which that witness had indeed been present;

(b) her conduct had not amounted to a disciplinary offence. In the alternative, she submitted that it had been driven by "necessity", in view of the avowed hostility of the judicial investigator F.M.J. towards her;

(c) she had not been questioned about the planned disciplinary penalty, which had not been proposed in the indictment;

(d) the CSM had altered the legal classification of the facts and the manner of her involvement in the disciplinary offence, in breach of her defence rights, including her right to be heard;

(e) the CSM had failed to give reasons for its decision not to suspend enforcement of the penalty; and

(f) the penalty imposed had been disproportionate to the facts.

43. On 23 January 2012 the CSM submitted its memorial in reply, which was notified to the applicant on 27 January 2012.

44. In a final judgment of 26 June 2013 the Judicial Division of the Supreme Court unanimously dismissed the applicant's appeal.

45. The Supreme Court began by defining its jurisdiction in the following terms:

> "The longest-established guarantee is the right to appeal or to challenge administrative acts; [this guarantee] is aimed at ... individuals' legally protected rights and interests, and generally encompasses the possibility of applying to have an administrative act set aside or declared null and void or non-existent, on grounds of unlawfulness.
>
> Hence, Article 50 § 1 of the Administrative Courts Code concerning appeals against administrative acts provides that 'an appeal against an administrative act is aimed at obtaining the setting-aside of the act in question or a declaration that it is null and void or non-existent'.
>
> Even though, since 1997, the Constitution no longer refers to 'unlawfulness' as a ground for appealing against an administrative act, this should not be construed to mean that the courts now have powers to examine the 'well-foundedness' of the administrative action: the unlawful nature of the act stems from the infringement of the individual's legally protected rights and legitimate interests[1].
>
> Under the Constitution, the administrative courts have jurisdiction to determine disputes arising in legal relationships in the administrative sphere. Article 212 § 3 provides that 'the administrative and fiscal courts shall rule on actions and appeals aimed at determining disputes arising out of legal relationships in the administrative and fiscal spheres'.
>
> However, Article 3 § 1 of the Administrative Courts Code provides for one limitation[2], according to which 'within the limits imposed by the principle of separation of powers, the administrative courts shall examine compliance with the legal rules and principles by which the administrative authorities are bound, but shall not examine the appropriateness or expediency (*conveniência ou opportunidade*) of their actions'.
>
> Article 3 § 1 of the Administrative Courts Code makes very clear that a degree of discretion is left to the authorities, an administrative sphere of activity that is not governed by legal rules or principles and falls outside the scope of the administrative courts' scrutiny.
>
> ...
>
> Accordingly, in view of this discretion on the part of the authorities, the courts' scrutiny of administrative activity must be confined to examining whether or not the authorities have complied with the legal principles by which they are bound. In principle, this will entail a negative review (proceedings to set aside rather than a full review), in which the court may not substitute its assessment for that of the

1. José Carlos Vieira de Andrade, *A justiça Administrativa* (*Lições*), Livraria Almedina, 1999, p. 95.

2. Jorge de Sousa, "Poderes de Cognição dos Tribunais Administrativos relativamente a Actos Praticados no Exercício da Função Política", in *Julgar*, no. 3-2007, Coimbra Editora, p. 119.

administrative authorities with regard to elements falling within the scope of that discretion."

46. With regard to the establishment of the facts by the CSM, the Supreme Court pointed to its case-law according to which judicial review could encompass only the insufficiency of the evidence and the facts in disciplinary proceedings; this did not entail conducting a fresh assessment of the available evidence or reaching a new and different conclusion on the basis of that evidence. Furthermore, the Supreme Court could not remedy possible omissions in the disciplinary proceedings. In the event of such an omission it was empowered solely to set aside the disciplinary body's decision and refer the case back to that body for any further steps in the investigation.

In the instant case the Supreme Court found that the CSM had indeed examined the factual evidence which, according to the applicant, it had disregarded. The Supreme Court pointed out in that connection that the issue whether the applicant had been acting in the performance of her duties was more in the nature of a legal issue and that, in any event, in assessing whether a judge had complied with his or her duty, it was necessary to take into account the judge's relations with society and with the CSM, which was the profession's management and disciplinary body. The Supreme Court found that the CSM had been right to dismiss the witness evidence presented by the applicant, in view of its content and the fact that the truth of the insult allegation had already been established in the earlier proceedings (see paragraphs 25 and 30 above).

47. The Supreme Court also considered that the CSM had not committed any manifest error in its assessment of the applicant's conduct in finding her to have acted in breach of her duty of honesty.

48. With regard to the applicant's remaining arguments, concerning the procedural safeguards in proceedings before the CSM, the Supreme Court found:

(a) that the fact that the judicial investigator had not proposed a penalty until the final report was in line with the statutory requirements and had been sufficient in view of the fact that the report had been duly notified to the applicant so that she could make whatever comments she deemed necessary;

(b) that the rights of the defence, and in particular the right to be heard, had not been infringed in the applicant's case, given that her defence had related to the facts of the case rather than to the proposed penalty and the fact that it had been open to the CSM to impose a heavier penalty than the one proposed; and

(c) that the legal reclassification of the facts had likewise not damaged the defence, given that it was in the context of the same facts that the applicant had breached her duty of honesty.

49. As to the applicant's arguments in relation to the penalty imposed, the Supreme Court found:

(a) that in contrast to the provisions of criminal law, where a custodial sentence was at stake, the statutory provisions governing disciplinary proceedings did not empower or require the authorities to suspend enforcement of the penalty. In any event, in the present case, suspending enforcement of the penalty would have run counter to its purpose; and

(b) that the penalty imposed had not been disproportionate.

C. Proceedings concerning the attempt to prevent the opening of disciplinary proceedings against a witness (application no. 74041/13)

1. Disciplinary proceedings before the CSM

50. On 7 June 2011, following information received from the judicial investigator F.M.J., the Permanent Council of the CSM decided to open a third set of disciplinary proceedings against the applicant (case no. 269/11) on the grounds that she had asked that judicial investigator, in the course of a private conversation on 18 March 2011, not to institute disciplinary proceedings against the witness on her behalf whom she had called in the first set of disciplinary proceedings.

51. On an unspecified date Judge R. was placed in charge of the investigation as judicial investigator.

52. On an unspecified date the applicant received notice of the indictment, which proposed that she be removed from her post for acting in breach of her duties of loyalty and propriety.

53. The applicant filed defence pleadings in accordance with section 121 of the Act and attached evidence. She argued, in particular, that the proposed penalty was manifestly disproportionate to the acts of which she was accused. She admitted having had a private conversation with F.M.J., but denied having made the request in question.

54. During the investigation evidence was heard from the applicant, F.M.J., and thirty-two witnesses. Written statements from witnesses were added to the file. The judicial investigator R. also organised a confrontation (*acareação)* between the applicant and F.M.J.

55. On 21 December 2011 the judicial investigator R. submitted his final report. Deeming Judge F.M.J.'s testimony to be credible, he concluded on that basis that the facts were established and therefore proposed that the applicant be removed from office for acting in breach of her duties of loyalty and propriety.

56. On 17 January 2012 the applicant requested that a public hearing be held. As it emerges from the minutes of the plenary sitting of the CSM held on the same day, the applicant's request was refused on the ground that the

statutory rights of the defence had been respected and that there was no legal basis for holding a public hearing before the CSM sitting in plenary.

57. On an unspecified date the applicant submitted that the final report was null and void, and requested that it be rectified. On 30 January 2012 the judicial investigator rectified various errors in the report.

58. In a decision of 10 April 2012 the CSM, sitting in plenary session, found that the applicant had acted in breach of her duties of loyalty and propriety.

First of all, it rejected the applicant's argument that the proceedings were null and void on account of a breach of the adversarial principle.

The CSM took the view that, despite the various items of evidence to the contrary adduced by the applicant, F.M.J.'s statements remained credible.

Taking into account the applicant's personal circumstances and her professional attributes, it found that a lesser penalty than that proposed in the final report was sufficient, and ordered that the applicant be suspended from duty for 180 days.

59. The decision of 10 April 2012 was taken by fourteen of the seventeen members of the CSM (eight judges, including the President, and six non-judicial members). One of the judges issued a dissenting opinion to the effect that the facts as established, given their seriousness, warranted a penalty of compulsory early retirement or removal from office under section 95 of the Act (see paragraph 71 below).

2. Supreme Court proceedings

60. On an unspecified date the applicant lodged an appeal against the CSM's decision with the Judicial Division of the Supreme Court. In her appeal, she submitted:

(a) that the relevant facts had not been taken into account, that the CSM had committed a manifest error in its assessment of the evidence, and that it had used factual evidence obtained by fraudulent means;

(b) that the CSM's decision had been unlawful, especially on account of the definition of the alleged disciplinary offence;

(c) that there had been a breach of her right to a fair trial, as the CSM had refused to provide her with information which, in her submission, would have made it possible (i) to clarify certain allegations made by the judicial inspector F.M.J. or cast doubt on their credibility, and (ii) to establish which member of the CSM formation had made public certain details of the deliberations in the case before the decision had been delivered;

(d) that no reasons had been given for the refusal to suspend enforcement of the penalty; and

(e) that the penalty imposed had been disproportionate to the acts of which she had been accused.

61. In her memorial the applicant requested that a public hearing be held in accordance with Article 91 § 2 of the Administrative Courts Code, so that she could present new evidence, namely a witness and some documents.

62. On an unspecified date the CSM submitted its memorial in reply.

63. In a judgment of 8 May 2013 the Judicial Division of the Supreme Court unanimously dismissed the appeal.

64. The Supreme Court found at the outset that the applicant's request for a public hearing should be refused on the ground that it was not that court's task to reassess the facts. Rather, its role was confined by law to verifying that the CSM had complied with the rules and principles governing the examination of evidence, and in particular that its decision regarding the establishment of the facts had been coherent and reasonable.

The Supreme Court held as follows:

> "Whether or not the provisions governing a special administrative action [*ação administrativa especial*] to set aside an administrative act permit the holding of a public hearing at an appellant's request will naturally depend from the outset on the extent of the Supreme Court's powers of review, as fashioned and regulated specifically by the Status of Judges Act, with regard to the establishment of the facts and the taking of evidence in connection with the appeal. In reality, it is clear that such a hearing, devoted to the production of evidence and discussion of the facts, would be useful and meaningful only if the Supreme Court, in determining the appeal, had broad-ranging jurisdiction to review without restriction all the facts and evidence relied on in the impugned decision. If that were the case the Supreme Court would repeat and add to the examination of the evidence produced in the disciplinary proceedings in order to ... form ... its own opinion as to the conclusions to be drawn from it ...
>
> However, as it follows from the uniform, settled case-law of the Judicial Division, this is manifestly not the legal position that is continuing to emerge, primarily, from the *reinforced* law represented by the Status of Judges Act."

With regard to the evidence which the applicant proposed to produce during the hearing, the Supreme Court found that it was inadmissible and irrelevant, stressing in particular

(a) that the applicant's request for evidence to be heard from the witness had been aimed at establishing the content of the draft decision of the plenary CSM in the applicant's disciplinary case; this ran counter to the confidentiality of the proceedings leading to the final decision; and

(b) that the documents submitted by the applicant went beyond the subject-matter of the disciplinary proceedings.

Lastly, the Supreme Court observed that the applicant had produced a lengthy memorial. Under Article 91 of the Administrative Courts Code, this made it unnecessary to hear legal arguments in oral proceedings.

65. On the merits, the Supreme Court noted

(a) that there had been no manifest error or inconsistency in the establishment of the facts, or any indication that the evidence had been obtained unlawfully;

(b) that the CSM had considerable discretion regarding the definition of the disciplinary offence, which was described in broad terms in the Act, and that the Supreme Court could alter that legal classification only in the event of a gross, manifest error, which was not the situation in the present case; and

(c) that the applicant's arguments that the proceedings before the CSM had been unfair were unfounded, as the refusal to provide certain items of information had been duly reasoned.

66. As to the penalty imposed, the Supreme Court observed

(a) that in contrast to the provisions of criminal law, where a custodial sentence was at stake, the statutory provisions governing disciplinary proceedings did not empower or require the authorities to suspend enforcement of the penalty. In any event, in the present case, suspending enforcement of the penalty would have run counter to its purpose; and

(b) that the penalty imposed had not been disproportionate.

On this last point, the Supreme Court found as follows:

> "Nevertheless, as ruled uniformly and consistently in this Division's case-law, 'when it comes to fixing penalties in the context of disciplinary proceedings, a degree of [administrative] discretion exists which should be overridden only in cases of gross, manifest error ...'
>
> ...
>
> In the light of the Supreme Court's powers with regard to the scale of the penalty – which falls wholly within the discretionary powers [of the administrative authorities] in accordance with the above-mentioned case-law – we do not consider that the CSM's value judgment regarding the specific factual circumstances and the accused's misconduct was apt to infringe the principles of proportionality and equality.
>
> Furthermore, there is nothing in the case file to indicate that the choice of the [type] of sanction or its severity was based on any criteria other than the need to protect the public interest and the requirements of judicial ethics; accordingly, [the complaint concerning the] alleged abuse of powers is manifestly ill-founded ..."

D. Cumulative imposition and enforcement of the penalties

67. In a final decision of 30 September 2014 the CSM, sitting in plenary session, after deciding that the penalties incurred by the applicant in the three sets of disciplinary proceedings referred to above should be imposed cumulatively (*cúmulo jurídico das penas disciplinares aplicadas*), unanimously ordered a single penalty of 240 days' suspension from duty.

68. The decision of 30 September 2014 was taken by a formation comprising twelve of the seventeen members of the CSM (seven judges, including the President of the CSM, and five non-judicial members).

69. The applicant stated that she had actually been suspended from duty for only 100 days, as enforcement of the remainder of the penalty had become time-barred.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Portuguese Constitution

70. The relevant provisions of the Portuguese Constitution read as follows:

Article 2 – Democratic State based on the rule of law

"The Portuguese Republic is a democratic State based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation, on respect for and guaranteed exercise of fundamental rights and freedoms and on the separation and interdependence of powers, with a view to achieving economic, social and cultural democracy and deepening participatory democracy."

Article 203 – Independence

"The courts are independent and are subject only to the law."

Article 212 § 3 – The administrative and fiscal courts

"The administrative and fiscal courts shall rule on actions and appeals aimed at determining disputes arising out of legal relationships in the administrative and fiscal spheres."

Article 215 § 4 – Judges of the ordinary courts

"Recruitment to the Supreme Court shall be by competition, based on candidates' curriculum vitae. It shall be open to judges and prosecutors and to other lawyers of particular merit, under the conditions determined by statute."

Article 216 – Guarantees and incompatible activities

"1. Judges shall have guaranteed tenure. They may not be transferred, suspended, compelled to retire or removed from office, save in those cases provided for by law.

2. Judges may not be held personally liable for their decisions, save in the exceptional cases provided for by law.

3. Serving judges may not hold any other position in the public or private sector, with the exception of unpaid teaching or academic research positions in the legal field as permitted by law.

4. Serving judges may not be seconded to positions unrelated to the work of the courts without the authorisation of the competent High Council.

5. The law may specify other activities that are incompatible with the performance of a judge's duties."

Article 217 § 1 – Appointment, assignment, transfer and promotion of judges

"Decisions on the appointment, assignment, transfer and promotion of the judges of the ordinary courts, and on disciplinary action against them, shall be taken by the High Council of the Judiciary, in accordance with the law."

Article 218 §§ 1 and 2 – High Council of the Judiciary

"1. The High Council of the Judiciary shall be presided over by the President of the Supreme Court and shall be composed of the following members:

(a) two members appointed by the President of the Republic;

(b) seven members elected by the Assembly of the Republic;

(c) seven judges elected by their peers ...

2. The rules concerning the guarantees enjoyed by judges shall apply to all members of the High Council of the Judiciary."

Article 266 – Basic principles

"1. The public administration shall pursue the public interest while respecting citizens' legally protected rights and interests.

2. The institutions and officials of the public administration shall be subject to the Constitution and the law and shall act, in performing their duties, in accordance with the principles of equality, proportionality, justice, impartiality and good faith."

Article 268 § 4 – Citizens' rights and guarantees

"Citizens shall be guaranteed effective judicial protection of their statutory rights and interests. This shall include recognition of those rights and interests, the right to appeal against any administrative act that causes them harm, irrespective of what form it takes ..."

B. Status of Judges Act

71. The relevant provisions of the Status of Judges Act (Law no. 21/85 of 30 July 1985) (*Estatuto dos Magistrados Judiciais* – "the Act") read as follows:

[General provisions]
Section 4(1) – Independence

"Judges shall adjudicate cases solely on the basis of the Constitution and the law. They shall not be subject to any orders or instructions, with the exception of the duty for the lower courts to adhere to the rulings given by the higher courts on appeal."

Section 6 – Guaranteed tenure

"Judges shall be appointed for life. They may not be transferred, suspended, promoted, compelled to retire or removed from office, or undergo any change of status, save in the cases provided for in the present Act."

Section 7 – Impediments

"Judges may not

(a) hear cases concerning judges, prosecutors or court officials with whom they are connected by marriage, a *de facto* marital relationship, a parent-child relationship or any tie of kinship in the direct line or a tie of kinship in the collateral line up to the second degree; or

(b) serve in a court within whose jurisdiction they have acted as a prosecutor or had a legal practice during the previous five years."

[Judges' duties, incompatible activities, rights and privileges]
Section 13(1) and (2) – Incompatible activities

"1. With the exception of retired judges and those on long-term unpaid leave, judges may not hold any other position in the public or private sector, apart from unpaid teaching or academic research positions in the legal field and executive positions in a professional representative body for judges.

2. Teaching or academic research activities in the legal field shall be subject to authorisation by the High Council of the Judiciary and must not interfere with the performance of the judge's duties."

Section 40 – Conditions [for appointment as a judge]

"In order to be eligible to serve as a judge, the individual concerned must

(a) be a Portuguese citizen;

(b) have full enjoyment of his or her political and civil rights;

(c) hold a law degree from a Portuguese university or validated in Portugal;

(d) have successfully completed the relevant training; and

(e) satisfy the other statutory requirements for the appointment of civil servants."

Section 50 – Manner of recruitment [of Supreme Court judges]

"Recruitment to the Supreme Court shall be by competition, open to all judges and prosecutors and to other lawyers of particular merit, in accordance with the provisions set out below."

Section 51 – Competition

"1. ... the High Council of the Judiciary, via an announcement in the Official Gazette (*Diário da República*), shall declare open the competition for recruitment to the Supreme Court on the basis of candidates' curriculum vitae.

2. Those appeal court judges who are in the top quarter of the list by seniority, and who have not explicitly waived their right to apply, shall be automatically considered for appointment.

3. The following shall be considered for appointment if they apply:

(a) deputy Attorneys-General whose period of service is at least equal to that of the most recently appointed of the judges referred to in paragraph 2, and whose performance is deemed to be 'very good' or 'good (with merit)';

(b) lawyers who are recognised for their particular merit and their civic standing and who have twenty years' exclusive or continuous experience in university teaching or as practising lawyers ...

...

6. Lawyers of particular merit shall, on submission of their application, cease any party-political activity of a public nature."

Section 52(2) and (4) – Assessment of curriculum vitae, ranking and filling of vacant posts

"2. Candidates shall present their curriculum vitae at a public hearing before a panel composed as follows.

(a) The President of the Supreme Court, in his or her capacity as President of the High Council of the Judiciary, shall chair the panel.

(b) The remaining members shall be:

(i) the Supreme Court judge with the longest period of service in his or her category and who is a member of the High Council of the Judiciary;

(ii) one member of the High Council of Prosecutors ...;

(iii) one member of the High Council of the Judiciary who is not a member of the judiciary and is elected by that body;

(iv) one university professor of law ... selected by the High Council of the Judiciary;

(v) one practising lawyer who holds a position within the Bar Council ...

...

4. Decisions shall be taken by a simple majority of the votes cast. In the event of a tie the Chair of the panel shall have the casting vote."

[Types of penalties]
Section 85 – Scale of penalties

"1. The following penalties may be imposed on judges:

(a) caution;

(b) fine;

(c) transfer;

(d) suspension from duty;

(e) disciplinary leave without pay (*inatividade*);

(f) early retirement;

(g) removal from office."

Section 87 – Fines

"Fines shall be expressed as day-fines, ranging from five to ninety days."

Section 89 – Suspension from duty and disciplinary leave without pay

"1. Suspension from duty and disciplinary leave without pay shall entail complete removal from duties for the duration of the penalty.

2. The period of suspension shall range from 20 to 240 days."

[Application of penalties]
Section 94(1) – Suspension from duty and disciplinary leave without pay

"Suspension from duty and disciplinary leave without pay may be ordered in respect of judges who have demonstrated serious negligence or a serious lack of commitment in the performance of their duties, or if a judgment is given sentencing them to a prison term and removal from office."

Section 95 – Early retirement and removal from office

"1. Early retirement or removal from office may be ordered where the judge concerned

...

(b) demonstrates a lack of honesty, and immoral or dishonourable conduct ..."

[Effects of penalties]
Section 102 – Fines

"The fine shall be applied by deducting from the judge's salary the amount corresponding to the number of day-fines imposed."

Section 104 – Suspension from duty

"Suspension from duty shall result in the period [corresponding to the penalty] being deducted from the period taken into account for the purposes of remuneration, length of service and retirement."

[Procedural rules]
Section 110(2) – Disciplinary proceedings

"... [D]isciplinary proceedings shall be in writing. They shall not be subject to any formalities apart from the requirement to hear evidence from the accused and to afford him or her the opportunity to present a defence."

Section 111 – Responsibility for instituting proceedings

"The High Council of the Judiciary shall be responsible for instituting disciplinary proceedings against judges."

Section 112 – Impediments and grounds for suspicion

"The impediments and grounds for suspicion provided for in criminal proceedings shall apply to disciplinary proceedings, with the necessary adjustments."

Section 113 – Confidentiality of proceedings

"1. Disciplinary proceedings shall remain confidential until the final decision is given ...

2. If the accused so requests, stating reasons, [the CSM] may provide him or her with copies of the file, provided that this is relevant to the defence of his or her legitimate interests."

Section 114(3) – Time allowed for investigation

"The [judicial] investigator shall notify the High Council of the Judiciary and the accused of the date on which he or she commences the investigation."

Section 115 – Number of witnesses during the investigation stage

"1. There shall be no limit on the number of witnesses during the investigation stage.

2. The [judicial] investigator may refuse a request for witness evidence to be heard ... if he or she considers the evidence produced to be sufficient."

Section 117(1) – Indictment

"Once the investigation is completed and details of the accused's disciplinary status have been added to the case file, the investigator shall draw up the indictment within ten days. This shall set out in detail the facts constituting the disciplinary offence and any aggravating or extenuating circumstances he or she considers to be established, together with the applicable statutory provisions."

Section 118(1) – Notification to the accused

"A copy of the indictment shall be given to the accused or sent by registered letter with recorded delivery. A time-limit of between ten and thirty days shall be laid down for the submission of defence pleadings."

Section 120 – Consultation of the file

"During the time allowed for the submission of defence pleadings the accused, his or her officially appointed representative or his or her lawyer may consult the file at the premises [of the CSM]."

Section 121 – Defence of the accused

"1. For the purposes of his or her defence the accused may call witnesses, submit documents and request investigative steps (*diligências*).

2. A maximum of three witnesses may be called in connection with each alleged act."

Section 122 – Report [of the judicial investigator]

"Once the investigation has been completed the judicial investigator shall compile the report within fifteen days. The report shall contain

(a) the establishment of the facts;

(b) their legal classification; and

(c) the applicable penalty."

Section 123 – Notification of the decision

"The final decision, accompanied by a copy of the report referred to in the previous section, shall be notified to the accused ..."

Section 124 – Grounds of nullity and irregularities

"1. Failure to hear evidence from the accused so as to enable him or her to present a defence, and failure to take in good time all practicable measures that are essential in order to establish the truth, shall constitute grounds of irremediable nullity.

2. Other irregularities or grounds of nullity shall be deemed to have been remedied if they are not raised either in the defence pleadings or, where they occurred after the date [of submission of the pleadings], within five days from the date on which the person concerned was given notice of them."

Section 131 – Subsidiary law

"The rules governing the status of civil servants ... shall apply in the alternative, together with the Criminal Code, the Code of Criminal Procedure ..."

[High Council of the Judiciary]
Section 137 – Composition

"1. The High Council of the Judiciary shall be presided over by the President of the Supreme Court and shall comprise the following members:

(a) two members appointed by the President of the Republic;

(b) seven members elected by Parliament;

(c) seven members elected by judges from among their number.

2. Judges may not decline membership of the High Council of the Judiciary."

Section 138(1) – Vice-President ...

"The Vice-President of the High Council of the Judiciary shall be the Supreme Court judge referred to in section 141(2) and shall be appointed on a full-time basis."

Section 139 – Appointment

"1. The members of the Council referred to in section 137(1)(b) shall be those appointed in accordance with the Constitution and the Regulation on the Assembly of the Republic.

2. The members referred to in section 137(1)(c) shall be elected by universal suffrage on the basis of a secret ballot, in accordance with the principle of proportional representation and taking into account the average number of votes obtained ..."

Section 147(1) – Performance of duties

"The members referred to in section 137(1)(c) shall be elected for a three-year term of office, renewable once."

Section 149 – Responsibilities

"The High Council of the Judiciary shall

(a) appoint, assign, transfer, promote and remove judges, assess their performance, take disciplinary action against them and, in general, perform any acts of a similar nature, without prejudice to the provisions governing elected posts ..."

Section 150 – Functioning

"1. The High Council of the Judiciary shall sit in plenary session (*plenário*) or as a Permanent Council.

2. The plenary formation shall comprise all the members of the Council, in accordance with section 137(1).

3. The Permanent Council shall comprise the following members:

(a) the President of the High Council of the Judiciary, who shall preside;

(b) the Vice-President of the High Council of the Judiciary;

(c) one appeal court judge;

(d) two judges;

(e) one of the members referred to in section 137(1)(a);

(f) four of the members elected by the Assembly of the Republic;

(g) the member referred to in section 159(2).

...

5. The member referred to at paragraph 3(g) above shall take part in the deliberations and the vote only in cases in which he or she was the rapporteur."

Section 151 – Responsibilities of the plenary formation

"The High Council of the Judiciary, sitting in plenary session, shall be responsible for

(a) carrying out the acts referred to in section 149 in respect of judges of the Supreme Court and the appeal courts, and with regard to those courts;

(b) examining and adjudicating complaints against decisions of the Permanent Council and of the President, Vice-President or members of the Council; ..."

Section 152 – Responsibilities of the Permanent Council

"1. The Permanent Council shall be responsible for those acts not referred to in the previous section.

2. The responsibilities referred to in section 149(a) ... shall be deemed to have been tacitly delegated, with the exception of those concerning the higher courts and their judges."

Section 153 – Responsibilities of the President

"1. The President of the High Council of the Judiciary shall

(a) represent the Council;

(b) perform the duties delegated to him or her by the Council, with the option of sub-delegating to the Vice-President;

(c) swear in the Vice-President, the judicial inspectors and the Secretary;

(d) direct and coordinate inspection services;

(e) draw up circulars on the basis of the Secretary's proposals; and

(f) perform the other tasks assigned to him or her by law.

2. The President may delegate to the Vice-President responsibility for swearing in the judicial inspectors and the Secretary, as well as the responsibilities referred to in sub-paragraphs (d) and (e) above."

Section 156(2) and (3) – Functioning of the plenary formation

"2. Decisions shall be taken by a majority of the votes cast. The President shall have a casting vote.

3. In order for the decisions to be valid, the presence of at least twelve members is required."

Section 157(2) and (3) – Functioning of the Permanent Council

"2. In order for the decisions to be valid, the presence of at least five members is required.

3. The provisions of paragraphs 2 and ... of the previous section shall apply also to the functioning of the Permanent Council."

Section 159(1) and (2) – Assignment of cases (*processos*)

"1. Cases shall be assigned by drawing lots in accordance with the Rules of Procedure.

2. The member to whom the case file has been assigned shall be the rapporteur in the case."

[Appeals]
Section 168 – Appeals

"1. The decisions of the High Council of the Judiciary shall be open to appeal before the Supreme Court.

2. For the purposes of examining the appeals referred to in the previous paragraph, the Supreme Court shall sit in a formation comprising the most senior Vice-President, who shall have a casting vote, and one judge from each of the divisions, appointed annually and in order of seniority.

...

5. The grounds for appeal shall be those provided for by law for the purpose of challenging Government acts."

Section 178 – Subsidiary law

"The rules governing appeals to the Supreme Administrative Court shall apply in the alternative."

72. The relevant parts of Article 43 of the Code of Criminal Procedure, which is applicable to judges under section 112 of the Status of Judges Act, read as follows:

"1. A judge may be withdrawn from a case (*recusado(a)*) where there is a risk that his or her involvement may give rise to suspicions, in view of the existence of serious and substantial reasons to doubt his or her impartiality.

2. The involvement of the judge in other, connected proceedings or in earlier stages of the same proceedings may constitute grounds for withdrawal within the meaning of paragraph 1 above ...

..."

73. At the material time the relevant provisions of the Civil Servants' Disciplinary Act (*Estatuto disciplinar dos trabalhadores que exercem funções públicas)* (Law no. 58/2008 of 9 September 2008), applicable to judges under section 131 of the Status of Judges Act, read as follows:

Section 3 – Disciplinary offences

"...

2. The general duties of civil servants shall comprise:

(a) a duty to pursue the public interest;

...

(d) a duty to inform;

...

(g) a duty of loyalty;

(h) a duty of propriety;

..."

C. Organisation of the Courts Act

74. Section 29(2) of the Organisation of the Courts Act (*Lei de organização e funcionamento dos tribunais judiciais*) (Law no. 3/99 of 13 January 1999), as in force at the relevant time, provided as follows:

"It shall be for the President of the Supreme Court to determine the distribution of judges among the divisions, taking into account, in turn, their level of specialisation, the needs of the service (*a conveniência para o serviço)* and any preference expressed."

This provision corresponds to section 49(2) of the Organisation of the Judicial System Act (*Lei de organização do sistema judiciário*) (Law no. 62/2013 of 26 August 2013), which is currently in force.

D. Administrative Courts Code

75. Articles 3 and 50 of the Administrative Courts Code, as derived from Law no. 15/2002 of 22 February 2002, read as follows:

Article 3

"Within the limits imposed by the principle of separation of powers, the administrative courts shall examine compliance with the legal rules and principles by

which the administrative authorities are bound, but shall not examine the appropriateness or expediency (*conveniência ou opportunidade*) of their actions."

Article 50

"1. An appeal against an administrative act is aimed at obtaining the setting-aside of the act in question or a declaration that it is null and void or non-existent.

2. Without prejudice to the other situations provided for by law, an appeal against an administrative act shall suspend the effects of that act where the only issue at stake is the payment of a sum which is not in the nature of a penalty, and where a security has been provided in one of the forms laid down in the tax legislation."

76. The relevant parts of Article 91 of the Administrative Courts Code, as derived from Law no. 15/2002 of 22 February 2002, provided:

"1. Once the taking of evidence is complete, the judge or rapporteur may, if the complexity of the facts warrants it, order of his or her own motion a public hearing in order to debate the facts.

2. The public hearing referred to in the previous paragraph may also be held at the request of one of the parties. However, the judge may refuse the request by means of a reasoned order if he or she considers that no hearing is warranted because the facts established on the basis of the documentary evidence are not disputed.

3. Where a public hearing is held at the initiative of the parties, the legal arguments shall also be presented orally.

..."

The relevant parts of this Article, as amended by Legislative Decree no. 214-G/2015 of 2 October 2015, read as follows:

"1. Where statements are to be taken from the parties, witness evidence is to be heard or experts are to provide oral clarifications, a final hearing shall be held.

2. Unless the case is being examined by a higher court, the hearing shall be held before a single judge and shall be governed by the principles of full attendance of the judge (*plenitude da assistência do juiz*) and the public and continuous nature of the hearing, in accordance with the law on civil procedure. The judge shall have full powers to ensure that the debate is brief and to the point and that the decision given in the case is fair.

..."

77. Article 192 of the Administrative Courts Code, on the applicability of the provisions of the Code, reads as follows:

"Without prejudice to the provisions of any specific legislation, administrative legal proceedings over which courts belonging to a different court system have jurisdiction shall be governed by the provisions of the present Code, with the necessary adjustments."

E. Code of Civil Procedure

78. The relevant provisions of the Code of Civil Procedure, which are applicable under Articles 154 and 155 of the Administrative Courts Code, read as follows:

Article 696

"A decision that has become *res judicata* may be the subject of an application to reopen the proceedings (*recurso de revisão*) only where

...

(f) it is incompatible with a final decision given by an international appeal body and by which Portugal is bound."

F. Case-law of the Judicial Division of the Portuguese Supreme Court

79. According to its settled case-law, the role of the Judicial Division of the Supreme Court in cases concerning decisions of the CSM is confined to a review of lawfulness (see, for instance, the judgment of 29 May 2006 in case no. 757/06, the judgment of 7 February 2007 in case no. 4115/05, the judgment of 19 September 2007 in case no. 1021/05, the judgment of 10 July 2008 in case no. 4265/07 and the judgment of 17 December 2009 in case no. 365/09.9YFLSB).

80. In a judgment of 15 December 2011 (domestic proceedings no. 87/11.OYFSB), the Supreme Court noted that an appeal against a disciplinary decision of the CSM constituted a "special administrative action" (*ação administrativa especial*) by which the person concerned sought the setting-aside of the administrative act in question or a declaration that it was null and void or legally non-existent. It found, in particular, as follows:

"Appeals to the Supreme Court against decisions of the CSM afford no fewer guarantees than appeals to the administrative courts. In particular, since the composition of the Judicial Division of the Supreme Court is based on fixed criteria, it is determined in advance and in an objective manner.

...

The effective judicial protection of citizens' rights under Article 268 § 4 of the Constitution, which provides, *inter alia,* for 'the right to appeal against any administrative act that causes them harm, irrespective of what form it takes', must comply with Article 3 of the Administrative Courts Code, which states that 'within the limits imposed by the principle of separation and interdependence of powers, the administrative courts shall examine compliance with the legal rules and principles by which the administrative authorities are bound, but shall not examine the appropriateness or expediency (*conveniência ou oportunidade*) of their actions'.

While this new provision appears to extend the powers of the administrative courts compared with the earlier legislation, the fact that these courts now enjoy full

jurisdiction should not blind us to the limitations inherent in the protection of the administrative authorities' discretionary powers. In this regard, the powers exercised by the CSM in ruling on conduct alleged to be incompatible with a judge's duty of diligence are exempt from the courts' scrutiny.

... the appeal body must, on the basis of lawfulness in the broad sense, examine compliance with Article 266 § 2 of the Constitution, according to which the administrative authorities must exercise their powers in accordance with the principle of proportionality in particular; this amounts, in other words, to a prohibition on acting in excess of their powers (*proibição do excesso*)."

81. According to its case-law, the review performed by the Judicial Division of the Supreme Court in the context of an application to set aside a decision by the CSM imposing a penalty is limited by the specific characteristics of the impugned decision.

In a judgment of 27 January 2004 (domestic proceedings no. 1049/01), it found as follows:

"A gross, manifest error of assessment constitutes an exception to the rule that the Supreme Court does not review matters falling within the margin of discretion. The error must not just be serious (a gross error, in that it is manifestly contrary to reason, common sense or the truth, or demonstrates inadequate knowledge); it must also be flagrant (manifest)."

In its judgment of 8 May 2012 (domestic proceedings no. 114/11.1YFLSB), the Judicial Division of the Supreme Court held, *inter alia*, as follows:

"Hence, it is necessary to respect the assessment made by the administrative authorities as regards the conduct of the accused and the circumstances of the case ... and the consequent choice of a fine as a disciplinary penalty, the amount of the fine and the fact that no mitigating factors were taken into account."

In its judgment of 26 June 2013 (domestic proceedings no. 132/12.2YFLSB), it found as follows:

"Given that what is in issue is simply an application to set aside under sections 168 et seq. of the Status of Judges Act, an application that can seek only to obtain the setting-aside of the impugned act or a declaration that it is null and void or non-existent, it is not for the Supreme Court to play an active administrative role by taking the place of the body whose decision is being contested (full review). Accordingly, in so far as the Supreme Court is empowered solely to rule on an application to set aside, it cannot substitute its assessment for that of the CSM and apply a penalty that is lesser in substance than the one imposed. Its sole task is to ascertain whether the penalty is appropriate to the offence committed and whether there is a relationship of proportionality between the penalty and the offence.

... in determining penalties in disciplinary proceedings the administrative authorities enjoy a very wide discretion, which may be overridden only in the event of a gross, manifest error. In other words, the Supreme Court may intervene only if it appears that a gross error was committed in determining the disciplinary penalty, in breach of the principle of proportionality as regards the appropriateness of the penalty ..."

Lastly, in its judgment of 25 September 2014 (domestic proceedings no. 21/14.6YFLSB), the Supreme Court found as follows:

"The Supreme Court may intervene only where it considers that, in the determination of the disciplinary penalty, a manifest, serious or gross error was committed, based on criteria that were clearly mistaken or contrary to the principles of justice, impartiality, equality, proportionality and pursuit of the public interest.

In all other cases the decision taken by the CSM must be considered to fall within the wide margin of discretion and assessment enjoyed by that administrative body. Accordingly, the corresponding factors may not be reviewed by the judiciary."

G. Case-law of the Constitutional Court

82. The Constitutional Court has confirmed in several judgments the compatibility of section 168(1) and (2) of the Status of Judges Act with the Constitution (see, for instance, judgment no. 347/97 of 29 April 1997, judgment no. 687/98 of 15 December 1998, judgment no. 40/99 of 19 January 1999, judgment no. 64/99 of 2 February 1999 and judgment no. 131/99 of 3 March 1999). In judgment no. 277/2011 of 6 June 2011 the Constitutional Court found as follows:

"... when jurisdiction was [originally] assigned to the Supreme Court sitting in plenary session to hear appeals against decisions of the High Council of the Judiciary, no credible alternative existed.

However, with increasing organisational autonomy in the exercise of administrative jurisdiction, the Supreme Administrative Court not only became an option no longer posing a threat to the judiciary, but also appeared, at first sight, the most natural choice in view of the issues under discussion in such appeals.

Nevertheless, the legislature retained the original approach, in view of the history – however short – of the exercise of this jurisdiction by the Supreme Court, and of the proximity of the judges of that Court to the issues forming the subject-matter of appeals against the decisions of the High Council of the Judiciary, and in particular against disciplinary decisions concerning judges. The legislature may also have feared creating a source of conflict between the two court systems.

In reality, even though this proximity may raise questions regarding the impartiality of the appellate court ..., it means that the latter is more familiar with the issues raised by the impugned decisions and can weigh the interests at stake in these appeals from a position of greater awareness.

While the judges of the Supreme Administrative Court have more detailed knowledge in principle of the applicable law, those of the Supreme Court are, given the specific nature of the matters being discussed, better placed to review the impugned decisions effectively. It was thus this last factor which influenced the legislature's decision to maintain the approach whereby the Supreme Court has jurisdiction to hear disputes concerning disciplinary measures against judges.

For these reasons it cannot be said that the assigning of jurisdiction to the Supreme Court is in breach of Article 213 § 1 of the Constitution.

...

The fact that the judges making up the formation of the Supreme Court which hears appeals against decisions of the High Council of the Judiciary, including in disciplinary cases, are subject to the administrative and disciplinary authority of that

body cannot, from an objective viewpoint, be regarded as a factor liable to influence the Supreme Court's decision in these cases.

The relationship between the Supreme Court and judges is not one of subordination. Judges not only enjoy independence from the other branches of State power, but also enjoy internal independence, as management and disciplinary issues are a matter for the High Council of the Judiciary, in accordance with the rules laid down in advance and in the abstract. ...

... the fact that, with the exception of the most senior Vice-President of the Supreme Court, the judges are appointed by the President, who is also the President of the body whose decisions are being challenged on appeal, is not apt to cast doubt on their impartiality, since the appointment by the President of the Supreme Court is based on an objective and binding (*vinculado*) criterion, namely that one judge must be chosen from each of the four divisions 'in order of seniority'.

The judges chosen are the most senior in each division.

... the impartiality of these judges *vis-à-vis* the High Council of the Judiciary and its President cannot therefore be called into question on this basis either ..."

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

83. The relevant international law and practice are cited in *Baka v. Hungary* [GC] (no. 20261/12, §§ 72-87, ECHR 2016) and *Oleksandr Volkov v. Ukraine* (no. 21722/11, §§ 78-80, ECHR 2013)

THE LAW

I. PRELIMINARY ISSUES

A. Subject-matter of the dispute

84. In their written observations before the Grand Chamber the Government stated that their request for referral to the Grand Chamber did not concern the complaints relating to the extent of the review conducted by the Supreme Court or the lack of a public hearing before that court in the context of application no. 74041/13.

85. At the hearing the Government argued that the Grand Chamber was not empowered to examine issues which the Chamber had declined to consider, or in respect of which the Chamber had found in the Government's favour. In their view, the Grand Chamber should not examine the complaint under Article 6 § 3 of the Convention, the issue of the alleged lack of independence and impartiality of the Supreme Court, or the just satisfaction claims, which had been dismissed by the Chamber.

86. The applicant, without replying formally to the Government's submissions in this regard, presented her own observations, in which she

argued that there had been a violation of the Convention in respect of the above-mentioned complaints and reformulated her just satisfaction claims.

87. According to the Court's settled case-law, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, and not only the serious "question" or "issue" at the basis of the referral. The content and scope of the "case" referred to the Grand Chamber are therefore delimited by the Chamber's decision on admissibility (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII; *Göç v. Turkey* [GC], no. 36590/97, §§ 35-37, ECHR 2002-V; *Perna v. Italy* [GC], no. 48898/99, §§ 23-24, ECHR 2003-V; and *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III). This means that the Grand Chamber must examine the case in its entirety in so far as it has been declared admissible; it cannot, however, examine those parts of the application which have been declared inadmissible by the Chamber. The entire judgment of the Chamber will be set aside in order to be replaced by the new judgment of the Grand Chamber delivered pursuant to Article 43 § 3 of the Convention (see *K. and T. v. Finland*, cited above, § 140, and, *mutatis mutandis*, *V.M. and Others v. Belgium* (striking out) [GC], no. 60125/11, § 39, 17 November 2016). The Court sees no reason to depart from this principle in the present case.

88. The Court further observes that the Grand Chamber has previously decided in some cases, in view of the importance of the issues at stake, to consider certain complaints which the Chamber had not deemed it necessary to examine, doing so even where the outcome was detrimental to the party that had requested referral to it (see, for example, *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 141 and 149, ECHR 2004-XII, and *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 382, ECHR 2012 (extracts)).

89. In the present case it should be noted that the Chamber declared the applications admissible (point 2 of the operative part) but decided that it was not necessary to examine the complaints under the criminal head of Article 6 of the Convention, to the effect that the applicant had not been informed of the nature and cause of the accusation against her and had not had adequate time and facilities for the preparation of her defence (point 3 of the operative part). The Court also stresses that, in paragraph 63 of its judgment, the Chamber set out in detail the complaints that had been declared admissible, namely those concerning the independence and impartiality of the judicial bodies, the extent of the review conducted by the Supreme Court and the lack of a public hearing.

90. In view of the foregoing, the Court will examine in the present case all the complaints declared admissible by the Chamber and set forth in the previous paragraph, as well as all the claims for just satisfaction.

B. Preliminary objections on grounds of inadmissibility

1. The parties' submissions

91. In their written observations to the Grand Chamber the Government raised for the first time a preliminary objection of failure to exhaust domestic remedies in respect of the complaint under Article 6 § 1 of the Convention, in so far as it concerned the CSM's alleged lack of independence and impartiality. They argued that the applicant had not raised this complaint at any point in her initial applications to the Court and that, when they had been given notice of the present case, no specific question had been put to them regarding the composition of the CSM and, accordingly, any lack of independence and impartiality on its part. The applicant had not referred to this complaint before the domestic courts, either in connection with her appeals to the Supreme Court against the CSM's decisions or by way of an application to the Constitutional Court.

In view of the foregoing considerations, and in particular the fact that they had been surprised by the Chamber judgment, which despite the particular circumstances referred to above had nonetheless examined the issue of the CSM's independence and impartiality, the Government maintained that they had thus been unable to raise an objection before the Chamber alleging a failure to exhaust domestic remedies. They therefore took the view that they were not estopped from raising it at the present stage of the proceedings.

92. Furthermore, the Government raised – in substance in their written observations before the Grand Chamber and expressly during the hearing – an objection of failure to exhaust domestic remedies regarding the issue of the independence and impartiality of the Supreme Court. They argued in that connection that this issue had not been examined by the domestic courts or by the Chamber itself. Accordingly, they took the view that this complaint was inadmissible for the same reasons set out above in relation to the complaint concerning the independence and impartiality of the CSM. In her applications, the applicant had merely alluded to the fact that the President of the CSM was also the President of the Supreme Court and that it would have been preferable for her appeals against the CSM's decisions to be examined by the Supreme Administrative Court.

93. At the hearing the Government also raised a plea of failure to exhaust domestic remedies in respect of the complaint regarding the allegedly insufficient review performed by the Supreme Court, a complaint which the applicant, in their submission, had omitted to raise before the national authorities.

94. Lastly, at the hearing, in response to questions previously put to them by the Grand Chamber concerning compliance with the six-month time-limit, the Government stated that the applicant had not complied with the six-month rule with regard to the complaint alleging that the CSM

lacked independence and impartiality. The applicant had made that complaint for the first time in her observations on the admissibility and merits of the case submitted to the Chamber on 30 October 2015.

95. The applicant contested these arguments and replied that the remedies relied on by the Government were ineffective on several counts. She added that she had complied with the six-month rule. She had not submitted a complaint alleging a lack of independence and impartiality on the CSM's part in her applications, but had set forth her arguments on the subject in response to the Government's written observations.

2. The Court's assessment

(a) Objection of failure to comply with the six-month time-limit

96. The Court notes that the parties agree that the applicant advanced her arguments alleging a lack of independence and impartiality on the part of the CSM, and in particular the composition of that body, only in her observations on the admissibility and merits of the case which she submitted to the Chamber on 30 October 2015, whereas the applications were lodged on 16 August and 8 November 2013.

(i) Whether or not the Court has jurisdiction to examine the issue of the applicant's compliance with the six-month rule

97. The Court reiterates firstly that the Grand Chamber is not, either by the Convention or the Rules of Court, precluded from deciding questions concerning the admissibility of an application under Article 35 § 4 of the Convention, since that provision enables the Court to dismiss applications it considers inadmissible "at any stage of the proceedings". Thus, even at the merits stage the Court may reconsider a decision to declare an application admissible if it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see *Blečić v. Croatia* [GC], no. 59532/00, § 65, ECHR 2006-III).

98. Secondly, the Court stresses that the fact that the Government did not raise the issue of failure to comply with the six-month time-limit, either before the Chamber or in their request for referral to the Grand Chamber, does not prevent the latter from ruling on it. According to the Court's case-law, it is not open to it to set aside the application of the six-month rule solely because a Government has not made a preliminary objection to that effect (see *Blečić*, cited above, § 68). In the present instance the Court sees no need to examine whether the Government are estopped from making the above objection since it finds in any event that it concerns a matter which goes to the Court's jurisdiction and which it is not prevented from examining of its own motion (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 138, ECHR 2018; *Fábián v. Hungary* [GC],

no. 78117/13, § 90, 5 September 2017; *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 70, ECHR 2016 (extracts); and *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 29, 29 June 2012).

(ii) Compliance with the six-month rule

(α) General principles

99. The relevant principles in this regard were established by the Grand Chamber in its judgment in *Sabri Güneş* (cited above):

> "39. The six-month time-limit provided for by Article 35 § 1 has a number of aims. Its primary purpose is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time (see *P.M. v. the United Kingdom* (dec.), no. 6638/03, 24 August 2004). It also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised (see *O'Loughlin and Others v. the United Kingdom* (dec.), no. 23274/04, 25 August 2005) and facilitates the establishment of facts in a case, since with the passage of time, any fair examination of the issues raised is rendered problematic (see *Nee v. Ireland* (dec.), no. 52787/99, 30 January 2003).
>
> 40. That rule marks out the temporal limit of the supervision exercised by the Court and signals, both to individuals and State authorities, the period beyond which such supervision is no longer possible (see *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I). The existence of such a time-limit is justified by the wish of the High Contracting Parties to prevent past judgments being constantly called into question and constitutes a legitimate concern for order, stability and peace (see *De Becker v. Belgium* (dec.), no. 214/56, 9 June 1958).
>
> 41. Article 35 § 1 contains an autonomous rule which has to be interpreted and applied in such a manner as to ensure to any applicant claiming to be the victim of a violation by one of the Contracting Parties of one of the rights set forth in the Convention and its Protocols the effective exercise of the right of individual petition pursuant to Article 35 § 1 of the Convention (see *Worm v. Austria* (dec.), no. 22714/93, 27 November 1995).
>
> 42. The Court reiterates that with regard to procedure and time-limits, legal certainty constitutes a binding requirement which ensures the equality of litigants before the law. That principle is implicit in all the Convention's Articles and constitutes one of the fundamental elements of the rule of law (see, among other authorities, *Beian v. Romania (no. 1)*, no. 30658/05, § 39, ECHR 2007-V (extracts))."

100. Moreover, some indication of the factual basis of the complaint and the nature of the alleged violation of the Convention is required to introduce a complaint and interrupt the running of the six-month period (see *Abuyeva and Others v. Russia*, no. 27065/05, § 222, 2 December 2010, and *Allan v. the United Kingdom* (dec.), no. 48539/99, 28 August 2001). As regards complaints that were not included in the initial communication, the running of the six-month period is not interrupted until the date when such complaints are first submitted to the Court (see *Allan*, cited above).

101. The Court has previously found a new complaint submitted for the first time in the applicant's observations on the admissibility and merits of the case to have been introduced outside the six-month time-limit, in breach of Article 35 § 1 of the Convention (see *Fábián,* cited above, § 98; *Messochoritis v. Greece* (dec.), no. 41867/98, 15 June 2000; *Ekimdjiev v. Bulgaria* (dec.), no. 47092/99, 3 March 2005; and *Majski v. Croatia*, no. 33593/03, § 34, 1 June 2006). The Court reiterates that the principle *ne eat judex ultra et extra petita partium* ("not beyond the request") is one of the fundamental principles of procedure under international and domestic (civil and administrative) law, it being understood that the *petitum* is the complaint submitted by the applicant. It follows that the scope of a case "referred to" the Court in the exercise of the right of individual application is determined by the applicant's complaint or "claim" (see *Radomilja and Others*, cited above, §§ 108-09 and 120-22). Allegations made after the expiry of the six-month time-limit can only be examined by the Court if they constitute legal submissions relating to, or particular aspects of, the initial complaints that were introduced within the time-limit (see *Kurnaz and Others v. Turkey* (dec.), no. 36672/97, 7 December 2004; *Sâmbata Bihor Greco-Catholic Parish v. Romania* (dec.), no. 48107/99, 25 May 2004; and *Fábián,* cited above, § 94).

(β) Application of these principles to the present case

102. In her observations to the Chamber in reply to the Government's remarks concerning the overall functioning of the CSM and the fact that proceedings before that body, responsible for management and disciplinary matters within the judiciary, complied with the rules of a fair trial, the applicant – referring to the Court's judgment in *Oleksandr Volkov v. Ukraine* (no. 21722/11, § 109, ECHR 2013) – asserted that the CSM did not satisfy the requirements of independence and impartiality or afford the guarantees of Article 6 § 1 of the Convention.

103. The Court must therefore ascertain whether these last allegations by the applicant are to be considered as legal arguments relating to her initial complaint or as arguments concerning a particular aspect of that complaint – in both of which cases the rule of the six-month time-limit does not apply – rather than as a separate complaint introduced subsequently, after the expiry of the six-month time-limit (see, for example, *Messochoritis*, cited above).

In that connection the Court reiterates that the mere fact that the applicant invoked Article 6 in his or her application is not sufficient to constitute introduction of all subsequent complaints made under that provision where no indication has initially been given of the factual basis of the complaint and the nature of the alleged violation (see *Allan,* cited above, and *Adam and Others v. Germany* (dec.), no. 290/03, 1 September 2005).

104. The complaints the applicant proposes to make under Article 6 of the Convention must contain all the parameters necessary for the Court to

define the issue it will be called upon to examine, as will the Government should the Court decide to invite them to submit observations on the admissibility and/or merits of the case. It must be stressed that the scope of application of Article 6 of the Convention is very broad and that the Court's examination is necessarily delimited by the specific complaints submitted to it.

105. In the instant case the Court notes that the applicant did not complain of a lack of independence and impartiality on the part of the CSM in her application forms. Moreover, the Court gave notice to the Government only of the complaints concerning the alleged lack of access to a court, the alleged lack of independence and impartiality of the Judicial Division of the Supreme Court, and the lack of a public hearing. The Grand Chamber considers that the complaint alleging a lack of independence and impartiality on the part of the CSM is separate from those in respect of which the Government were invited to submit observations. Likewise, it is not intrinsically linked to them such that it may not be examined separately.

106. Consequently, the Court concludes that the complaint concerning the CSM's alleged lack of independence and impartiality, which was made for the first time in the applicant's observations of 30 October 2015, is out of time since the domestic proceedings ended in 2013, that is to say, more than six months before the complaint was submitted. Accordingly, it must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

107. In view of the foregoing, the Court finds that it does not have jurisdiction to rule on this complaint. However, when examining the remaining complaints it will take into consideration, as appropriate, any relevant factors concerning the CSM.

(b) Objection of failure to exhaust domestic remedies

108. In the light of the foregoing the Court considers at the outset that it is not necessary additionally to examine the Government's objection of failure to exhaust domestic remedies in respect of the complaint alleging a lack of independence and impartiality on the part of the CSM.

109. Next, it observes that the Government raised a similar objection in respect of the complaints concerning the alleged lack of independence and impartiality of the Supreme Court and the allegedly insufficient extent of its review. In that connection it should be noted that the Government were given notice of the above-mentioned complaints and were invited to submit observations on the subject. They submitted those observations in the Chamber proceedings but did not raise a preliminary objection at that stage. Since no plausible explanation was offered for the delay, the Government are estopped from raising an objection of non-exhaustion directly before the Grand Chamber on these points. The Grand Chamber therefore dismisses this objection.

(c) Conclusions

110. The Court has concluded that the applicant's complaint of a lack of independence and impartiality on the part of the CSM is out of time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention. Accordingly, it is not necessary additionally to examine the Government's objection of failure to exhaust domestic remedies in respect of this complaint. At the same time, the Government are estopped from raising an objection of failure to exhaust domestic remedies in respect of the complaints concerning the alleged lack of independence and impartiality of the Judicial Division of the Supreme Court and the allegedly insufficient extent of its review. Accordingly, the Court dismisses this objection.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

111. The applicant alleged a violation of her right to an independent and impartial tribunal with full jurisdiction and of her right to a public hearing. She further alleged that, following the reclassification of the facts by the CSM, she had not been informed in detail of the accusation against her and had therefore not had adequate time and facilities for the preparation of her defence. She relied on Article 6 of the Convention, which in its relevant parts provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ..."

A. The Chamber judgment

112. On the question of admissibility, with regard to the application of Article 6 of the Convention under its civil head, the Chamber noted that the proceedings in question had concerned a dispute raised by the applicant in respect of the CSM's decisions imposing disciplinary sanctions on her in three separate sets of proceedings. Regarding the existence of a "right", it

observed that the proceedings in question had been decisive for the applicant's rights in so far as they could have led to the setting-aside of the disciplinary sanctions imposed by the CSM if the domestic courts had allowed her appeals. As to the "civil" nature of such a right, the Chamber found that the first condition of the test established in the judgment in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, § 62, ECHR 2007-II) had not been met, as domestic law – in the form of section 168 of the Act (see paragraph 71 above) – made provision for persons with an interest in bringing proceedings to lodge an appeal with the Supreme Court challenging the lawfulness of a decision by the CSM to impose a disciplinary penalty on a judge. The applicant had in fact made use of that option. Accordingly, the Chamber held that Article 6 was applicable under its civil head. In view of that finding, the Chamber did not consider it necessary to ascertain whether that provision was applicable in the present case under its criminal head, and decided not to examine the complaints submitted in that regard.

113. On the merits, the Chamber held that there had been a violation of Article 6 § 1 of the Convention on account of the cumulative effect of several factors relating to the lack of independence and impartiality of the CSM, the insufficient extent of the review conducted by the Supreme Court, and the lack of a public hearing in the proceedings that were the subject of application no. 74041/13.

114. Firstly, in the light of the principles enshrined in the Court's case-law and those arising out of various instruments adopted by the Council of Europe bodies, the Chamber examined the principles governing the composition of the CSM, both in the abstract and in the proceedings concerning the applicant. It concluded that the independence and impartiality of the CSM could be open to doubt.

115. With regard to the extent of the review conducted by the Supreme Court, the Chamber noted that the latter had been empowered to review the lawfulness of the CSM's decisions imposing disciplinary penalties on the applicant. In the course of that review it could verify the validity of the evidence, whether the facts had been adequately and coherently established, and whether the penalty imposed had been reasonable and proportionate. It could therefore set aside the decision on several grounds of unlawfulness linked to the procedural or substantive requirements laid down by law and refer the case back to the CSM for a fresh ruling in conformity with any instructions issued by the Supreme Court regarding possible irregularities.

However, the Chamber noted that under Portuguese law the Supreme Court did not have jurisdiction to re-examine the facts as established by the CSM. Furthermore, it could not reconsider the penalty imposed, but could only determine whether the penalty had been appropriate to the offence and proportionate to it. For that reason, in the Chamber's view, the case was to be likened to situations in which the national courts had been unable or had

refused to examine a key issue in the dispute because they had considered themselves bound by the findings of fact or of law made by the administrative authorities and could not examine the relevant issues independently. In the instant case the Supreme Court had confined itself to conducting a review of lawfulness with regard to the establishment of the facts and had thus not properly addressed important arguments advanced by the applicant concerning questions of fact that were crucial to the disciplinary proceedings against her.

As to the review of the legal issues, the Chamber noted that, in the view of the Supreme Court, it was not its task to rule on conduct alleged to be incompatible with a judge's duties, or to encroach on the discretionary powers of the administrative authorities, but simply to conduct a review of lawfulness in the broad sense. The Chamber concluded from this that the Supreme Court adopted a restrictive approach to the extent of its own jurisdiction to review the disciplinary activities of the CSM, and that the review carried out in the cases concerning the applicant had therefore been insufficient.

116. Lastly, the Chamber concluded that the domestic authorities had failed to afford the guarantees of a public hearing in the context of application no. 74041/13. The protection of the applicant's dignity had not been an issue, as she herself had requested a public hearing. Moreover, the reasons given by the Supreme Court had been insufficient to justify the refusal to examine the witness whom the applicant wished to have called and whose evidence, in the Chamber's view, had been relevant to the case. That refusal had led ultimately to a limitation of the applicant's ability to defend her case and had undermined the transparency which that procedural act would have lent to the disciplinary proceedings against her.

The Chamber took the view that the matters under discussion in the proceedings at issue, namely the disciplinary penalty imposed on a judge for acts connected in particular with remarks in breach of her professional obligations, had not been of a highly technical nature and had thus required a hearing open to public scrutiny. It further noted that the facts had been contested and that the penalties which the applicant had been liable to incur carried a significant degree of stigma and were likely to adversely affect her professional honour and reputation. Accordingly, a public hearing, open and accessible to the applicant, had been necessary in the present case.

B. Applicability of Article 6 of the Convention

1. The parties' submissions

117. In their observations to the Grand Chamber the Government no longer disputed the applicability of Article 6 of the Convention under its civil head as they had done before the Chamber. However, they submitted

that the issue of the applicability of that provision under its criminal head should be "definitively left out of account". Referring to the case of *Oleksandr Volkov* (cited above, §§ 92-95), they maintained that the disciplinary proceedings against the applicant had not related to a criminal charge. Reiterating essentially their submissions to the Chamber, the Government stressed that the above-mentioned proceedings had been administrative in nature and that the offences in question related to a breach of professional obligations and were not criminal in character. Furthermore, the sanctions imposed – a fine and a temporary suspension from duty – were classic disciplinary penalties that did not attain a level of severity comparable to criminal sanctions.

118. The applicant submitted that Article 6 of the Convention was applicable under both its civil and its criminal head. With particular reference to the latter, she reiterated the arguments she had submitted before the Chamber, arguing that the penalties liable to be imposed on her were of a criminal nature on account of their severity and the fact that they cast doubt on the honour, integrity and trustworthiness of the person concerned.

2. The Court's assessment

(a) Existence of a "dispute" relating to "civil rights and obligations"

119. The Court notes at the outset that the parties do not contest before the Grand Chamber the applicability of the civil limb of Article 6 of the Convention.

120. For its part, the Court agrees entirely with the Chamber's conclusions in this regard (see paragraph 112 above) and reaffirms that Article 6 of the Convention is applicable in the present case under its civil head, as is clear from its settled case-law (see, for recent examples, *Baka v. Hungary* [GC], no. 20261/12, §§ 104-05, ECHR 2016, and *Paluda v. Slovakia*, no. 33392/12, §§ 33-34, 23 May 2017).

(b) Existence of a "criminal charge"

121. Bearing in mind that the two aspects, civil and criminal, of Article 6 of the Convention are not necessarily mutually exclusive (see *Albert and Le Compte v. Belgium*, 10 February 1983, § 30, Series A no. 58), and given the scope of the applicant's complaints under Article 6 § 3 (a) and (b), the Grand Chamber considers, unlike the Chamber, that it should assess whether the above-mentioned Article is also applicable under its criminal head.

(i) General principles

122. The Court reiterates that the concept of a "criminal charge" in Article 6 § 1 is an autonomous one. The Court's established case-law sets out three criteria, commonly known as the "Engel criteria", to be considered

in determining whether or not there was a "criminal charge" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22). The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative, and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, among other authorities, *Jussila v. Finland* [GC], no. 73053/01, § 30-31, ECHR 2006-XIV, and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X). The fact that an offence is not punishable by imprisonment is not by itself decisive for the purposes of the applicability of the criminal limb of Article 6 of the Convention since, as the Court has stressed on numerous occasions, the relative lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character (see *Nicoleta Gheorghe v. Romania*, no. 23470/05, § 26, 3 April 2012).

123. The Court has, in a variety of cases, examined the applicability of the criminal limb of Article 6 § 1 to disciplinary proceedings. It has long held that disciplinary proceedings as such cannot be characterised as "criminal" (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 42, Series A no. 43, and *Durand v. France* (dec.), no. 10212/07, § 56, 31 January 2012, and the case-law cited therein). The cases concerned several professional categories: lawyers (see *Brown v. the United Kingdom* (dec.), no. 38644/97, 24 November 1998; *Müller-Hartburg v. Austria*, no. 47195/06, §§ 41-48, 19 February 2013; *Helmut Blum v. Austria*, no. 33060/10, § 59, 5 April 2016; and *Biagioli v. San Marino* (dec.), no. 64735/14, §§ 51-57, 13 September 2016); notaries (see *Durand*, cited above, §§ 55-60); civil servants (see *J.L. v. France* (dec.), no. 17055/90, 5 April 1995; *Costa v. Portugal* (dec.), no. 44135/98, 9 December 1999; *Linde Falero v. Spain* (dec.), no. 51535/99, 22 June 2000; *Moullet v. France* (dec.), no. 27521/04, 13 September 2007; and *Nikolova and Vandova v. Bulgaria*, no. 20688/04, § 59, 17 December 2013); doctors (see *Ouendeno v. France* (dec.), no. 18441/91, 2 March 1994); members of the armed forces (see *Kaplan and Karaca v. Turkey* (dec.), no. 40536/98; *Gökden and Karacol v. Turkey* (dec.), no. 40535/98; *Batur v. Turkey* (dec.), no. 38604/97; *Duran and Others v. Turkey* (dec.), no. 38925/97; and *Yildirim v. Turkey* (dec.), no. 40800/98, and *Durgun v. Turkey* (dec.), no. 40751/98, decisions of 4 July 2007); liquidators (see *Galina Kostova v. Bulgaria*, no. 36181/05, § 52, 12 November 2013); and, as in the circumstances of the present case, judges (see *Oleksandr Volkov*, cited above, §§ 92-95; *Di Giovanni v. Italy*, no. 51160/06, § 35, 9 July 2013; *Sturua v. Georgia*, no. 45729/05, § 28, 28 March 2017; and *Kamenos*

v. Cyprus, no. 147/07, §§ 50-53, 31 October 2017). Of course, this may not hold good for certain specific cases, for instance where a deprivation of liberty is at stake (see *Engel and Others*, cited above, §§ 80-85).

(ii) Application of these principles to the present case

124. In the present case, as regards the first of the *Engel* criteria – the domestic classification of the offences – the Court observes that the administrative instruments applied in the context of the proceedings in question form part of the disciplinary rules applicable to judges (see, *mutatis mutandis*, *Moullet*, cited above). The fact that these are applied, as appropriate, in conjunction with the provisions of the Criminal Code or the Code of Criminal Procedure (see paragraphs 71 and 72 above) does not alter this finding. Furthermore, the proceedings were conducted by a management and disciplinary body – the CSM – subject to the subsequent supervision of the Judicial Division of the Supreme Court, and neither the prosecuting authorities (see, *mutatis mutandis, Brown*, cited above) nor the criminal courts were involved in determining the cases (see, *mutatis mutandis*, *Müller-Hartburg*, cited above, § 43).

125. As to the second criterion – the very nature of the offence – the Court observes that the statutory provisions authorising the imposition of penalties were not aimed at the public in general but at a specific category, namely judges. Such provisions are designed to protect the profession's honour and reputation and to maintain public trust in the judiciary (see, *mutatis mutandis*, *Müller-Hartburg*, cited above, § 45). Hence, the offences of which the applicant was accused were purely disciplinary rather than criminal in nature.

126. With regard to the third criterion – the degree of severity of the penalty – the Court notes that all the sanctions that the applicant could have incurred are purely disciplinary in nature (see, *mutatis mutandis*, *Moullet*, cited above, and *Müller-Hartburg*, cited above, § 47). Although the amount of the fine may be substantial and it is therefore punitive in nature, in the present case the severity of the sanction in itself does not bring the offence into the criminal sphere (see *Müller-Hartburg*, cited above, § 47).

127. In view of the foregoing, the Court considers that the facts of the case provide no basis for finding that the disciplinary proceedings against the applicant concerned the determination of a criminal charge within the meaning of Article 6 of the Convention. Accordingly, that Article is not applicable under its criminal head.

128. Consequently, and reiterating that while the first paragraph of Article 6 applies to the determination of both civil rights and criminal charges, the third paragraph protects only persons "charged with a criminal offence", the Court finds that the applicant's complaint that she was not informed in detail of the accusation against her, and that she therefore did not have adequate time and facilities for the preparation of her defence, is

incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and should be rejected under Article 35 § 4.

C. Merits

1. Preliminary considerations concerning the procedural guarantees before the CSM

(a) The parties' submissions

129. The applicant, besides arguing that the CSM did not satisfy the requirements of independence and impartiality laid down by Article 6 § 1 of the Convention, also submitted that proceedings before the CSM did not comply with the guarantees required by that Article as established by the Court's case-law. In her submission

(i) professional disciplinary offences were not defined with the requisite precision and were based in part on the provisions concerning civil servants;

(ii) the adversarial principle was not adhered to, given that the CSM was responsible – either directly or through the judicial investigators whom it appointed and dismissed – for the opening of proceedings, the disciplinary investigation, the indictment and the adoption of the final decision;

(iii) the requirement to hold a public oral hearing did not apply to disciplinary proceedings, with the adversarial principle being confined to hearing evidence from the person concerned and giving him or her the opportunity to request additional investigative measures;

(iv) disciplinary proceedings were confidential and no public hearing before the CSM was possible.

130. The Government submitted at the outset that, under domestic law, the CSM was a management and disciplinary body for judges. Although it was not a judicial body, it nevertheless satisfied the requirements of Article 6 of the Convention in the exercise of its disciplinary powers. Hence, from the point at which the indictment was drawn up, the procedure before that body complied with the adversarial principle. The judge in question had the right to give evidence; he or she could be represented by a lawyer and could study the indictment and submit arguments in that regard. He or she also had the right to participate in the proceedings by contesting the charges, submitting requests, adducing evidence and raising grounds of nullity. Furthermore, the final decision was accompanied by reasons. The judicial investigator who conducted the investigation did not participate in the decision-making formation of the CSM. Moreover, the decisions of the CSM were open to appeal before the Supreme Court, with the result that the right of access to a court was guaranteed.

(b) The Court's assessment

131. Firstly, the Court notes that the disciplinary penalties were imposed on the applicant by an administrative body, the CSM. Secondly, it observes that the parties agree that the CSM is a non-judicial body. The Court cannot but accept this and therefore considers it unnecessary to examine this issue further.

132. In this connection the Court reiterates its settled case-law according to which, even where an administrative body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1" (see *Albert and Le Compte*, cited above, § 29, and *Tsfayo v. the United Kingdom*, no. 60860/00, § 42, 14 November 2006), that is, if any structural or procedural shortcomings identified in the proceedings before an administrative authority are remedied in the course of the subsequent control by a judicial body that has full jurisdiction (see *Bistrović v. Croatia*, no. 25774/05, §§ 51-53, 31 May 2007, concerning structural defects; see also *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 52, Series A no. 263, and *Letinčić v. Croatia*, no. 7183/11, §§ 46 and 55-67, 3 May 2016, concerning procedural defects).

133. In the present case there existed the possibility, of which the applicant availed herself, of appealing against the CSM's decisions to the Judicial Division of the Supreme Court. In the specific circumstances of the case and in the light of the complaints validly raised before it, the Court will seek to establish whether the latter body is a judicial body with full jurisdiction within the meaning of the Court's case-law and which affords the guarantees of Article 6 of the Convention. The relevant features of proceedings before the CSM, and in particular the procedural guarantees, will be taken into account to the extent necessary for the examination of the complaints concerning proceedings before the Supreme Court (see paragraph 107 above).

2. The Grand Chamber's approach to examining the complaints

134. The Grand Chamber stresses that the Chamber found a violation of Article 6 § 1 of the Convention only on account of the cumulative effect of the various shortcomings consisting in the lack of independence and impartiality of the CSM, the insufficient extent of the review conducted by the Judicial Division of the Supreme Court, and the lack of a public hearing (see paragraph 113 above). For its part, the Grand Chamber intends to take a different approach, that is, to examine separately the various complaints raised by the applicant (see, for example, *Olujić v. Croatia*, no. 22330/05, § 55, 5 February 2009, and *Tsanova-Gecheva v. Bulgaria*, no. 43800/12,

§§ 90, 105-06 and 109, 15 September 2015). However, as the complaint regarding the alleged insufficiency of the review conducted by the Judicial Division of the Supreme Court is closely linked, in the circumstances of the case, to the complaint concerning the lack of a hearing, the Grand Chamber will examine these two complaints together (see point 4 below). It will start by considering the complaint alleging that the Judicial Division of the Supreme Court lacked independence and impartiality (see point 3 below).

3. Independence and impartiality of the Judicial Division of the Supreme Court

(a) The parties' submissions

(i) The applicant

135. The applicant submitted that there were objective reasons to doubt the independence and impartiality of the Judicial Division of the Supreme Court.

136. She argued, firstly, that the President of the CSM was also the President of the Supreme Court and that in the latter capacity, under section 168(2) of the Act (see paragraph 71 above), he or she appointed each year the members of the *ad hoc* division that examined appeals against the CSM'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 CSM.

137. Secondly, under Portuguese law, disciplinary disputes concerning judges were classified as coming within the ambit of administrative law. Contrary to the provisions of the Constitution (see Article 212 § 3 of the Constitution, paragraph 70 above), which required disputes concerning administrative acts to be determined by the administrative courts, the disciplinary decisions of the CSM were subject to appeal before an *ad hoc* division of the Supreme Court. Thus, the appraisal, appointment and promotion of Supreme Court judges, and disciplinary proceedings concerning them, came within the remit of the CSM, in other words the body whose decisions were submitted to those judges for review. Accordingly, in the applicant's view, it would have been wiser for the appeals in question to be adjudicated by the Supreme Administrative Court, whose members came under the authority of the High Council of the Administrative and Fiscal Courts rather than that of the CSM.

138. Thirdly, the applicant pointed out that the rulings of the Constitutional Court finding that this division of responsibilities did not breach any provision of the Constitution (see paragraph 82 above) had been the subject of criticism in the legal literature.

(ii) The Government

139. The Government stressed firstly that, as a general rule, judges were independent, had guaranteed tenure and were subject to rules on impediments, grounds for suspicion and incompatibility apt to guarantee their independence and impartiality.

140. Secondly, the composition of the Judicial Division of the Supreme Court was determined by law on the basis of objective criteria such as judges' seniority and their membership of a particular division, and was therefore not dependent on the wishes of the President of the Supreme Court. Furthermore, the members were formally appointed by the most senior Vice-President of the Supreme Court. The President did not participate in sittings at which appeals against CSM decisions were being examined.

141. Thirdly, the Constitutional Court had previously endorsed this method of appointment to the Judicial Division of the Supreme Court (see paragraph 82 above). Referring to the conclusions of the Constitutional Court, the Government argued that submitting the CSM's decisions to a different court would undermine the independence of the CSM and of the court in question.

142. Fourthly, the composition of the Judicial Division of the Supreme Court had not given rise to any problems in practice. Its members were highly qualified judges in the final stages of their careers, who were no longer subject to performance appraisals or in search of promotion. Furthermore, the Supreme Court enjoyed administrative autonomy. The only issue that could arise in practice concerned the CSM's – purely theoretical – power to open disciplinary proceedings against the judges of the Judicial Division.

143. Fifthly, the appropriateness, coherence and proper functioning of the system in place in Portugal were demonstrated by the fact that, over the period from 16 November 2009 to 31 December 2015, the Judicial Division of the Supreme Court had delivered sixty-one judgments on appeal against disciplinary decisions of the CSM. The CSM's decision had been upheld in fifty-three cases and overturned in eight.

(b) The Court's assessment

(i) General principles

144. In order to establish whether a tribunal can be considered to be "independent" within the meaning of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see *Findlay v. the United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I, and *Tsanova-Gecheva*, cited above, § 106, 15 September

2015). The Court observes that the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV). However, neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98 and 3 others, § 193, ECHR 2003-VI).

145. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII, and *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009).

146. In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see *Micallef*, cited above, § 95, and *Morice v. France* [GC], no. 29369/10, § 75, 23 April 2015). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports* 1996-III).

147. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96, and *Morice*, cited above, § 76).

148. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings (see *Micallef*, cited above, § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to

indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38).

149. In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain,* 28 October 1998, § 45, *Reports* 1998-VIII, and *Micallef*, cited above, § 98).

150. The concepts of independence and objective impartiality are closely linked and, depending on the circumstances, may require joint examination (see *Sacilor-Lormines v. France*, no. 65411/01, § 62, ECHR 2006-XIII).

(ii) Application of these principles to the present case

151. The Court notes that there are two aspects to the applicant's complaint. The first concerns the fact that the President of the Supreme Court is also the President of the CSM, while the second relates to the fact that the Supreme Court judges come under the authority of the CSM as regards their careers and disciplinary proceedings against them.

152. In the present case the Court observes that the applicant did not call into question the subjective impartiality of the Supreme Court. It therefore considers it appropriate to examine the complaint from the standpoint of the requirement of independence and objective impartiality, and more specifically to determine whether the applicant's doubts can be regarded as objectively justified in the circumstances of the case. It will examine each aspect of the complaint separately.

(α) The dual role of the President of the Supreme Court

153. The Court observes at the outset that the applicant's complaint concerns the highest court in Portugal, which is made up exclusively of professional judges. The judges are independent, have guaranteed tenure and are subject to rules on incompatibility apt to guarantee their independence and impartiality.

154. The composition of the Judicial Division of the Supreme Court is determined by the Status of Judges Act (section 168, see paragraph 71 above), on the basis of objective criteria such as judges' seniority and their membership of a particular division, and the President of the Supreme Court does not sit in this *ad hoc* division. The Government's argument that, in practice, the members of this division are formally appointed by the most senior Vice-President of the Supreme Court must also be taken into account.

155. It is also noteworthy that 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 otherwise demonstrated bias. Nor did she

claim that the President of the Supreme Court could have influenced the judges of the Judicial Division by any other means. In particular, it is not established that those judges were specially appointed with a view to adjudicating her case (see, *mutatis mutandis*, *Pereira da Silva v. Portugal*, no. 77050/11, §§ 59-60, 22 March 2016). No evidence exists in the present case capable of arousing objectively justified fears on the part of the applicant (see *Sacilor-Lormines*, cited above, § 74).

156. The foregoing considerations suffice for the Court to conclude that the dual role of the President of the Supreme Court is not such as to cast doubt on the independence and objective impartiality of that court in ruling on the applicant's appeals against the CSM's decisions.

(β) The CSM's role as regards the careers of Supreme Court judges and disciplinary proceedings against them

157. With regard to the second aspect of the complaint, the Court observes that in the case of *Oleksandr Volkov* (cited above), it previously examined a similar issue concerning the impartiality and independence of the Higher Administrative Court (HAC), whose task it was to examine appeals against decisions of the Ukrainian High Council of Justice (HCJ). In that case the Court found as follows:

> "130. The Court observes that the judicial review was performed by judges of the HAC who were also under the disciplinary jurisdiction of the HCJ. This means that these judges could also be subjected to disciplinary proceedings before the HCJ. Having regard to the extensive powers of the HCJ with respect to the careers of judges (appointment, disciplining and dismissal) and the lack of safeguards for the HCJ's independence and impartiality (as examined above), the Court is not persuaded that the judges of the HAC considering the applicant's case, to which the HCJ was a party, were able to demonstrate the 'independence and impartiality' required by Article 6 of the Convention."

158. In the Court's view, regard being had to the arguments advanced by the Chamber which examined the case of *Oleksandr Volkov*, these findings should be regarded as a criticism based on the circumstances of the case and applicable in a system with serious structural deficiencies or an appearance of bias within the disciplinary body for the judiciary, as was the case in the specific context of the Ukrainian system at the time, rather than as a general conclusion.

159. In *Oleksandr Volkov*, in addition to the fact that the judges of the Higher Administrative Court were under the disciplinary jurisdiction of the Ukrainian High Council of Justice, a number of serious issues had been identified. These problems related firstly to structural shortcomings in the procedure before the HCJ, notably the inclusion of the Minister of Justice and of the Prosecutor General as *ex officio* members of that body and the fact that the great majority of its non-judicial members were appointed directly by the executive and legislative authorities. Secondly, the Court took into account the appearance of bias on the part of some members of the

HCJ who had determined the applicant's case. It observed that the members of the Ukrainian HCJ who had carried out the preliminary inquiries in the applicant's case and submitted requests for his dismissal had subsequently taken part in the decisions to remove him from office. Moreover, one of them had been appointed President of the HCJ and had presided over the hearing of the applicant's case. The Court therefore found that the proceedings before the HCJ had been incompatible with the principles of independence and impartiality set forth in Article 6 § 1 of the Convention (see *Oleksandr Volkov*, cited above, § 117). The subsequent determination of the applicant's case by Parliament, the legislative body, had not remedied the structural defects of a lack of "independence and impartiality" but rather had served to contribute to the politicisation of the procedure and to aggravate the inconsistency of the procedure with the principle of the separation of powers (ibid., § 118). In those circumstances, according to the Court's case-law, it was extremely important for the Ukrainian Higher Administrative Court to afford the guarantees of Article 6 of the Convention in order to be able to remedy any lack of independence and impartiality.

160. By contrast, in the present case, no such serious issues have been established in terms of structural deficiencies or an appearance of bias within the Portuguese CSM.

161. Next, having regard to the facts of the present case, the Court finds it appropriate to examine together the issues of the independence and impartiality of the Judicial Division of the Supreme Court in respect of this aspect of the complaint (see paragraph 150 above).

162. The Court emphasises at the outset the importance of the guarantees listed at paragraph 153 above, in particular the principle of independence of the judiciary in Portugal, which is protected both under the Constitution (see paragraph 70 above) and by other provisions of domestic law (see paragraph 71 above). It also takes note of the reasons that prompted the Portuguese legislative authorities to choose the current system whereby jurisdiction over appeals against decisions of the CSM is assigned to the Judicial Division of the Supreme Court, reasons that have been endorsed on several occasions by the Constitutional Court (see paragraph 82 above).

163. Furthermore, it goes without saying that the fact that judges are subject to the law in general, and to the rules of professional discipline and ethics in particular, cannot cast doubt on their impartiality. As noted by the Government and not disputed by the applicant, the judges of the Supreme Court, who are highly qualified and often in the final stages of their careers, are no longer subject to performance appraisals or in search of promotion, and the CSM's disciplinary authority over them is in reality rather theoretical (see paragraph 142 above). The Court also notes the absence of any specific evidence of a lack of impartiality, such as, for instance, the existence of pending disciplinary proceedings against one of the members of the benches that examined the applicant's appeals. In more general terms

the Court considers it normal that judges, in the performance of their judicial duties and in various contexts, should have to examine a variety of cases in the knowledge that they may themselves, at some point in their careers, be in a similar position to one of the parties, including the defendant. However, a purely abstract risk of this kind cannot be regarded as apt to cast doubt on the impartiality of a judge in the absence of specific circumstances pertaining to his or her individual situation. Even in the context of disciplinary cases a theoretical risk of this nature, consisting in the fact that judges hearing cases are themselves still subject to a set of disciplinary rules, is not in itself a sufficient basis for finding a breach of the requirements of impartiality.

164. Consequently, having regard 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 Court considers that the applicant's fears cannot be regarded as objectively justified and that the system in place in Portugal for reviewing disciplinary decisions of the CSM does not breach the requirement of independence and impartiality under Article 6 § 1 of the Convention.

165. Accordingly, the Court sees no evidence of a lack of independence and impartiality on the part of the Judicial Division of the Supreme Court, and therefore finds that there has been no violation of that Article.

4. Extent of the review conducted by the Judicial Division of the Supreme Court and lack of a public hearing

166. As the Court has observed (see paragraph 133 above), domestic law offered the possibility in the present case of obtaining judicial review of the CSM's decisions imposing disciplinary penalties on the applicant, by means of an appeal to the Judicial Division of the Supreme Court. The Court's task will therefore consist in ascertaining whether the review conducted by the Judicial Division of the Supreme Court was sufficient in the circumstances of the present case.

(a) The parties' submissions

(i) The applicant

167. The applicant began by submitting that, in dismissing her appeals, the Judicial Division of the Supreme Court had merely reproduced systematically the arguments advanced by the CSM. Referring to various extracts from the Supreme Court's judgments, she highlighted the nature of appeals to that court, which entailed a review of lawfulness rather than a review by a body with full jurisdiction. There was no possibility of effectively re-examining the establishment of the facts, which, in her submission, had been established by the CSM on the basis of insufficient evidence. Likewise, the Supreme Court had not carried out a proper

assessment of her disciplinary conduct. Lastly, with regard to the disciplinary penalties imposed, despite finding that it was empowered to examine the severity of each penalty, the Supreme Court had in reality omitted to examine this point on account of the wide discretion afforded to the administrative authorities. While it was true that Article 6 § 1 of the Convention did not guarantee a right of appeal, she had not had access to any level of jurisdiction, as a single administrative entity had been responsible for establishing the facts and determining the disciplinary penalty. She had therefore not had the benefit of a review by a judicial body with full jurisdiction or, accordingly, of an "effective remedy".

168. The applicant also complained that the disciplinary proceedings concerning her had been confidential, and more specifically that neither the proceedings before the CSM nor those before the Supreme Court had been public. In her submission, neither the CSM nor the Judicial Division of the Supreme Court had ever held a public hearing in disciplinary proceedings. Hence, although the applicant had formally requested a public hearing before both the CSM and the Supreme Court (in the proceedings in issue in application no. 74041/13), her request had been refused on each occasion, despite the existence of a dispute as to the facts, namely the content of her alleged remarks. In her view it had been necessary, in order to assess the evidence, to test the credibility of the statements of the only witness against her, the judicial investigator F.M.J. Against that background, in her submission, the taking of evidence on this point had been essential in order to secure her defence rights.

169. Furthermore, in the applicant's view, the penalty she had risked incurring (removal from office or suspension from duty) was very serious and carried a significant degree of stigma.

170. Lastly, the holding of a public hearing had been particularly important in the instant case since, on several occasions throughout the last set of proceedings, the CSM had impeded the applicant's access to documents that had been relevant in order to test the credibility of the witness against her, namely documents produced by that witness during the proceedings in issue or in various disciplinary and criminal cases against him.

(ii) The Government

171. With regard to the extent of the review carried out by the Judicial Division of the Supreme Court, the Government reiterated the arguments advanced in the Chamber proceedings to the effect that it was not for the highest court to encroach on the discretionary powers of the administrative authorities. Despite the limitation of its powers resulting from observance of the principle of separation of powers and the autonomous exercise of disciplinary authority by the administration, the Supreme Court had examined the facts of the present case in detail and had ruled on the

lawfulness, sufficiency and coherence of the establishment of the facts and the evidence. It had also analysed the relevance of the facts in relation to the duties that had been breached, and the necessity and proportionality of the penalties imposed. The Supreme Court had not merely conducted a general assessment in the abstract, but had based its findings on specific evidence contained in the file which had been gathered in the course of a fair trial.

172. In the Government's submission, the Supreme Court, in contrast to the situation in the case of *Oleksandr Volkov* (cited above, § 125), had been empowered to set aside the decisions of the CSM and to instruct it to adopt fresh decisions in conformity with the court's findings. Hence, the review performed by the Supreme Court in the present case had been sufficient for the purposes of Article 6 § 1 of the Convention.

173. With regard to the lack of a public hearing, the Government stressed that the applicant's request for a public hearing before the Judicial Division of the Supreme Court in the context of application no. 74041/13 had been refused not just because it served no purpose in view of the limited jurisdiction of the Judicial Division regarding the establishment of the facts and the assessment of the evidence, but also because of the inadmissible and irrelevant nature of the evidence which the applicant sought to have examined at the hearing. Furthermore, the applicant had already submitted detailed defence pleadings dealing with the legal issues. In the Government's submission, the applicant had not sought to present witnesses at the hearing or crucial evidence concerning the subject-matter of her case, but rather evidence relating, for example, to the dispute between the applicant and the judicial investigator F.M.J. or the arrangements for enforcement of the penalty.

174. While the holding of a public hearing before the Judicial Division of the Supreme Court was not common practice in cases concerning appeals against disciplinary rulings, it had nevertheless been open to the applicant, under domestic law, to request such a hearing. In any event, according to the Court's case-law, a hearing was not required in all cases. Hence, in the Government's view, in cases where minor penalties were imposed such as a fine or suspension from duty, the proceedings could still be deemed to be fair despite the lack of a public hearing, provided that the person concerned was given every opportunity to mount a defence.

175. The Government submitted that, in its judgment of 21 June 2016 in the present case, the Chamber had disregarded the margin of appreciation that should be left to the domestic courts, which were better placed to assess the need to examine evidence or hold a hearing. The Government argued that the reasoning of the Chamber judgment appeared to be based on an absolute requirement to hold a hearing in all cases concerning appeals against decisions imposing disciplinary penalties on judges.

(b) The Court's assessment

(i) General principles

(α) Extent of the judicial review

176. The Court reiterates that, for the determination of civil rights and obligations by a "tribunal" to satisfy Article 6 § 1 of the Convention, the "tribunal" in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see *Terra Woningen B.V. v. the Netherlands*, 17 December 1996, § 52, *Reports* 1996-VI; *Chevrol v. France*, no. 49636/99, § 77, ECHR 2003-III; and *I.D. v. Bulgaria*, no. 43578/98, § 45, 28 April 2005).

177. Both the Commission and the Court have acknowledged in their case-law that the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it (see *Sigma Radio Television Ltd v. Cyprus*, nos. 32181/04 and 35122/05, § 152, 21 July 2011, and the case-law cited therein). Thus, the requirement of full jurisdiction has been given an autonomous definition in the light of the object and purpose of the Convention, one that does not necessarily depend on the legal characterisation in domestic law.

178. In adopting this approach the Convention organs have had regard to the fact that it is often the case in relation to administrative-law appeals in the member States of the Council of Europe that the extent of judicial review over the facts of a case is limited, and that it is characteristic of review proceedings that the competent authorities review the previous proceedings rather than taking factual decisions. It can be derived from the relevant case-law that it is not the role of Article 6, in principle, to guarantee access to a court which can substitute its own assessment or opinion for that of the administrative authorities. In this regard, the Court has placed particular emphasis on the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and which often involve specialised areas of law (see *Sigma Radio Television Ltd*, cited above, § 153, and the case-law cited therein).

179. In assessing whether, in a given case, the extent of the review carried out by the domestic courts was sufficient, the Court has held that it must have regard to the powers of the judicial body in question and to such factors as: (a) the subject-matter of the decision appealed against, and in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and, if so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the administrative body; and (c) the

content of the dispute, including the desired and actual grounds of appeal (see *Sigma Radio Television Ltd*, cited above, § 154; see also *Tsanova-Gecheva*, cited above, § 98, and the cases cited therein, and in particular *Bryan v. the United Kingdom*, 22 November 1995, § 45, Series A no. 335-A, and *Galina Kostova*, cited above, § 59).

180. In considering whether the legislative scheme, taken as a whole, provided a due enquiry into the facts, the Court must also have regard to the nature and purpose of that scheme. Indeed, in relation to administrative-law appeals, the question whether the extent of judicial review afforded was "sufficient" may depend not only on the discretionary or technical nature of the subject-matter of the decision appealed against and the particular issue that the applicant wishes to ventilate before the courts as being the central issue for him or her, but also, more generally, on the nature of the "civil rights and obligations" at stake and the nature of the policy objective pursued by the underlying domestic law (see *Fazia Ali v. the United Kingdom*, no. 40378/10, § 84, 20 October 2015).

181. Whether the review carried out was sufficient will thus depend on the circumstances of a given case: the Court must therefore confine itself as far as possible to examining the question raised in the case before it and to determining if, in that particular case, the extent of the review was adequate (see *Sigma Radio Television Ltd*, cited above, § 155, and *Potocka and Others v. Poland*, no. 33776/96, § 54, ECHR 2001-X).

182. The Court has previously had occasion to examine situations in which the domestic courts were unable or refused to examine a key issue in the dispute because they considered themselves bound by the findings of fact or of law made by the administrative authorities and could not examine the relevant issues independently (see *Terra Woningen B.V.*, cited above, §§ 46 and 50-55; *Obermeier v. Austria*, 28 June 1990, §§ 66-70, Series A no. 179; *Tsfayo*, cited above, § 48; *Chevrol*, cited above, § 78; *I.D. v. Bulgaria*, cited above, §§ 50-55; *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 99-108, ECHR 2005-XII (extracts); and *Fazliyski v. Bulgaria*, no. 40908/05, § 59, 16 April 2013).

The case of *Tsfayo* falls into this category. In that case, the body whose decision was under judicial review was not merely lacking in independence from the executive, but was also directly connected to one of the parties to the dispute (see *Tsfayo*, cited above, § 47). The Court considered that the independence of judgment in relation to the finding of primary fact was liable to be impaired in a manner which could not be adequately scrutinised or rectified by judicial review. As the competent court had lacked jurisdiction to rehear the evidence and had therefore been unable to determine a crucial issue of fact, the Court found a violation of Article 6 on the ground that the central issue had not been determined by a tribunal that was independent of the parties. In other words, in that case, the impossibility of re-examining a decisive factual issue had prevented the

appellate court from remedying the lack of independence from one of the parties to the dispute that had been found at first instance.

183. The Court has also been called on to examine cases in which the court in question did not have full jurisdiction within the meaning of the domestic law as such but had examined point by point the applicants' grounds of appeal, without having to decline jurisdiction in replying to them or in scrutinising findings of fact or law made by the administrative authorities. In these cases the Court examined the intensity of the domestic courts' review of the discretion exercised by the administrative authorities (see, for instance, *Tsanova-Gecheva*, cited above, §§ 101-05; *Bryan*, cited above, §§ 43-47; *Potocka and Others*, cited above, §§ 55-59; *Sigma Radio Television Ltd*, cited above, §§ 158-69; *Galina Kostova*, cited above, §§ 61-66; and, under the criminal limb of Article 6 § 1 of the Convention, *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, §§ 63-64, 27 September 2011).

184. Furthermore, the Court has considered it generally inherent in the notion of judicial review that, if a ground of appeal is upheld, the reviewing court must have the power to quash the impugned decision, and either take a fresh decision or remit the case to the same body or a different body (see *Kingsley v. the United Kingdom* [GC], no. 35605/97, §§ 32 and 34, ECHR 2002-IV, and *Oleksandr Volkov*, cited above, § 125).

185. Article 6 also requires the domestic courts to adequately state the reasons on which their decisions are based. Without requiring a detailed answer to every argument put forward by a complainant, this obligation nevertheless presupposes that a party to judicial proceedings can expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question (see, among many other authorities, *Ruiz Torija v. Spain*, 9 December 1994, §§ 29-30, Series A no. 303-A).

186. The Court also reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, among other authorities, *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 49, 20 October 2011). The Court is not a court of appeal from the national courts and it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

(β) Public hearing

187. The Court observes at the outset that the right to an oral hearing is not only linked to the question whether the proceedings involve the examination of witnesses who will give their evidence orally. It is also important for litigants to have the opportunity to state their case orally

before the domestic courts (see *Göç,* cited above, § 48). Thus, the right to an oral hearing is one element underpinning the overall equality of arms between the parties to the proceedings (see, *mutatis mutandis*, *Margaretić v. Croatia*, no. 16115/13, §§ 127-28, 5 June 2014).

188. The Court also reiterates that, according to its established case-law, in proceedings before a court of first and only instance the right to a "public hearing" within the meaning of Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see *Göç*, cited above, § 47).

189. Moreover, in the case of *Martinie v. France* ([GC], no. 58675/00, §§ 39-42, ECHR 2006-VI), the Court summed up the relevant principles as follows:

> "39. The Court reiterates that the public character of proceedings before the judicial bodies referred to in Article 6 § 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, among many other authorities, *Axen v. Germany*, 8 December 1983, § 25, Series A no. 72).
>
> 40. The right to a public hearing implies a public hearing before the relevant court (see, *inter alia*, *mutatis mutandis*, *Fredin v. Sweden (no. 2)*, 23 February 1994, § 21, Series A no. 283-A, and *Fischer v. Austria*, 26 April 1995, § 44, Series A no. 312). Article 6 § 1 does not, however, prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle: in accordance with the actual wording of this provision, '... the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'; holding proceedings, whether wholly or partly, in camera must be strictly required by the circumstances of the case (see, for example, *mutatis mutandis*, *Diennet v. France*, 26 September 1995, § 34, Series A no. 325-A).
>
> 41. Moreover, the Court has held that exceptional circumstances relating to the nature of the issues to be decided by the court in the proceedings concerned (see, *mutatis mutandis*, *Miller v. Sweden*, no. 55853/00, § 29, 8 February 2005) may justify dispensing with a public hearing (see, in particular, *Göç v. Turkey* [GC], no. 36590/97, § 47, ECHR 2002-V). ... It should be pointed out, however, that in the majority of cases concerning proceedings before 'civil' courts ruling on the merits in which it has arrived at that conclusion the applicant had had the opportunity of requesting a public hearing.
>
> 42. The position is rather different where, both on appeal (if applicable) and at first instance, 'civil' proceedings on the merits are conducted in private in accordance with a general and absolute principle, without the litigant being able to request a public hearing on the ground that his case presents special features. Proceedings conducted in that way cannot in principle be regarded as compatible with Article 6 § 1 of the Convention (see, for example, *Diennet* and *Göç*, cited above): other than in wholly

exceptional circumstances, litigants must at least have the opportunity of requesting a public hearing, though the court may refuse the request and hold the hearing in private on account of the circumstances of the case and for the aforementioned reasons."

190. The Court has identified the following situations in which the above-mentioned exceptional circumstances may justify dispensing with a hearing:

(a) where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the case file (see *Döry v. Sweden*, no. 28394/95, § 37, 12 November 2002, and *Saccoccia v. Austria*, no. 69917/01, § 73, 18 December 2008);

(b) in cases raising purely legal issues of limited scope (see *Allan Jacobsson v. Sweden (no. 2)*, 19 February 1998, § 49, *Reports* 1998-I, and *Mehmet Emin Şimşek v. Turkey*, no. 5488/05, §§ 29-31, 28 February 2012), or points of law of no particular complexity (see *Varela Assalino v. Portugal* (dec.), no. 64336/01, 25 April 2002, and *Speil v. Austria* (dec.), no. 42057/98, 5 September 2002);

(c) where the case concerns highly technical issues. For instance, the Court has taken into consideration the technical nature of disputes concerning social-security benefits, which may be better dealt with in writing than in oral argument. It has held on several occasions that in this sphere the national authorities are entitled, having regard to the demands of efficiency and economy, to dispense with a hearing, as systematically holding hearings may be an obstacle to the particular diligence required in social-security cases (see *Schuler-Zgraggen*, § 58, and *Döry*, § 41, both cited above).

191. By contrast, the Court has found the holding of a hearing to be necessary, for example:

(a) where there is a need to assess whether the facts were correctly established by the authorities (see *Malhous v. the Czech Republic* [GC], no. 33071/96, § 60, 12 July 2001);

(b) where the circumstances require the court to form its own impression of litigants by affording them a right to explain their personal situation, on their own behalf or through a representative (see *Göç*, cited above, § 51; *Miller*, cited above, § 34 *in fine*; and *Andersson v. Sweden*, no. 17202/04, § 57, 7 December 2010);

(c) where the court needs to obtain clarification on certain points, *inter alia* by means of a hearing (see *Fredin v. Sweden (no. 2)*, 23 February 1994, § 22, Series A no. 283-A, and *Lundevall v. Sweden*, no. 38629/97, § 39, 12 November 2002).

192. The Court has previously examined the question whether the lack of a public hearing at the level below may be remedied by a public hearing at the appeal stage. In a number of cases it has found that the fact that proceedings before an appellate court are held in public cannot remedy the

lack of a public hearing at the lower levels of jurisdiction where the scope of the appeal proceedings is limited, in particular where the appellate court cannot review the merits of the case, including a review of the facts and an assessment as to whether the penalty was proportionate to the misconduct (see, for example, in a disciplinary context, *Le Compte, Van Leuven and De Meyere*, cited above, § 60; *Albert and Le Compte*, cited above, § 36; *Diennet*, cited above, § 34; and *Gautrin and Others v. France*, 20 May 1998, § 42, *Reports* 1998-III).

If, however, the appellate court has full jurisdiction, the lack of a hearing before a lower level of jurisdiction may be remedied before that court (see, for example, *Malhous*, cited above, § 62, and, in a disciplinary context, *A. v. Finland* (dec.), no. 44998/98, 8 January 2004, and *Buterlevičiūtė v. Lithuania*, no. 42139/08, §§ 52-54, 12 January 2016).

(ii) Application of these principles to the present case

193. As mentioned above (see paragraph 134 above), the Court will conduct a combined examination of the applicant's complaints concerning the allegedly insufficient extent of the review performed by the Judicial Division of the Supreme Court and the lack of a public hearing, as these complaints are closely linked.

194. In order to determine whether the Judicial Division of the Supreme Court had full jurisdiction within the meaning of the Convention institutions' case-law, the Court will take account of the powers of that body and its case-law, as outlined at paragraphs 179 et seq. above.

(α) The subject-matter of the CSM's decisions

195. The subject-matter of the impugned decisions of the CSM (see paragraph 179 (a) above), which the applicant challenged by means of special administrative actions (*ação administrativa especial*, see paragraphs 64 and 80 above) as they existed under Portuguese law at the relevant time, was the issue whether the applicant had breached her professional obligations. It is beyond doubt that, in order to address that issue, the CSM had to exercise its discretionary powers. That authority has specific responsibility under the Constitution (see paragraph 70 above) for the autonomous management of the judiciary, and in particular for disciplinary matters concerning judges, with the wider aim of guaranteeing the independence of the justice system (see, *mutatis mutandis*, *Tsanova-Gecheva*, cited above, § 100, regarding the power of the Bulgarian Supreme Judicial Council to appoint the President of a court). The Court therefore recognises the particular importance of the CSM's responsibilities under the Constitution in a key area from the perspective of the rule of law and the separation of powers. As a body specifically set up to interpret and apply the rules governing the disciplinary conduct of judges, the CSM has the task of contributing to the smooth operation of the justice system.

However, in the instant case, the assessment of the facts and the review of the disciplinary sanctions imposed did not require specialised knowledge or specific professional experience, but could have come within the jurisdiction of any court. This was not a classic exercise of administrative discretion in a specialised area of law (see, conversely, *Sigma Radio Television Ltd*, cited above, § 161).

196. The Court further observes that the CSM's decisions were challenged by means of administrative-law appeals to the Judicial Division of the Supreme Court. It considers, firstly, that the review of a decision imposing a disciplinary penalty differs from that of an administrative decision that does not entail such a punitive element. Secondly, it notes that the disciplinary proceedings in question concerned a judge. In that connection the Court stresses that, even if they do not come within the scope of Article 6 of the Convention under its criminal head, disciplinary penalties may nevertheless entail serious consequences for the lives and careers of judges. The accusations against the applicant were liable to result in her removal from office or suspension from duty, that is to say, in very serious penalties which carried a significant degree of stigma (see, *mutatis mutandis*, *Grande Stevens and Others v. Italy*, nos. 18640/10 and 4 others, § 122, 4 March 2014). In accordance with the general principles set forth above and taking into account the policy objectives pursued by the legislation in this sphere (see paragraph 180 above), the Court considers that the judicial review carried out must be appropriate to the subject-matter of the dispute, that is to say, in the instant case, to the disciplinary nature of the administrative decisions in question. This consideration applies with even greater force to disciplinary proceedings against judges, who must enjoy the respect that is necessary for the performance of their duties. When a member State initiates such disciplinary proceedings, public confidence in the functioning and independence of the judiciary is at stake; in a democratic State, this confidence guarantees the very existence of the rule of law. Furthermore, the Court has stressed the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313; *Kudeshkina v. Russia*, no. 29492/05, § 86, 26 February 2009; and *Stafford*, § 78; *Kleyn*, § 193; and *Baka*, § 165, all cited above).

(β) The proceedings before the CSM (the disciplinary body)

197. As regards the method used by the CSM in order to arrive at its decisions (see paragraph 179 (b) above), the Court reiterates at the outset that the CSM, as a disciplinary authority, is a non-judicial body, a fact to which its composition, among other factors, attests (see paragraphs 26, 41, 59, 68, 70 and 131 above). As to the procedural safeguards applied by that body, the Court is prepared to accept that, as the Government argued, the

proceedings conducted in the present case afforded the applicant the opportunity to mount a defence. The applicant was notified of the indictment drawn up by the judicial investigator (see paragraphs 16, 19, 37 and 52 above) and filed defence pleadings (see paragraphs 17, 21, 37 and 53 above). She was also able to consult the final report and had a period of time in which to submit possible observations, although these were examined by the same judicial investigator (see paragraphs 17, 39 and 57 above).

198. However, despite the fact that the applicant was liable to incur very serious penalties (see paragraph 196 above), the proceedings before the plenary CSM were in writing and the applicant could not attend its sittings in any of the three sets of proceedings concerning her; under the national legislation, those sittings were not open either to the person concerned by the proceedings or to members of the public. Firstly, as the Government acknowledged, the CSM is not authorised by law to hold public hearings, and, secondly, in the third set of proceedings it refused the applicant's request for such a hearing on the grounds, *inter alia*, that there was no legal basis for the case to be heard in public before the CSM sitting in plenary (see paragraph 56 above). Furthermore, the applicant did not have an opportunity to make oral representations, either on the factual issues and the penalties or on the various legal issues. Likewise, the plenary formation of the CSM did not hear any evidence from witnesses, although it was not only the applicant's credibility that was at stake but also that of crucial witnesses, in particular the judicial inspector H.G. and the judicial investigator F.M.J. In these circumstances the Court considers that the CSM did not exercise its discretionary powers on an adequate factual basis.

(γ) The proceedings before the Judicial Division of the Supreme Court (the judicial body)

199. Next, as regards the content of the dispute, or more specifically the proceedings before the judicial body – in this instance, the Judicial Division of the Supreme Court – and the review conducted by it (see paragraph 179 (c) above), the Court emphasises that a distinction needs to be drawn between different aspects of the judicial review of disciplinary decisions. Thus, the Court must take into account, firstly, the issues covered by the review carried out by the competent domestic court and, secondly, the method of review adopted by the latter, while addressing the question of the right to a hearing. Next, consideration must be given to the decision-making powers of the court in question for the purposes of concluding its review of the case before it, and to the reasoning of the decisions adopted.

200. The Court stresses that, since the application of Article 6 of the Convention is in issue here, it is not its role to ascertain whether the CSM's decisions imposing sanctions on the applicant were lawful under domestic law. The Court's task consists solely in establishing whether the extent of the Supreme Court's review was sufficient with regard to the disciplinary

proceedings conducted before the CSM against the applicant in her capacity as a judge.

- *The issues submitted for judicial review*

201. The first step is to define the substantive issues on the basis of which the Court will have to ascertain whether the review performed by the Supreme Court was sufficient.

Firstly, as emphasised by the Chamber, the applicant, in her appeals to the Supreme Court, consistently denied the acts of which she had been accused by the CSM (see, *mutatis mutandis*, *Tsfayo*, cited above, § 46, and *Družstevní Záložna Pria and Others v. the Czech Republic*, no. 72034/01, § 112, 31 July 2008).

Secondly, the Court notes that in each set of proceedings the disciplinary sanctions imposed on the applicant were based on the finding that she had breached her professional obligations as a judge. The characterisation of the applicant's professional conduct was therefore a crucial issue in the proceedings to be reviewed by the Supreme Court.

Thirdly, in so far as the applicant complained to the Judicial Division of the Supreme Court that the penalties imposed on her in each set of proceedings had been disproportionate, the Court reiterates that a judicial body cannot be said to have full jurisdiction unless it has the power to assess whether the penalty was proportionate to the misconduct (see *Diennet*, cited above, § 34, and *Mérigaud v. France*, no. 32976/04, § 69, 24 September 2009).

202. It follows that the Court must first of all ascertain whether the review conducted by the Judicial Division of the Supreme Court was sufficient with regard to the establishment of the facts. If necessary, it will examine the two remaining aspects of the review, namely the review of the breach of professional duties and that of the disciplinary penalties imposed.

203. As regards the establishment of the facts, the Court observes that in the specific context of disciplinary proceedings the issues of fact are just as crucial as the legal issues for the outcome of proceedings relating to "civil rights and obligations" (see, *mutatis mutandis*, *Le Compte, Van Leuven and De Meyere*, cited above, § 51 *in fine*). It considers that the establishment of the facts is especially important in the case of proceedings that entail the imposition of penalties, and in particular disciplinary penalties against judges, as the latter must enjoy the respect that is necessary for the performance of their duties, so as to ensure public confidence in the functioning and independence of the judiciary as such (see paragraph 196 above).

In the present case the factual evidence was a decisive aspect of the proceedings concerning the applicant and was not merely secondary to the issues coming within the discretion of the administrative authorities. The applicant denied calling Judge H.G. a "liar" and stated that during her

conversation with Judge F.M.J. she had not asked him to refrain from instituting proceedings against the witness whom she had wished to call. In that regard it should be noted that the establishment of the facts had been the subject of disagreement among the members of the CSM (see paragraph 26 above). Like the Chamber, the Grand Chamber regards these facts as "decisive". The accusations against the applicant were liable to result in her removal from office or suspension from duty, that is to say, in very serious penalties which carried a significant degree of stigma (see paragraph 196 above) and which were apt to have irreversible repercussions on her life and career. They did in fact result in a disciplinary penalty of 240 days' suspension from duty, although the period of suspension lasted for only 100 days in practice (see paragraphs 67 and 69 above).

- *The method of judicial review*

204. As to the extent of the review carried out by the Judicial Division of the Supreme Court regarding the establishment of the facts, the Court notes that the Judicial Division took care to set out in detail its powers of review in disciplinary cases as established by Portuguese law, including its own case-law (see paragraphs 29 and 45 above). It stated expressly that it did not have full jurisdiction in the matter but was called upon solely to review the lawfulness of the decisions under challenge. In particular, it stressed that it did not have jurisdiction when it came to "gathering the evidence (*aquisição da matéria instrutória*) or establishing the key facts" (see paragraph 29 above).

It appears therefore that, in view of the limits imposed on it by the legislation and by its own case-law, the Judicial Division of the Supreme Court was not empowered to examine the decisive points in the proceedings, namely the content of the applicant's conversations with the judicial inspector H.G. and with Judge F.M.J. It could only "examine any contradictions, inconsistencies and insufficiency in the evidence and any manifest errors in the assessment thereof, in so far as these defects [were] apparent" (see paragraph 29 above). According to the definition in its own case-law, a "manifest" error "must not just be serious (a gross error, in that it is manifestly contrary to reason, common sense or the truth, or demonstrates inadequate knowledge); it must also be flagrant (manifest)" (see paragraph 81 above).

205. In view of the foregoing considerations, the Court must determine whether the review of the lawfulness of the establishment of the facts – which was crucial for the outcome of the proceedings – was sufficient for the purposes of Article 6 § 1 of the Convention.

206. It notes first of all that the assessment of the facts entailed examining issues going to the credibility of the applicant and the witnesses. Having found that it did not have jurisdiction to re-examine the facts and the evidence, even on the basis of the material in the file sent to it, the Judicial

Division of the Supreme Court accordingly refused the applicant's request for a public hearing (see paragraph 64 above). In the Court's view, the dispute as to the facts and the repercussions of the disciplinary penalties on the applicant's reputation made it necessary in the present case for the Judicial Division of the Supreme Court to perform a review that was sufficiently thorough to enable it firstly to determine, for instance, whether the applicant had made certain remarks during her telephone conversation with the judicial inspector H.G. or her private meeting with the judicial investigator F.M.J., and, secondly, to form its own impression of the applicant by affording her an opportunity to explain her version of the situation orally (see, *mutatis mutandis*, *Malhous*, § 60; *Göç*, § 51; *Miller*, § 34 *in fine; Olujić*, § 80; and *Andersson*, § 57, all cited above).

207. As the Government argued that a public hearing in the case served no purpose given the limited jurisdiction of the Judicial Division of the Supreme Court regarding the establishment of the facts and the assessment of the evidence (see paragraph 173 above), the Court must examine the necessity of holding a public hearing in the present case. It reiterates in that regard that no hearing was held before the CSM (see paragraph 198 above) and that the Judicial Division of the Supreme Court was the first and only judicial body to examine the applicant's appeals against the CSM's decisions.

208. The applicant submitted that the CSM and the Judicial Division of the Supreme Court never held public hearings in disciplinary proceedings (see paragraph 168 above). In that connection the Court reiterates that, notwithstanding the technical nature of some discussions and depending on what is at stake in the proceedings, public scrutiny may be viewed as a necessary condition for transparency and for the protection of litigants' rights. It is true that it has previously found that holding disciplinary proceedings in private with the consent of the person concerned is not contrary to the Convention (see *Le Compte, Van Leuven and De Meyere*, cited above, § 59). However, in the present case the applicant had requested a public hearing. She should therefore have had the possibility of obtaining a public hearing before a body with full jurisdiction for the purposes of the Convention (see, for example, *Martinie*, cited above, §§ 43-44, and *Vernes v. France*, no. 30183/06, § 32, 20 January 2011). Such a hearing would have allowed for an oral confrontation between the parties (see, *mutatis mutandis*, in a criminal-law context, *Grande Stevens and Others*, cited above, § 123).

209. As the CSM did not hold a hearing, it must be determined whether the applicant had an opportunity to request public proceedings before the Judicial Division of the Supreme Court. The Government acknowledged that the holding of a public hearing before the Judicial Division was not common practice; however, they argued that, under domestic law, it had been open to the applicant to request such a hearing (see paragraphs 76 and 174 above).

The applicant did in fact request the holding of a hearing in the third set of proceedings, relying on Article 91 § 2 of the Administrative Courts Code (see paragraph 61 above). The Judicial Division of the Supreme Court, whose task it was to rule on whether such a measure was necessary, did not declare the applicant's request inadmissible for lack of a legal basis, as the CSM had done, but nevertheless refused it, citing as reasons the scope of its jurisdiction and the supposed irrelevance of the evidence which the applicant wished to have examined (see *Jussila*, cited above, § 48, and paragraphs 64 and 76 above).

210. Since the Supreme Court rejected the applicant's request for a hearing, the Court must ascertain whether there existed exceptional circumstances, relating to the nature of the issues raised in the proceedings in question, such as to justify dispensing with such a hearing (see paragraph 188 above). In view of what is at stake, namely the impact of the possible penalties on the lives and careers of the persons concerned and their financial implications, the Court considers that, in the context of disciplinary proceedings, dispensing with an oral hearing should be an exceptional measure and should be duly justified in the light of the Convention institutions' case-law.

211. In the instant case the proceedings in question did not relate to purely legal issues of limited scope or to highly technical questions that could be dealt with satisfactorily on the basis of the case file alone. On the contrary, the applicant's appeals concerned important factual and legal issues (see paragraph 206 above). Even if the Supreme Court considered that it was not its task to conduct a re-examination of the evidence, it nevertheless had a duty to ascertain whether the factual basis for the decisions taken by the CSM was sufficient to support the latter's conclusions. In such a situation, the importance for the parties of obtaining an adversarial hearing before the body performing the judicial review should not be underestimated (see, *mutatis mutandis*, *Margaretić*, cited above, § 128). In the instant case such a hearing would have made it possible to undertake a more thorough review of the facts, which were disputed.

- *The decision-making powers*

212. The Court observes that the Judicial Division of the Supreme Court was prevented by its own case-law (see, in particular, paragraphs 29 and 81 above) from substituting its assessment for that of the disciplinary body. Nevertheless, it was empowered to set aside a decision wholly or in part in the event of a "gross, manifest error", and in particular if it was 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 CSM for the latter to give a fresh ruling in conformity with any instructions issued by the Judicial Division

regarding possible irregularities (see, conversely, *Oleksandr Volkov*, cited above, §§ 125-26, and *Kingsley*, cited above, § 32).

- *The reasons given for the Supreme Court's decisions*

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

(δ) Conclusion

214. In the light of the foregoing the Court concludes that, in the circumstances of the present case – taking into consideration the specific context of disciplinary proceedings conducted against a judge, the seriousness of the penalties, the fact that the procedural guarantees before the CSM were limited, and the need to assess factual evidence going to the applicant's credibility and that of the witnesses and constituting a decisive aspect of the case – the combined effect of two factors, namely 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, meant that the applicant's case was not heard in accordance with the requirements of Article 6 § 1 of the Convention.

Accordingly, it is not necessary to examine the two remaining aspects of the review performed by the Judicial Division of the Supreme Court, namely its review of the breach of professional obligations and its review of the disciplinary sanctions imposed (see paragraphs 201-02 above).

215. In view of the foregoing considerations, the Court finds that there has been a violation of Article 6 § 1 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

216. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

217. In the Chamber proceedings the applicant claimed 43,750 euros (EUR) in respect of the pecuniary damage she had allegedly sustained on account of her loss of salary. She did not lodge a claim for non-pecuniary damage, submitting that a finding of a violation would constitute in itself sufficient just satisfaction in respect of the damage sustained. The Government contested that argument, maintaining that the applicant was confusing the subject-matter of the domestic proceedings and of the proceedings before the Court.

218. Having regard to all the circumstances and in accordance with its normal practice in civil and criminal cases regarding violations of Article 6 § 1 caused by a lack of objective or structural independence and impartiality, the Chamber – citing, *mutatis mutandis*, *Kingsley*, cited above, § 43 – did not consider it appropriate to award financial compensation to the applicant in respect of loss of salary. It saw no causal link between the violations found and the pecuniary damage alleged, and dismissed the applicant's claim.

219. In the Grand Chamber proceedings the applicant claimed EUR 16,829.40 in respect of the pecuniary damage she had allegedly sustained on account of the actual loss of 100 days' salary. She produced documents in support of her claim. Lastly, the applicant requested the Court to direct the Portuguese State to reopen the proceedings in question. In her view, this was the only possible means of affording redress for the alleged violations.

220. The Government did not comment on this point in the Grand Chamber proceedings.

221. The Grand Chamber agrees with the Chamber's analysis and therefore rejects in full the applicant's claim in respect of pecuniary damage.

222. As regards the applicant's request for reopening of the domestic proceedings in the context of the present case, the Court considers that it is for the respondent State to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation or violations found by the Court and to redress as far as possible the effects. Nevertheless, the Court notes that Article 696 of the Code of Civil Procedure provides for the possibility of reopening proceedings at domestic level where the Court has found a violation of an applicant's fundamental rights and freedoms (see paragraph 78 above).

B. Costs and expenses

223. Before the Chamber the applicant also claimed EUR 2,500 for the costs and expenses incurred in the domestic proceedings. The Government did not submit any observations in that regard.

224. In view of the documents in its possession and its case-law, the Chamber dismissed the claim in respect of costs and expenses.

225. Before the Grand Chamber the applicant claimed EUR 2,608.65 in respect of the costs and expenses incurred in the domestic proceedings, and produced documents in support of her claims. She did not submit any claim for costs and expenses in connection with the Grand Chamber proceedings.

226. The Government did not comment on this point in the Grand Chamber proceedings.

227. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case the Court observes that, in the Chamber proceedings, the applicant did not submit any documents in support of her claim for reimbursement of costs and expenses, providing documents only before the Grand Chamber but without offering any explanation for the delayed submission. Accordingly, in view of its case-law (see, *mutatis mutandis*, *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 385, ECHR 2014 (extracts)), the Court rejects the claim in respect of the costs and expenses incurred in the domestic proceedings.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, that, as the applicant did not comply with the six-month time-limit, it is unable to examine on the merits the complaint alleging a lack of independence and impartiality on the part of the CSM;

2. *Dismisses*, unanimously, the Government's preliminary objection of failure to exhaust domestic remedies with regard to the complaints concerning the alleged lack of independence and impartiality of the Judicial Division of the Supreme Court and the extent of its review;

3. *Declares*, unanimously, inadmissible the complaint alleging a violation of Article 6 § 3 (a) and (b) on the ground that the applicant was not informed in detail of the accusation against her and therefore did not have adequate time and facilities for the preparation of her defence;

4. *Holds*, by eleven votes to six, that there has been no violation of Article 6 § 1 of the Convention with regard to the complaint alleging a

lack of independence and impartiality on the part of the Judicial Division of the Supreme Court;

5. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention on account of the shortcomings in the conduct of the proceedings against the applicant;

6. *Dismisses*, unanimously, the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 November 2018.

Françoise Elens-Passos	Guido Raimondi
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Raimondi, Nussberger, Jäderblom, Møse, Poláčková and Koskelo;

(b) concurring opinion of Judge Pinto de Albuquerque;

(c) joint partly dissenting opinion of Judges Yudkivska, Vučinić, Pinto de Albuquerque, Turković, Dedov and Hüseynov.

G.R.
F.E.P.

JOINT CONCURRING OPINION OF JUDGES RAIMONDI, NUSSBERGER, JÄDERBLOM, MØSE, POLÁČKOVÁ AND KOSKELO

1. We agree with the present judgment with the exception of the reasons for the finding in point 5 of the operative provisions, according to which there has been a violation of Article 6 § 1 on account of the shortcomings in the conduct of the proceedings against the applicant.

2. In this case, the Grand Chamber opted for a joint examination of the applicant's complaints regarding the sufficiency of the review performed by the Judicial Division of the Supreme Court and the lack of an oral hearing (see paragraph 193 of the judgment). As a result, point 5 of the operative part of the judgment was formulated in a manner that does not distinguish between those two aspects but refers more generally to "shortcomings in the conduct of the proceedings against the applicant". In our opinion, there has been a violation of Article 6 § 1 only on account of the applicant's complaint under application no. 74041/13 regarding the lack of an oral hearing in the third set of disciplinary proceedings against her. Thus, while we agree that there was a shortcoming in the conduct of those proceedings, we reach this conclusion on that narrower ground. The combined approach, and the broader finding of a violation adopted in the present judgment, are in our view not well-founded and the reasoning on which that position is based is particularly problematic, for the reasons discussed below. Therefore, although the vote on the outcome in point 5 of the operative provisions has technically been unanimous, we do not share the reasoning leading up to that conclusion. Accordingly, the references below to "the majority" relate to those of our colleagues who subscribed to the reasons set out in the judgment.

3. The crux of our difficulty is brought to the fore by the statement in paragraph 206 of the present judgment, where the majority find it "necessary ... for the [court] to perform a review that was sufficiently thorough to enable it firstly to determine, for instance, whether the applicant had made certain remarks [during a certain telephone conversation or a certain private meeting] and, secondly, to form its own impression of the applicant by affording her an opportunity to explain her version of the situation orally". This passage highlights a problem in the majority's approach to the impugned proceedings before the Judicial Division of the Supreme Court, and to judicial review more generally, which is liable to be a source of confusion and uncertainty. Below, we will try to explain why we are not able to share the majority's approach and why we see it as an ill-considered departure from the Court's existing case-law on the standards of judicial review required under Article 6 § 1. We will first stress the general principles to be upheld and then explain why we consider that they have not been correctly applied in the present case.

General remarks

4. This case concerns proceedings under the civil limb of Article 6 § 1 arising from the imposition of disciplinary sanctions on the applicant by an administrative body, namely the Portuguese High Council of the Judiciary (CSM), and which the applicant contested before the competent appeal body, namely the Judicial Division of the Supreme Court of Portugal. Under the applicable domestic law, such an appeal before the Judicial Division is governed by the norms concerning judicial review.

5. In its case-law, the Court has in many respects expanded the scope of application of Article 6 § 1 and reinforced the procedural safeguards which must be guaranteed in domestic adjudication. The Court has, however, never sought to undermine the basic feature of judicial review of administrative decisions, namely that it is designed to entail a *verification* of such decisions, and not a fresh examination of their subject-matter by a judicial authority.

6. This basic feature of judicial review is rooted in the principle of separation of powers, which in many Contracting States is enshrined at the level of the Constitution. One of its tenets is that the courts shall perform scrutiny of administrative acts, but not take over the functions of the administration. More specifically, what is at issue from the perspective of the separation of powers is, firstly, the guarantee of judicial scrutiny of administrative decisions in order to ensure their lawfulness and, secondly, the need to ensure that the norms governing that scrutiny continue to uphold the principle that the courts should not encroach on the functions or responsibilities of the administration by taking the place of the competent administrative authorities when dealing with the appeals before them.

7. Accordingly, the Court has acknowledged that Article 6 does not go so far as to guarantee access to a court which can substitute its own assessment or opinion for that of the administrative authorities (see *Fazia Ali v. the United Kingdom*, no. 40378/10, § 77, 20 October 2015). This is part of well-established case-law. What is required under Article 6 § 1 is access to a court with "full jurisdiction". Both the Commission and the Court have acknowledged in their case-law that the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it (see *Sigma Radio Television Ltd v. Cyprus*, nos. 32181/04 and 35122/05, § 152, 21 July 2011, and the case-law cited therein). Thus, the requirement of full jurisdiction has been given an autonomous definition in the light of the object and purpose of the Convention, one that does not necessarily depend on the legal characterisation in domestic law. As the well-established case-law shows, this notion requires the exercise of "sufficient jurisdiction", or "sufficient review". While this approach is reiterated in the present judgment as a

general principle (see paragraph 177 of the judgment), it is not, in our view, taken seriously enough in its application to the present case (see below).

8. It is important to stress that no exceptions to this approach have hitherto been made in cases where sanctions, such as disciplinary ones, are imposed on an individual by an administrative authority – which as such is not precluded under Article 6 (see, for instance, *Diennet v. France*, 26 September 1995, Series A no. 325-A; *Mérigaud v. France*, no. 32976/04, § 68, 24 September 2009; *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, § 59, 27 September 2011; and *Grande Stevens and Others v. Italy*, nos. 18640/10 and 4 others, § 139, 4 March 2014). In this domain, too, the Court has held that the access to court enshrined in Article 6 § 1 requires that the court must have "full jurisdiction", within the above-mentioned autonomous meaning, to deal with the appeal. Thus, although the sufficiency of judicial review does depend on the subject-matter of the case (see *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, § 98, 15 September 2015, and the cases cited therein, and in particular *Bryan v. the United Kingdom*, 22 November 1995, § 45, Series A no. 335-A; *Sigma Radio Television Ltd*, cited above, § 154; and *Galina Kostova*, no. 36181/05, § 59, 12 November 2013), this has not been taken to mean that the case on appeal from the administrative body must be subjected to a full re-examination at the judicial stage (see *Menarini Diagnostics S.r.l.*, cited above, §§ 62-67, and *Grande Stevens and Others*, cited above, §§ 139 and 149). In this context, it is also to be noted that these last cases concerned administrative sanctions falling under the criminal limb of Article 6 § 1.

9. In this connection it should be stressed that there is a distinction to be made, on the one hand, between the *issues* that must be *subject to* the court's *scrutiny* when it carries out a judicial review and, on the other hand, the *method* of their review by the court. The latter in turn is linked to the manner of the court's disposal of the case on conclusion of its review. This point is, in principle, reflected in paragraph 199 of the present judgment.

10. As regards the *subject-matter* of the review, the competent court must, according to the Court's case-law, be empowered to conduct a review of all questions of fact and law relevant to the appeal before it, and to address any procedural shortcomings before the administrative authority (see, *mutatis mutandis*, *Potocka and Others v. Poland*, no. 33776/96, §§ 55-56, ECHR 2001-X, and *Tsanova-Gecheva v. Bulgaria*, cited above § 101), as well as the proportionality of the sanction imposed (see *Diennet,* cited above, § 34; *Mérigaud*, cited above, § 69; and, *mutatis mutandis*, *Sigma Radio Television Ltd*, cited above, § 168).

11. As regards the *method* of review, the Court has consistently acknowledged that the domestic courts cannot be required under Article 6 to be able to substitute their own assessment or findings for those of the competent administrative authority. Consequently, judicial scrutiny may be

confined to a review of the administrative acts and proceedings, without fresh decisions having to be taken, especially on the facts of the case. Accordingly, the judicial body conducting the review has been recognised as having "full jurisdiction", within the autonomous meaning of Article 6 § 1 of the Convention, even if it does not conduct a re-examination and reassessment of the evidence, including a rehearing of witnesses, but confines itself to verifying – particularly from the standpoint of relevance, sufficiency and coherence – the facts and evidence on which the administrative decision under review was based.

12. As regards the court's disposal of the case, the court carrying out judicial review must have the power to quash the impugned administrative decision and either replace it with a new decision or remit the case to the same administrative authority or a different authority (see *Kingsley v. the United Kingdom* [GC], no. 35605/97, §§ 32 and 34, ECHR 2002-IV, and *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 125, ECHR 2013), a point reiterated in paragraph 184 of the present judgment. Especially where the administrative body is found to have established the facts in an unlawful or inadequate manner, it may be necessary to annul the decision and remit the case back to the administrative body for the latter to conduct a re-examination of the facts and reconsider its conclusions accordingly.

13. The above elements are the essence of the standard under which the competent court must be able to exercise "full" jurisdiction, within the autonomous meaning adopted by the Court. As outlined above, this notion is satisfied by means of judicial *review* by the court in respect of all the above aspects of the case, in so far as they have been raised on appeal before the court. It has not been understood to require that the issues decided upon by the administrative authority must be submitted to a re-examination by the competent court. In this sense, the legal position is similar to the requirement under Article 2 of Protocol No. 7, which stipulates (as a minimum standard) that criminal appeals must ensure a "review" of the conviction and sentence; this does not entail a re-examination or retrial.

14. In particular where questions of fact are concerned, there is a major difference between, on the one hand, a requirement that the court must verify (review) the manner in which the relevant facts have been established by the administrative authority and whether the factual basis on which the latter has taken its decision can be regarded as sufficient and solid enough to warrant the legal consequences that have been attached to it, and, on the other hand, a requirement that the court must conduct a re-examination of the evidence in order to establish the facts for itself. Under the first scenario, what the party contesting the administrative decision must achieve, in order to be successful with the appeal, is to argue before the court, and to persuade the latter, that the facts as established by the administrative authority did not constitute a sufficiently solid basis for the legal

consequences which the decision entails, or that the facts were established in a manner not affording the necessary procedural safeguards. Where the appeal succeeds, the court must then annul the impugned decision. Depending on the circumstances, the court may remit the case for fresh examination by the administrative authority or, if the correct factual basis has already become sufficiently clear, possibly issue a new decision on the merits. Under the second scenario, the court would repeat the examination and assessment of the evidence.

15. According to the Court's case-law, the first type of judicial scrutiny has been considered to satisfy the requirements of Article 6 § 1. Even in situations where Article 6 was applicable under its criminal head, the Court has considered the judicial review sufficient although the competent court did not conduct a fresh examination of the evidence or make its own assessment of that evidence (see, for instance, *A. Menarini Diagnostics S.r.l.*, cited above, §§ 63-64).

16. By contrast, the Court has found violations of Article 6 in situations where the national courts were unable or refused to examine a key issue in the dispute because they considered themselves bound by the findings of fact or of law made by the administrative authorities and could not conduct an independent review of such findings (see the case-law cited in paragraph 182 of the present judgment). A particular variant of that type of situation can be seen in *Tsfayo v. the United Kingdom* (no. 60860/00, § 47, 14 November 2006), where the Court was faced with a case in which the decision under judicial review had been taken by an organ that was not only lacking in independence from the executive but was *directly connected to one of the parties to the dispute*. Under those special circumstances, the Court considered that the independence of judgment in relation to the finding of primary fact could be infected in a manner which could not be adequately scrutinised or rectified by judicial review. As the competent court lacked jurisdiction to rehear the evidence and, therefore, a crucial question of fact had not been re-examined by it, the Court found a violation of Article 6 as the central issue had not been determined by a tribunal that was independent from the parties. In other words, that case concerned a particular kind of situation where there was a combination of deficiencies in the form of a lack of independence from one of the parties at first instance, allied to a failure to re-examine and determine a decisive factual issue on appeal.

17. There is no need to dwell further on this last line of case-law, as it is clear that the present case does not raise any issues of a similar kind. It can be seen from the citations of the relevant domestic judgments that the Judicial Division of the Portuguese Supreme Court performed a judicial review of a kind that has hitherto been considered to satisfy the requirements of Article 6 § 1.

18. In this context, a couple of further points are worth noting. Firstly, it is true that the judicial review of an administrative decision imposing a disciplinary penalty may often raise issues different from those involved in the review of administrative decisions which do not entail a specific punitive element. Nevertheless, the Court has not previously considered that the access to court enshrined in Article 6 § 1 requires that appeals against administrative decisions imposing a disciplinary penalty or another kind of administrative sanction should be subject to procedural rules that are separate from the paradigm of judicial review described above. On the contrary, the Court has not, even in the context of proceedings concerning administrative sanctions falling under the criminal limb, been inclined to abandon the approach whereby the necessary access to a court with "full" jurisdiction is sufficient, entailing judicial review but not necessarily a re-examination of the case, especially on the facts and the evidence relied on by the administrative authority.

19. Secondly, as regards the subject-matter of the decision appealed against, it can be noted that the Court, when assessing the sufficiency of judicial review, has taken into account to what extent it concerned a specialised issue requiring professional knowledge or experience and to what extent it involved the exercise of administrative discretion (see, for instance, *Fazia Ali*, cited above, § 84). The underlying consideration here is that where an administrative decision is based on the application of specialised expertise or the exercise of discretionary powers incumbent on the administration, the judicial review should not result in such characteristics of administrative decision-making being "overridden" by the courts. In the present context, similar considerations should be borne in mind. While it is true that the impugned disciplinary proceedings did not concern issues of a highly technical nature or otherwise requiring a particular kind of special expertise, the point to be taken into account in the present case relates to the special function and constitutional position of the CSM. The latter is the authority entrusted under the Portuguese Constitution (see paragraph 70 of the present judgment) with specific responsibility for the autonomous management of the judiciary, and in particular for disciplinary matters concerning judges, with the wider aim of guaranteeing the independence of the justice system. The Court should therefore recognise the particular importance of the CSM's responsibilities under the Constitution in a key area from the perspective of the rule of law and the separation of powers. As a body specifically mandated to interpret and apply the rules governing the disciplinary conduct of judges, the CSM has the task of ensuring the proper operation of the justice system. In this context, just as the courts exercising judicial review should not take over the functions of the administrative authority whose decisions they examine, the judicial review performed by the Supreme Court when it comes to disciplinary proceedings within the competence of the CSM should likewise

not result in the disciplinary function of the latter being taken over by the Supreme Court.

20. Finally, one further feature of judicial review also deserves to be mentioned, linked to the fact that such review is concerned with the verification of administrative decisions rather than the re-examination of the relevant issues with a view to enabling the court to adopt its own decision in place of the administrative decision. Given its function of verification rather than re-examination, a court of judicial review typically enjoys a degree of discretion as to the extent to which, in the light of the submissions made by the parties, it needs to order particular investigative steps to clarify whether the facts have been established in an adequate manner. Thus, the court is not required to order such steps simply because certain facts have been contested by a party on appeal. In its case-law under Article 6, the Court has held that the requirement of a fair trial does not – even in the context of criminal proceedings before a trial court – impose on the competent court an obligation to order an investigative measure merely because a party has requested it. Thus, it is for the court to consider and to decide whether it is necessary or advisable to accept evidence for examination (see *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07 and 2 others, § 95, 12 May 2016, with further references). The same approach must apply, *a fortiori*, in the context of judicial review proceedings, where the task of the competent court is not to re-examine and re-decide the subject-matter of the case but to perform judicial scrutiny as described above.

21. In our opinion, it is important to acknowledge and preserve the distinction between scrutiny or review and re-examination, as discussed above. It is a distinction that is well-established and anchored both in domestic and supranational systems of judicial appeals and judicial review, and one that should not be blurred or eroded. This, however, is precisely what the majority do in the present case. The consequences are highly problematic, given the wide range of situations where these matters arise in the domestic courts that exercise jurisdiction on appeals arising from administrative decisions, and in particular from those concerning the imposition of various administrative or disciplinary sanctions.

Application in the present case

22. As already mentioned at paragraph 17 above, on the basis of the decisions and case-law of the Judicial Division of the Supreme Court as cited in the present judgment, there is no doubt in our minds that the principles followed by that court in respect of the scope and method of the judicial review in the applicant's cases were in line with the Court's case-law as described above and thus satisfied the requirements of Article 6 § 1.

23. As regards the specific application of those principles it is important to observe at the outset that, as the Court has stated many times, it is not its function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention, and that issues such as the weight attached by the national courts to given items of evidence or to findings or assessments in issue before them for consideration are normally not for the Court to review. The Court should not act as a fourth instance and question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 90, ECHR 2016, and further references cited therein).

24. Furthermore, it must be noted that the present case before this Court comprises three separate complaints, based on three sets of disciplinary proceedings against the applicant at the domestic level, which were linked in the sense that they arose from a specific sequence of events. The first set of proceedings was based on the alleged use by the applicant of insulting language toward the judicial inspector in charge of her appraisal. The second set of proceedings came about as it transpired that the applicant had attempted to exonerate herself from the accusation in the first set of proceedings by inciting a colleague to give false testimony in her favour. The third set of proceedings in its turn arose from an alleged attempt by the applicant to persuade another judicial inspector to refrain from opening disciplinary proceedings against the person who had provided the false testimony in her favour in the first set of proceedings. It is also to be noted that the chronological order in which the disciplinary decisions were taken by the CSM was different from the above in that the second case, concerning the incitement to give false testimony, ended up being decided before the first case, which concerned insulting language.

25. In the first of the above-mentioned sets of proceedings, the question whether the applicant had uttered the word "liar" was a key issue of fact, involving the credibility of the persons involved in the conversation. In the third set of proceedings, the content of the applicant's utterances similarly presented itself as the key factual issue. In the second set of proceedings, concerning the incitement to give false testimony, the essential facts appear to have been beyond dispute.

26. As already stated, the Court's case-law under Article 6 § 1 does not require that applicants should have access to a court that will conduct a re-examination of the evidence and establish the facts for itself. We see no good reason why that position should be abandoned now. The applicant in the present case had the opportunity to argue before the Judicial Division of the Supreme Court that the facts had not been properly and reliably established at the level of the CSM. The fact that she was not successful in persuading the Judicial Division that this was the case is not in itself a basis

for finding a violation of Article 6 § 1. If it found otherwise the Court would be acting as a court of fourth instance.

27. Furthermore, we discern no grounds on which it could be concluded that the Judicial Division of the Supreme Court acted in an arbitrary or manifestly unreasonable manner in performing its review of the facts of the case. There has been no violation of Article 6 § 1 on that basis, either.

The lack of an oral hearing

28. In respect of the third set of proceedings, the applicant complained further about the lack of an oral hearing before the Judicial Division of the Supreme Court.

29. It should be pointed out that in the course of the proceedings against her, the applicant did have the opportunity to give oral evidence at the investigative stage of the proceedings before the CSM, as well as to make oral submissions. However, neither before the plenary of the CSM nor before the Judicial Division of the Supreme Court did she have any opportunity to argue her case orally.

30. In its case-law, the Court has emphasised the fundamental nature of the right to a public hearing, of which the right to an oral hearing is one aspect (see *Göç v. Turkey* [GC], no. 36590/97, § 46, ECHR 2002-V). Thus, the Court has considered that a complaint about the lack of a public hearing could not be absorbed by its findings in respect of another aspect of fairness such as the right to an adversarial procedure; instead, the right to a public hearing was an aspect of fairness in the proceedings that called for separate consideration as a self-standing right (ibid., § 46).

31. Furthermore, it is to be noted that the right to an oral hearing is not only linked to the question whether the proceedings involve the examination of witnesses who shall give their evidence orally. What is at issue as well is the opportunity for a party to state his or her case orally before the domestic courts (see *Göç*, cited above, § 48). Thus, the right to an oral hearing underpins the overall equality of arms between the parties to the proceedings.

32. Thus, for instance, in the case of *Grande Stevens and Others,* cited above, where the complaints concerned judicial review of the imposition of administrative financial sanctions (characterised as falling under the criminal limb of Article 6) by a specialised administrative body (CONSOB) before which the proceedings were conducted in writing, the Court considered that although those proceedings in themselves did not meet the requirements set out in Article 6, the applicants' case had subsequently been reviewed by an independent and impartial body with full jurisdiction, as required by the Court's case-law. However, that body had not held a public hearing, which amounted to a violation of Article 6 § 1 of the Convention (see *Grande Stevens and Others*, cited above, § 161).

33. Similarly, the applicant in the present case had no opportunity at either level of the proceedings against her to make oral representations before the bodies deciding her case, whether on the factual issues or the penalties or on the various legal issues she had raised. According to the Court's case-law, and in the absence of any exceptional circumstances that would justify a finding to the contrary, this deficiency in the proceedings is sufficient in itself to give rise to a breach of Article 6 § 1 of the Convention.

Critical observations on the approach taken by the majority

34. The Court has repeatedly stated that its judgments serve not only to decide the individual cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the States' observance of the engagements undertaken by them (see, for instance, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 89, ECHR 2012, with further references). The Court's Grand Chamber, in particular, should be committed to and capable of contributing to a sufficient degree of clarity and legal certainty in the case-law. If a departure from existing case-law is found necessary or desirable, it should be made clear what is being changed, why, and how.

35. In the present case the judgment adopted by the majority, regrettably, falls short of those expectations. What seems clear is that the majority are departing from the existing case-law, namely the principles of judicial review as outlined above and hitherto accepted by the Court. Where the majority is going instead is harder to tell.

36. The majority no longer appear to approve of the position whereby a court conducting judicial review verifies the factual basis of the administrative decision but is not required to re-examine the facts and the evidence on the basis of which the facts have been established. The majority note that the Judicial Division of the Supreme Court did not have the task of "gathering the evidence ... or establishing the key facts" and that owing to this limitation it was not "empowered to examine the decisive points in the proceedings, namely the content of the ... conversations" (see paragraph 204 of the judgment). The majority also note that "the assessment of the facts entailed examining issues going to the credibility of the applicant and the witnesses", whereas the Judicial Division did not have jurisdiction to "re-examine the facts and the evidence". The majority take the view that it was "necessary" in the present case for the court to "determine, for instance, whether the applicant had made certain remarks" (see paragraph 206 of the judgment). These statements suggest that the majority wish to set a new standard by requiring that the court must re-examine and re-establish the key facts, instead of verifying the factual basis of the administrative decision as described above (see paragraphs 10-11 and 13-14). At the same time, however, the majority continue to refer to the traditional concept of

"review" by stating that it must determine whether the "review of the lawfulness of the establishment of the facts" was sufficient for the purposes of Article 6 § 1 (see paragraph 205 of the judgment). Later on, the majority state that the court had a duty to "ascertain whether the factual basis for the decisions taken by the CSM was sufficient to support the latter's conclusions" (see paragraph 211 of the judgment) which also implies an approach typical of judicial review, as opposed to a re-examination of the facts and evidence and they conclude that a hearing would have enabled a more thorough "review" of the disputed facts. In the conclusion, reference is made to "the need to assess factual evidence going to the applicant's credibility", which, by contrast, again implies a re-examination of the relevant evidence by the court on appeal. The latter approach appears also to be reflected in the reference to the "lack of a hearing in respect of the decisive factual evidence" (see paragraph 213 of the judgment).

37. With respect, all this strikes us as incoherent, obscure and confusing. It will be difficult for domestic courts to understand, and to follow, such reasoning, which will give rise to major legal uncertainty. Issues of disputed facts arise all the time before domestic courts dealing with appeals from administrative decisions imposing sanctions of various kinds, under both the civil and the criminal limb of Article 6 § 1. How will the domestic courts be able to figure out which procedural standards they are required to satisfy when addressing such issues? It is highly problematic and regrettable that the Court, especially at the level of the Grand Chamber, does not provide reasonable clarity in the standard it aims to develop.

38. The majority endeavour to both justify and limit the approach taken, by reference to the procedural protection of judges (see paragraphs 203 and 214). While safeguarding the independence of judges is clearly of paramount importance in order to preserve the rule of law, the argument seems odd in the present context, where we are dealing with judicial review of the decisions of a judicial council, in this case a special constitutional body set up precisely for the purpose of ensuring judicial independence. There is no complaint, submission or evidence on the basis of which the Court would have cause to call into question, as a matter of principle, the role of the Portuguese High Council of the Judiciary as the body in charge of disciplinary proceedings against judges, and to conclude that the established principles of the Court's case-law are no longer adequate as a standard for the judicial review of disciplinary decisions taken by that body.

39. From a more general point of view, the case for creating, under Article 6 § 1, a *lex specialis* for disciplinary proceedings against judges does not appear convincing. In particular, we find the present case an ill-chosen occasion for such a step. Taking into account the circumstances that gave rise to the impugned disciplinary proceedings, especially the second and third sets of proceedings (see paragraph 24 above), the present case is about

upholding judicial ethics – which is also a matter of high importance – and not about upholding judicial independence.

Concluding summary

40. Through its case-law, the Court has developed the standards of judicial review required under Article 6 § 1. We see no compelling reason to abandon those standards now. Furthermore, any further development of the case-law should be introduced in a conceptually clear and comprehensible manner. The domestic authorities can hardly be expected to take guidance from something that fails to provide guidance.

41. In the specific context of the present case, given the constitutionally enshrined function of the CSM, the purpose of which is to safeguard judicial independence, it would seem essential, in the context of disciplinary proceedings, to ensure appropriate procedural safeguards at the level of that body, rather than transforming the subsequent judicial review into a "re-run" of the examinations of the case on appeal.

42. As explained in the beginning, this separate opinion is, technically, a concurring one. The underlying difference of opinion and approach, however, is of a kind that will require further clarification in the future. It is to be hoped that the legal uncertainty will not have to persist for too long.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. In view of the importance of the constitutional and legal issues at stake in the present case, I would like to elaborate further on the shortcomings identified by the Grand Chamber, in order to clarify that they necessitate a reform and modernisation of the applicable legal framework and practice in Portugal, but not of the relevant constitutional framework.

The history of judicial governance in Portugal

2. The first Republic (1910-1926) set up a governing body of the judiciary[1]. After the declaration of the Republic (5 October 1910), the Law of 12 July 1912 created a High Council for Judges (*Conselho Superior da Magistratura Judicial* – CSMJ), composed of three judges appointed by the Government. A Regulation of 29 October 1912 laid down the procedure to be applied by the new CSMJ. The most serious disciplinary sanctions were imposed by the Government, on a proposal from the CSMJ, and the less serious by the CSMJ itself. The disciplinary procedure was adversarial, but lacked any public hearing. There was no judicial oversight of the disciplinary decisions.

3. Decree no. 4172 of 30 April 1918 stipulated that the composition of the CSMJ was to be exclusively judicial, with three full and three substitute members, elected from among the judges of the Supreme Court for a three-year term by all judges. If the President of the Supreme Court was elected, he or she also became the President of the CSMJ. The CSMJ had exclusive competence to apply the most severe disciplinary sanctions, with an appeal to the plenary of the Supreme Court (Article 13). Decree no. 4691 of 23 July 1918 provided that the CSMJ was to be composed of five full members and three substitutes, but the method of election remained the same. The President of the Supreme Court was chosen by the Government from among the judges of the Supreme Court (Article 5). Decree no. 5499 of 5 May 1919 accorded the Government the power to appoint all members of the CSMJ (two full members and two substitutes, plus the President) from among the judges of the Supreme Court; the President of the Supreme Court was also the President of the CSMJ.

4. Decree no. 7725 of 6 October 1921 merged the CSMJ with the public prosecutors' and judicial clerks' own governing councils, the single unified council being known as the High Judicial Council (*Conselho Superior Judiciario* – CSJ). The Prosecutor General and the prosecutor of the Lisbon second-instance court, as well as two judicial clerks chosen by the Government, joined the composition of the CSJ. From that point on, the

1. For reasons of economy I will limit the scope of the opinion to the Republican regime.

Supreme Court judges who were full members had to perform their functions on a full-time basis. According to Decree no. 10310 of 19 November 1924, which consolidated the rules governing disciplinary proceedings against judges, less severe sanctions were applied by the CSJ without the possibility of appeal, while the more severe ones were open to appeal before the plenary of the Supreme Court, which had full jurisdiction (Article 113). Decree no. 10734 of 2 May 1925 created a special summary procedure for political disciplinary offences, which were dealt with by the Minister of Justice, with an appeal to the Council of Ministers.

5. The dictatorship (1926-1974) changed the system radically. Under Decree no. 11751 of 23 June 1926, the CSJ had a mixed composition: three judicial members appointed by the Government, including the President of the CSJ and of the Supreme Court, and two judicial members elected by the judges. The most severe disciplinary penalties were open to appeal before the plenary of the Supreme Court, which had full jurisdiction. The Status of Judges Acts 1927 (Decree no. 13809 of 22 June 1927) and 1928 (Decree no. 15344 of 12 April 1928) did not change the composition of the CSJ, but both limited drastically the possibility of lodging an appeal against disciplinary decisions. The most severe penalties applied by the CSJ were open to appeal before an enlarged *ad hoc* formation of the same CSJ, including both its full and substitute members.

6. In 1929, Decree no. 16563 of 5 March 1929 again radically changed the CSJ's composition, since new members could now be appointed by the Government following a reform of the retirement age. Under Decree no. 17955 of 12 February 1930, judges once again prevailed in the composition of the CSJ; with the exception of the President of the CSJ and of the Supreme Court, who was appointed by the Government, all the other four members were judges elected by three different electoral colleges (with the judges of the first-instance courts electing two representatives, the judges of the second-instance courts electing one, and the judges of the Supreme Court electing a further one). However, the CSJ's powers became merely consultative and the decision-making power lay with the Government. Finally, under Decree no. 21485 of 20 July 1932, the CSJ's composition was again amended, with the members being appointed entirely by the Government.

7. According to the Status of Judges Act 1944 (Decree no. 33547 of 23 February 1944), the CSJ was presided over by the President of the Supreme Court and composed of three judges of that same court and, with no voting right, two other judges of the first-instance or second-instance courts. All members were chosen by the Government. More importantly, appeals against the most severe disciplinary penalties were treated as applications to review lawfulness, made to the *ad hoc* formation of the CSJ, like any another appeal lodged against governmental acts (section 445[2]).

According to the preamble to the Act, the Government made a deliberate political choice to deny judges the benefit of full jurisdiction in their appeals against the most severe disciplinary penalties, on the grounds that they should not be treated better than any other civil servants coming within the jurisdiction of the administrative authorities.

8. The Status of Judges Act 1962 again reviewed the composition of the CSJ, which now included the President and the Vice-President of the Supreme Court, the three presidents of the courts of appeal and one first-instance judge, all appointed by the Government. The most severe disciplinary penalties were open to appeal before a new *ad hoc* formation of the CSJ known as the Supreme Disciplinary Council (*Supremo Conselho Disciplinar*), which was composed of all the members of the CSJ and the four most senior judges of the Supreme Court. This legal framework remained in force until the fall of the dictatorship.

9. The democratic Constitution of 1976 provided that the composition of the High Council of the Judiciary (*Conselho Superior da Magistratura* – CSM) was to be established by law and was to include judges elected by their peers. The first legislative instrument to regulate the CSM's composition was Decree no. 926/76 of 31 December 1976, which included only judges and judicial clerks (13 judges and 4 judicial clerks, the latter intervening only on issues related to clerks). Law no. 85/77 of 13 December 1977 (the first Status of Judges Act of the democratic regime) returned to a mixed composition, with judges outnumbering non-judicial members (13 judges and 10 non-judicial members). The constitutional reform of 1982 enshrined the CSM's composition in the Constitution with a minimum majority of judges (9 judges and 8 non-judicial members). Finally, the constitutional reform of 1997 reversed the judicial majority in the CSM (8 judges and 9 non-judicial members).

10. Article 13 of Decree no. 926/76 of 31 December 1976 as well as section 175 of the Status of Judges Act 1977 provided that the CSM's disciplinary decisions were open to appeal before the plenary of the Supreme Court. However, section 168 of Law no. 21/85 of 30 July 1985 (Status of Judges Act 1985) reintroduced the possibility of appeal before an *ad hoc* formation of the Judicial Division of the Supreme Court, presided over by the President of the CSM and of the Supreme Court. The same person combined these three functions: President of the Judicial Division of the Supreme Court, President of the CSM and President of the Supreme Court. In order to ensure that the President of the body whose decision was under appeal (the CSM) and the appellate body (the Judicial Division) were not one and the same person, Law no. 10/94 of 5 May 1994 conferred the

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2. The Portuguese word *artigo* is translated in accordance with the Court's consistent practice, which is to use "section" for Acts and "Article" for Codes.

presidency of the Judicial Division on the Vice-President of the Supreme Court.

11. It is clear from this historical overview that the fact that the disciplinary procedure before the CSM is not public, the *ad hoc* formation for hearing appeals lodged against the most severe disciplinary penalties and the limited powers of review of this formation are relics of the past, introduced in 1911, 1928 and 1944 respectively and which the new democratic regime should have sought to abolish. It is against this historical background that the Judicial Division's powers of review over the CSM's decisions must be assessed[3]. Both the law in books[4] and the law in action[5] show that the body empowered to review decisions of the CSM has traditionally had very limited powers when it comes to reviewing and establishing the "key facts" and collecting and reassessing the evidence. In paragraphs 203 and 214 of the judgment, the Grand Chamber specifically upheld the Chamber judgment with regard to the "decisive" nature of the facts disputed by the applicant and the lack of proper judicial review of the CSM's decision on these facts. This serious shortcoming is aggravated by the lack of a public and oral hearing of the evidence or of the indicted judge.

With the present findings, the Grand Chamber seeks to convey the same message as the Chamber judgment: that it is high time to reform the applicable legal framework and practice in Portugal. It is laudable that the Government heeded the call of the Chamber and, even before the Grand Chamber ruling, presented a proposal to reform the Status of Judges Act[6]. I would like to emphasise that this reform does not, however, mean that the constitutional framework has to be changed. I will elaborate further on this issue below.

The international standards on judicial governance

12. The Council of Europe and, in particular, the European Commission for Democracy through Law (the Venice Commission) and the Group of

3. On this issue, see the critical Portuguese literature: J. Miranda, Annotation to Article 217, in Miranda/Medeiros, *Constituiçao Portuguesa Anotada*, vol. III, 2007, p. 192; "Os parametros constitucionais da reforma do contencioso administrativo", in *Reforma do contencioso administrativo*, vol. 1, 2007, p. 374; S. Correia, *Contencioso Administrativo*, 1990, p. 125; R. Alves, "A apreciaçao jurisdicional das deliberaçoes do CSM pelo STJ", in *Julgar*, no. 21, p. 248; C. Fraga, *Sobre a independencia dos juizes*, 2003, p. 189; P. Rangel, *Repensar o poder judicial*, 2001, p. 227; A. Pereira, "O poder politico perante a magistratura", ASJP (ed.), in *Poder Judicial na viragem do seculo*, vol. II, 1997, p. 89; and A. Santos Silva, "A Constituiçao e a independencia do poder judicial", in *Scientia Juridica*, 1975, XXII, p. 35.

4. See section 168(5) of the Status of Judges Act. As demonstrated above, this provision dates back to the Status of Judges Act 1944 (section 445), with the very same wording.

5. See paragraphs 79 to 81 of the judgment.

6. The reform procedure was started by Government Bill no. 122/XIII.

States against Corruption (GRECO) have assessed the compatibility of judicial councils with the European standards of judicial independence. Two main issues were discussed in the case at hand[7]. First, the majority of the members of the CSM are not judges elected by their fellow judges. For example, out of the fifteen members who ruled in the applicant's case on 10 January 2012, only six were judges (see paragraph 26 of the judgment). In the other two sets of proceedings, a slight majority of the CSM's members were judges, because some of the non-judicial members happened to be absent. Indeed, there is no guarantee that a majority of the CSM's members will even have legal training, since there is no legal requirement in this regard for the non-judicial members of the CSM[8]. Prior to the CSM's deliberations there is no way of knowing who is going to participate in those deliberations. The indicted judge cannot find out who is going to be a member of the formation voting on his or her case. To aggravate things, it is not ruled out that a non-judicial member of the CSM may be the rapporteur in a disciplinary case[9], which raises the possibility of a person without any legal background performing that function.

13. Second, the members of the CSM can choose to work part-time[10], a decision that may *de facto* expose them to whatever hierarchical or professional ties they may have outside this function, whether in the private or the public sector. This was already noted as a problem by the Court in *Oleksandr Volkov v. Ukraine* (no. 21722/11, ECHR 2013), when the Court noted that all but four members of the Ukrainian High Council of Justice (HCJ) "continue to work and receive a salary outside the HCJ, which inevitably involves their material, hierarchical and administrative dependence on their primary employers"[11]. Both features (the lack of a judicial majority and the part-time nature of the function) have been identified as potential threats to judicial independence by a number of international and European bodies. The relevant materials were highlighted by the Chamber judgment[12], and here I reproduce only the ones that are germane to this point. The emphases are my own.

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7. Although I agree with the Court that the applicant's claim regarding the composition of the CSM as such was first made after the six-month period had expired, nothing prevented the Court from analysing the legal arguments presented as a part of the historical and constitutional context in which the CSM's decisions were taken. In fact, the Government themselves invoked the argument of the composition of the CSM (Government's observations, §§ 97-108). The Grand Chamber recognises this too. In declaring the claim concerning the CSM to be inadmissible, the majority announce that "when examining the remaining complaints [the Court] will take into consideration, as appropriate, any relevant factors concerning the CSM" (see paragraph 107 of the judgment), which the majority ultimately refrain from doing (see paragraph 160).
8. Section 137 of the Status of Judges Act.
9. Section 159 of the Status of Judges Act.
10. Section 148(2) of the Status of Judges Act.
11. *Oleksandr Volkov v. Ukraine*, no. 21722/11, §113, ECHR 2013.
12. See paragraphs 41-50 of the Chamber judgment.

14. The report on judicial appointments (CDL-AD(2007)028), adopted by the Venice Commission at its 70th plenary session on 16 and 17 March 2007, reads as follows:

> "29. ... Thus, a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest ..."

15. In the conclusions to its report on the Independence of the Judicial System Part I: The Independence of Judges, adopted at its 82nd plenary session on 12 and 13 March 2010 (CDL-AD (2010) 004), the Venice Commission found as follows:

> "32. To sum up, it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with *a substantial part, if not the majority, of members being judges*. With the exception of ex-officio members these judges should be elected or appointed by their peers ..."

16. The relevant extracts from the Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia" (CDL-AD(2015(042)), adopted by the Venice Commission at its 105th plenary session (18-19 December 2015), read as follows:

> "77. The Venice Commission recalls its position in the Opinion on the draft law on the High Judicial and Prosecutorial Council (HJPC) of Bosnia and Herzegovina, where the Commission stressed that it is important to have 'a balance between the need to protect the independence of the HJPC and the interest in ensuring its public control and in preventing corporatist management'. While in that opinion it was recommended that *a majority of the HJPC members should be elected by the judiciary*, the Venice Commission has never been in favor of systems where all members of the body were elected by the judges. Given that now the CDF [Council for Determination of Facts] has obtained very important powers in the sphere of the judges' discipline, it is recommended that a significant proportion of its members are appointed by democratically elected bodies, most preferably by the Parliament with a qualified majority of votes. The latter solution would increase democratic accountability of the judiciary while providing sufficient protection against domination of this body by political appointees."

17. The relevant parts of Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities (adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) read as follows:

"Chapter IV – Councils for the judiciary

26. Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.

27. *Not less than half the members of such councils should be judges chosen by their peers* from all levels of the judiciary and with respect for pluralism inside the judiciary.

28. Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions

...

Chapter VI – Status of the judge

Selection and career

46. The authority taking decisions on the selection and career of judges should 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*."

18. The Consultative Council of European Judges, at its 11th plenary meeting (17-19 November 2010), adopted a Magna Carta of Judges (Fundamental Principles) summarising and codifying the main conclusions of the Opinions it had already adopted. This document reads, *inter alia*, as follows:

"13. To ensure independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status as well as the organisation, the functioning and the image of judicial institutions. The Council shall be composed *either of judges exclusively or of a substantial majority of judges elected by their peers*. The Council for the Judiciary shall be accountable for its activities and decisions."

19. GRECO's Fourth evaluation round report on Portugal, adopted on 4 December 2015, made the following assessment with regard to the CSM and its counterpart in the administrative and tax jurisdiction, the Supreme Council of Administrative and Tax Courts:

"Given the extensive powers of these two councils, notably with respect to appointment, promotion, evaluation and disciplinary procedures, their composition attracted criticism on site and their independence and freedom from political bias was questioned. In this respect, the [GRECO evaluation team] wishes to recall Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, which stipulates that judges elected by their peers should make up not less than half the members of councils for the judiciary. In Portugal, *the legal framework falls short of meeting this important requirement*."

GRECO also noted as follows:

> "... in practice some of the HCJ members appointed by the President of the Republic happen to be former judges. The [GRECO evaluation team] was told that the two members appointed by the President to the HJC are not career judges, although currently one of them is an ex-judge of the Constitutional Court."

On this basis, GRECO made the following recommendation:

> "vi. 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*; ..."[13]

20. On 6 March 2018 GRECO called on Portugal to step up its efforts to improve its legal framework in order to prevent corruption in respect of MPs, judges and prosecutors. This follow-up report[14], which assessed Portugal's compliance with the recommendations issued by GRECO in the 2015 evaluation report, concluded that Portugal had only implemented satisfactorily one of fifteen recommendations. Three had been partly implemented and eleven had not yet been implemented. The situation was described by GRECO as "globally unsatisfactory"[15].

21. At this juncture it is important to note that the Committee of Ministers of the Council of Europe and GRECO, while recommending that not less than half of the judicial council's members should be judges elected by their peers, do not require a majority of judges elected by their peers where the judicial council has an uneven number of members, which is the case of the CSM. It is my firm belief that the CSM's composition, according to the constitutional framework from 1982 to 1997 and the subsequent presidential practice of appointing one judge, is in line with the role of judicial councils as guarantors of judicial independence. The moral authority and political representativeness of the President of the Republic are in and of themselves a solid guarantee of a fair balance between the democratic and judicial components in the Portuguese judicial governance body. The generally recognised high professional calibre and social standing of the members hitherto chosen by the successive Presidents of the Republic attest to this conclusion.

Reinforcement of the guarantees in judicial governance

22. The reform of the legal framework should take into account the nature of the subject-matter of these proceedings[16]. I note that the three

13. Greco Eval IV Rep (2015) 5E.
14. Greco RC4(2017)23.
15. Ibid., paragraph 72.
16. The operative part of the judgment does not refer explicitly to the applicant's claim that the case should have been considered under the criminal limb of Article 6 and not only under its civil head. In this regard, the Grand Chamber omits to consider important features of the "punitive" nature of the sanctions applied to the applicant, to which the subsequent considerations will be dedicated.

Engel criteria[17] are not cumulative but alternative. The Grand Chamber makes this explicit in paragraph 122 of the judgment regarding the second and third criteria, but it is obviously also true for the first one: any other reading would imply that a sanction needs to be criminal under domestic law in order to be criminal under the Convention. As the Court put it in *Engel*:

> "If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 ... would be subordinated to their sovereign will[18]."

23. I would reiterate that the present case relates to disciplinary proceedings concerning insulting remarks about judicial inspector H.G. (application no. 57728/13), disciplinary proceedings concerning the use of false testimony (application no. 55391/13) and disciplinary proceedings concerning an attempt to prevent the opening of disciplinary proceedings against a witness (application no. 74041/13), and that the subject-matter of these proceedings was intrinsically criminal in nature (defamation, use of false testimony and obstruction of justice). Although no criminal prosecution was brought against the applicant on the basis of the facts investigated in the three sets of disciplinary proceedings, these facts were typical of the "mixed"[19] offences to which the *Engel* judgment referred. These were offences with a high degree of social offensiveness and stigma. The downgrading of these offences by the Grand Chamber, in paragraph 125 of the judgment, as "purely disciplinary" deprives the defendant judge of basic procedural guarantees. This is precisely what the Convention is meant to prevent, especially in the case of the "mixed" offences to which the *Engel* judgment made reference.

24. Therefore, even if the sanction is not labelled as criminal under domestic law and the underlying offence is not considered as "criminal", a reasonable reading of the Convention still demands that a sanction, if sufficiently severe, should attract the guarantees of the criminal limb of Article 6, absent a good reason to the contrary. As the Court puts it:

> "... notwithstanding the non-criminal character of the proscribed misconduct, the nature and degree of severity of the penalty that the person concerned risked incurring – the third criterion – may bring the matter into the 'criminal' sphere" [20].

25. Moreover, in its case-law concerning disciplinary proceedings against the members of a certain profession, the Court has paid attention to

17. *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.
18. Ibid., § 81.
19. Ibid., § 81.
20. *Brown v. the United Kingdom* (dec.), no. 38644/97, 24 November 1998. In this case, the Court declared the complaint inadmissible precisely because "the severity of the penalty was not, of itself, such as to render the charges 'criminal' in nature".

whether the sanction relates to the person's profession or not. Sanctions such as a suspension or dismissal from the exercise of a profession or a public duty have been found to be purely disciplinary in nature[21], while fines, if they are severe enough, are found to be deterrent and punitive in nature[22].

26. In fact, the applicant faced a possible punishment of up to 90 day-fines and suspension from duty of up to 240 days. She was actually fined (see paragraph 25 of the judgment) and punished by a penalty of 100 days' suspension from duty (see paragraph 41 of the judgment), a penalty of 180 days' suspension from duty (see paragraph 58) and an aggregate penalty of 240 days' suspension from duty (see paragraph 67).

27. Furthermore, according to domestic law, fines are applied by deducting from the judge's salary the amount corresponding to the number of day-fines imposed[23]; the suspension from duty results in the period corresponding to the penalty being deducted from the period taken into account for the purposes of remuneration[24]. In practice, this means that in the case of both fines and suspension from duty, the financial loss is automatically imposed in the form of deduction from the judge's salary. As is plain to see, the financial loss resulting from 240 days' suspension from duty may be much more severe than that resulting from the highest possible fine applicable, namely 90 day-fines.

28. This line of reasoning is reinforced by another important feature of domestic law that emerges from the comparison between the disciplinary penalty of suspension from duty[25] and the criminal penalty of prohibition on holding office and suspension from office[26]. This comparative exercise would have clearly revealed a telling similarity in terms of punitive features and consequently an overlap of these punitive instruments, which may target the very same professional category.

29. Bearing this in mind, and also the fact that the applicable subsidiary law is the Criminal Code and the Code of Criminal Procedure[27], it seems to me that the sanctions that are applicable and were applied are, in theory and in practice, deterrent and punitive and should attract the guarantees of the criminal limb of Article 6.

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21. For example, regarding lawyers, see *Müller-Hartburg v. Austria*, no. 47195/06, § 48, 19 February 2013, and *Biagioli v. San Marino* (dec.), no. 64735/14, § 56, 13 September 2016; regarding judges, see *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 93, ECHR 2013; and regarding other public officials, see *Moullet v. France* (dec.), no. 27521/04, 13 September 2007.

22. "A fine which is punitive and deterrent rather than compensatory, may suggest that the matter is 'criminal' in nature if the penalty is sufficiently substantial" (*Brown*, cited above).

23. Section 102 of the Status of Judges Act, cited in paragraph 71.

24. Section 104 of the Status of Judges Act, cited in the same paragraph 71.

25. Section 102 of the Status of Judges Act.

26. Articles 66 and 67 of the Criminal Code.

27. Section 131 of the Status of Judges Act.

30. I would further argue, on a more general note, that there is nothing in the "nature" of disciplinary offences that justifies different treatment compared with criminal offences as regards respect for fundamental procedural guarantees. The classification of some offences as "disciplinary" rather than "criminal" for the purposes of Article 6 of the Convention, despite the high degree of social offensiveness they represent, the considerable stigma they attract and the severity of the resulting punishment, is only possible if one applies a nominalist distinction which has no basis in European case-law. This nominalist interpretation of the Convention is even less convincing when it accepts that the criminal limb of Article 6 is applicable in certain cases involving heavy financial penalties for disciplinary offences[28]. Such an unprincipled approach not only ignores the impact of serious non-financial penalties, like suspension or dismissal from a profession, but leaves the impression of an uncertain and unclear jurisprudence which gives no proper guidance to the respondent States.

31. Hence, the argument, in paragraph 125 of the judgment, that the sanctions faced by the applicant were "not aimed at the public in general but at a specific category, namely judges" and that this circumstance should be determinative of the classification of the offence as non-criminal, is wrong. It does not stand any criminal-law test. It ignores a long-standing tradition of criminal offences with a limited personal scope, applicable only to people distinguished by certain personal or professional features[29]. For example, innumerable criminal-law provisions in all countries punish bribe-taking committed specifically by public officials. These criminal-law provisions are designed to protect the profession's honour, reputation and integrity and to maintain public trust in public officials, and no one would dare to argue that they are not criminal in nature for the purposes of Article 6 of the Convention. In other words, the mere fact that an offence is applicable to a specific professional category is not decisive as to its nature.

32. For unknown reasons, the Grand Chamber concluded that "in the present case, the severity of the sanction in itself does not bring the offence into the criminal sphere" (see paragraph 126 of the judgment). Nevertheless, it also acknowledged that, in general, "disciplinary penalties may nevertheless entail serious consequences for the lives and careers of judges" and that, in the case at hand, "[t]he accusations against the applicant were liable to result in her removal from office or suspension from duty, that is to say, in very serious penalties which carried a significant degree of stigma" (see paragraph 196 of the judgment)[30].

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28. *Brown,* cited above.

29. *Delicta propria*, or *Sonderdelikte*. See my separate opinion in *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, § 19, ECHR 2016.

30. The very serious nature of the penalties was emphasised in paragraphs 198 and 203 and in the concluding remarks of paragraph 214 of the judgment.

33. Accordingly, it is submitted that the current reform of the legislative framework[31] should reinforce the procedural safeguards in disciplinary proceedings against judges in the light of the guarantees of Article 6 of the Convention, and in particular should strengthen the adversarial, oral and public nature of these proceedings, as follows:

(1) the defendant judge should have the right "to be heard in public before the CSM sitting in plenary"[32];

(2) the defendant judge should have the right "to make oral representations" on both "the factual issues and the penalties" and on "the various legal issues" before the CSM sitting in plenary[33];

(3) the defendant judge should have the right to have witnesses heard before the CSM sitting in plenary[34];

(4) the defendant judge should have the right to have "an adversarial hearing before the body performing the judicial review"[35];

(5) the defendant judge should have the right to obtain "a public hearing before a body with full jurisdiction" and such a hearing should allow "for an oral confrontation between the parties", namely the CSM and the defendant judge[36];

(6) the defendant judge should have the right to be heard "orally" by the body performing the judicial review, in order "to explain (his or) her version of the situation" and allow the appellate judges "to form (their) own impression of the applicant"[37];

(7) the body performing the judicial review should observe that "in the context of disciplinary proceedings, dispensing with an oral hearing should be an exceptional measure and should be duly justified in the light of the Convention institutions' case-law"[38];

(8) "in respect of the decisive factual evidence", the body performing the judicial review should include "in its reasoning considerations relating to the assessment of those issues"[39];

(9) the body performing the judicial review should "assess factual evidence going to the applicant's credibility and that of the witnesses and constituting a decisive aspect of the case"[40];

(10) the body performing the judicial review should have the power "to assess whether the penalty was proportionate to the misconduct"[41];

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31. Government Bill no.122/XIII.
32. Paragraph 198 of the judgment.
33. Ibid.
34. Ibid.
35. Paragraph 211 of the judgment.
36. Paragraph 208 of the judgment.
37. Paragraph 206 of the judgment.
38. Paragraph 210 of the judgment.
39. Paragraph 213 of the judgment.
40. Paragraph 214 of the judgment.
41. Paragraph 201 of the judgment.

(11) in order to put an end to the violation or violations found by the Court and to redress as far as possible the effects there should be, at least, a "reopening [of the] proceedings at domestic level where the Court has found a violation of an applicant's fundamental rights and freedoms"[42].

These are the minimum procedural guarantees in disciplinary proceedings against judges, laid down by the Grand Chamber of the Court.

Conclusion

34. In the light of the above considerations, I could not but conclude that the fact that disciplinary proceedings before both the CSM and the Supreme Court are not public, the *ad hoc* formation of the Judicial Division of the Supreme Court in disciplinary cases and the limited powers of review of that Judicial Division are relics of the past which are out of step with the contemporary international standard of judicial independence. The reform and modernisation of the legal framework and practice as regards judicial governance in Portugal is now under way, and the fact that the Government have presented draft legislation in Parliament to that end is to be welcomed. I am sure that Parliament will listen attentively to the message sent by this Court and will deliver a fully-developed response to it.

42. Paragraph 222 of the judgment.

JOINT PARTLY DISSENTING OPINION OF JUDGES YUDKIVSKA, VUČINIĆ, PINTO DE ALBUQUERQUE, TURKOVIĆ, DEDOV AND HÜSEYNOV

1. We do not agree with the majority in so far as they do not find a violation of Article 6 § 1 of the European Convention on Human Rights ("the Convention") regarding the independence and impartiality of the Judicial Division of the Supreme Court ("the Judicial Division").

2. The majority conclude that they see "no evidence of a lack of independence and impartiality on the part of the Judicial Division of the Supreme Court" (see paragraph 165 of the judgment). In order to reach this conclusion, they dismiss the two claims brought by the applicant concerning the independence and objective impartiality of the Supreme Court, namely that the President of the CSM, since he or she is also the President of the Supreme Court, can exert undue influence over the appeal proceedings, and that the CSM's disciplinary power over the members of the Supreme Court jeopardises their independence. In our view, these two arguments by the applicant were not duly assessed.

The dual role of the President of the Supreme Court

3. As to the first claim, the majority conclude that "the dual role of the President of the Supreme Court is not such as to cast doubt on the independence and impartiality of that court in ruling on the applicant's appeals against the CSM's decisions" (see paragraph 156). The majority put forward two sets of arguments in support of this conclusion.

4. First, they observe that, according to the Status of Judges Act, "[t]he composition of the Judicial Division of the Supreme Court ... is determined on the basis of objective criteria such as judges' seniority and their membership of a particular division, and the President of the Supreme Court does not sit in this *ad hoc* division" (see paragraph 154). The majority also take into account the fact that these judges are "formally appointed" by the most senior Vice-President of the Supreme Court (ibid.). However, none of these arguments is convincing on closer examination.

5. It is true that the President cannot select the members of the Judicial Division for a particular case as such, and it is true that the composition of the Judicial Division is determined by seniority and division membership. More precisely: the Judicial Division is composed of the most senior Vice-President of the Court, as well as of the most senior judge of each of the Supreme Court's three divisions (Civil, Criminal and Social Affairs)[43]. But the majority omit a crucial aspect of the organisation of the Supreme Court, namely that it is the President of the Supreme Court who selects the

43. Section 168 of the Status of Judges Act.

members of each of the divisions, at his or her discretion, on the basis, among other criteria, of the "needs of the service" (*conveniência para o serviço*). Therefore, the President could to a certain extent determine who is the most senior judge in each division[44].

6. The quintessential characteristic of any judicial body is that appearances matter as much as facts. Justice must not only be done properly, but must be seen and perceived to be done properly. To us, there is no doubt that the appearance of impartiality of the appellate body is irreversibly tainted when the president of the body whose decision is under appeal (in this instance, the CSM) is, even if only indirectly, in a position to determine the composition of the appellate body (the Judicial Division). This shortcoming is compounded by the fact that the Judicial Division is called upon to assess a decision in which the President of the Supreme Court took part in his or her capacity as President of the CSM.

7. The second argument of the majority is that the applicant did not "claim that the President of the Supreme Court could have influenced the judges of the Judicial Division" and that "it is not established that those judges were specially appointed with a view to adjudicating her case" (see paragraph 155). In view of the above, this argument is not convincing, because, as the majority themselves announce from the outset, the applicant's complaint is to be examined "from the standpoint of independence and objective impartiality" (see paragraph 152). This "objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings" (see paragraph 148). This is not about whether in this particular case the judges of the Judicial Division harboured any particular animosity towards the applicant, but about whether the institutional setting in which the applicant had her case heard afforded the appropriate guarantees to secure the appearance of impartiality.

The fact that the Supreme Court is subject to the CSM's disciplinary power

8. The other claim raised by the applicant is that the CSM is in charge of the "appraisal, appointment and promotion" of Supreme Court judges, including those in the Judicial Division, and of disciplinary proceedings concerning them (see paragraph 137). Therefore, the body whose decisions were being reviewed had various forms of power over the body that was reviewing them. The majority also reject this argument (see paragraphs 157-64).

9. From the outset, the majority seek to distinguish this case from *Oleksandr Volkov*[45] (see paragraphs 157-60 of the judgment). In that case,

44. Section 29(2) of the Organisation of the Courts Act, cited in paragraph 74 of the judgment.

the Court observed that the judicial review of disciplinary sanctions "was performed by judges ... who were also under the disciplinary jurisdiction" of the body whose decisions were being reviewed, and that this fact jeopardised the "independence and impartiality" of the reviewing court[46]. According to the majority, that case can be distinguished from the present one because, in *Oleksandr Volkov*, "these findings should be regarded as a criticism based on the circumstances of the case and applicable in a system with serious structural deficiencies or an appearance of bias within the disciplinary body for the judiciary ... rather than as a general conclusion" (see paragraph 158 of the judgment). By contrast, the majority assert that "in the present case, no such serious issues have been established in terms of structural deficiencies or an appearance of bias within the Portuguese CSM" (see paragraph 160). In fact, the Grand Chamber considered itself prevented from reviewing any such possible deficiencies owing to the application of the six-month rule (see paragraph 107). We note that the majority thus do not rubber-stamp in general terms the structure and functioning of the CSM, but leave the door open to future complaints regarding possible "structural deficiencies" of that body.

10. We believe that the principle set out in § 130 of *Oleksandr Volkov* is fully applicable to the present case. Just as in the Ukrainian case, the Supreme Court's judicial review of disciplinary sanctions was performed by judges who were also under the disciplinary jurisdiction of the CSM. In this regard we accept the national judge's analysis, in his separate opinion, concerning the constitutional and legal framework in which the CSM's decisions were taken.

11. The majority choose to respond to this argument in two ways. First, they consider it "normal" that judges assess cases knowing that "at some point in their careers [they may themselves be] in a similar position to one of the parties" (see paragraph 163). More specifically, the majority describe the "theoretical risk" of the situation as consisting in "the fact that judges hearing cases are themselves still subject to a set of disciplinary rules" (ibid.).

12. This reconstruction by the majority misses the point. The problem is not that the Judicial Division judges are assessing a factual situation that they may face in the future, as if they were adjudicating a breach of contract knowing that they might breach a contract in the future, or a robbery case knowing they may be robbed in the future, and so on. The problem is about the institutional framework itself. The Judicial Division adjudicates cases knowing that the persons whose decisions they are asked to review can exert disciplinary power over them.

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45. *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013.
46. *Oleksandr Volkov*, cited above, § 130.

13. The second line of argument of the majority dismisses the risk of disciplinary proceedings being brought against the judges of the Judicial Division as "theoretical" (see paragraph 163). The majority go on to note that there are no "pending disciplinary proceedings" against the judges who reviewed the applicant's case (see paragraph 163). But again, the majority themselves recognise that the issue at stake here is "objective" impartiality, meaning that the existence of disciplinary proceedings against the Supreme Court judges acting in the present case is not decisive. All we need to know is whether there is a realistic possibility that judges in the Judicial Division may face disciplinary proceedings before the CSM. Indeed, this is not only a realistic possibility, but has actually happened in the past[47].

14. Like the majority, we consider that disciplinary proceedings which entail the imposition of sanctions against judges, as in the present case, must ensure public confidence in the functioning and independence of the judiciary as such, because they go to the heart of the rule of law. In the current climate, it is not superfluous to restate this principle.

47. For example, case 02P3735, judgment of the Supreme Court of 3 July 2003, on an appeal against a disciplinary sanction imposed by the CSM on a judge of the Supreme Court.