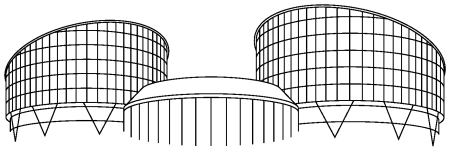

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SOARES v. PORTUGAL

(Application no. 79972/12)

JUDGMENT

STRASBOURG

21 June 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Soares v. Portugal,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

András Sajó, *President,*
Vincent A. De Gaetano,
Boštjan M. Zupančič,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 24 May 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 79972/12) 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, Mr António Alberto Mota Soares ("the applicant"), on 4 December 2012.

2. The applicant was represented by Mr R. Mendes, a lawyer practising in Coimbra. The Portuguese Government ("the Government") were represented by their Agent, Mrs M. F. da Graça Carvalho, Deputy Attorney General.

3. The applicant complained, under Article 10 of the Convention, that his right to freedom of expression had been breached on account of his criminal conviction for reporting an alleged misuse of public money.

4. On 23 June 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1957 and lives in Góis.

A. Background of the proceedings

6. At the relevant time, the applicant was a chief corporal in the National Republican Guard (*Guarda Nacional Republicana*), working at the Góis territorial post.

7. On 7 November 2009 the applicant sent an email to the General Inspectorate of Internal Administration (*Inspecção-Geral da Administração Interna*) on the subject "Suspected misuse of money", in which he made reference to an alleged misuse of money by Commander M.C. of the Arganil territorial post in accordance with what he had heard in a conversation with colleagues at the Arganil territorial post. He asked the General Inspectorate to investigate the alleged facts, stating as follows:

> "In the month of December 2008 the Coimbra [National Republican Guard] Territorial Group distributed money to the territorial posts of its area of command ... for the Christmas dinner ...
>
> The only members of the military [in Arganil] who attended the dinner were the Commander of the post and Corporal M.; the total amount of money that had been given to the military from the [territorial] post [to pay for the dinner] was paid to the restaurant's manager in exchange for a receipt ... it seems that the Commander has since then been going with his family to the mentioned restaurant, where the cost of his meals is deducted from the money that was not spent [on the above dinner] ... Note: I have just become aware of this matter through rumours within the military of the mentioned post, who claim that they have not reported the situation for fear of reprisals, and because of that [fear of reprisals] I ask you for secrecy during the investigation because I am also a member of the military ..."

8. On an unknown date the General Inspectorate of Internal Administration forwarded the email to the General Command of the National Republican Guard (*Comando Geral da Guarda Nacional Republicana*) and to the Lousã public prosecutor's office (*Ministério Público*).

9. On an unknown date the Lousã public prosecutor's office opened an investigation into the applicant's allegations. On 28 February 2010 the Lousã public prosecutor's office discontinued the proceedings on the grounds that, following investigations by the criminal investigation police (*Policía Judiciária*), it had found no evidence of the criminal offence denounced by the applicant.

10. The General Inspectorate of Internal Administration also conducted an inquiry into the applicant's allegations. On 21 June 2010 the inquiry was discontinued.

11. The General Command of the National Republican Guard also started an internal inquiry into the allegations on 4 December 2009. On 23 December 2009 Commander M.C. was heard in that respect. He then became aware of the email of 7 November 2009 and its content. On 9 February 2010 the inquiry was converted into disciplinary proceedings

against Commander M.C. at the request of the official in charge of the inquiry on the grounds that the management of the cafeteria of the Arganil territorial post showed signs of lack of transparency which required further investigation.

12. On 30 July 2010 the disciplinary proceedings against Commander M.C. were discontinued on the grounds that there was insufficient evidence to take disciplinary action. The decision to discontinue the disciplinary proceedings also took into account the decision of the Lousã public prosecutor's office to discontinue the criminal proceedings against Commander M.C.

B. Criminal proceedings against the applicant

13. On 22 April 2010 Commander M.C. lodged a criminal complaint before the Lousã public prosecutor's office, accusing the applicant of defamation. He alleged that the applicant's email had disseminated injurious statements about him.

14. On 7 July 2011 the public prosecutor brought charges (*acusação*) against the applicant for aggravated defamation on the grounds that the statements made in his email called into question Commander M.C.'s honesty, honour and professional reputation, which the applicant had intentionally attacked.

15. On 21 September 2011 Commander M.C. lodged a claim for damages against the applicant in the amount of 5,000 euros (EUR).

16. In a judgment of 17 January 2012 the Lousã Criminal Court convicted the applicant of aggravated defamation and sentenced him to eighty day-fines, totalling EUR 720 euros. The applicant was also ordered to pay EUR 1,000 in damages to Commander M.C. The Court described its findings of fact and the manner in which it had assessed the evidence, and held as follows:

> "... since the existence of such a rumor has not been proved in any way, the court is fully convinced that the defendant's intention was to undermine the honour of the offended party, once he knew that this was just a rumour and that therefore he was making an allegation that was not true.
>
> ...
>
> The allegation made in the defendant's complaint, by its content, put into question the offended party's honesty, honour and professional reputation as commander of a territorial post of the National Republican Guard – which was well known to the defendant.
>
> The defendant has therefore acted in a free, voluntary and conscious way, with the achieved aim of attacking the offended party's honour and personal and professional reputation.
>
> ...

> The disclosure of irregular situations has to be seen as a duty (as the performance of an obligation) when it falls within the competence and responsibilities of the whistle-blower and when it does not go beyond the facts which were effectively observed. [Whistle-blowing] cannot be used as a basis to cast suspicion which cannot be supported by any factual element.
>
> In the instant case, the defendant accuses the offended party of facts which are objectively dishonorable without having any evidence to substantiate them. Indeed, by submitting that the offended party and his family were using the existing credit to have dinner at the mentioned restaurant, the defendant knew that he was accusing the offended party of a dishonorable deed, all the more because he knew that the offended party was in charge of the National Republican Guard's Arganil territorial post. He further knew that the allegation was inconsistent with the truth and that he could easily have clarified its authenticity with the restaurant owner.
>
> Through such conduct, the defendant acted of his own free will and in the knowledge that ... [his actions] were not allowed."

17. On an unknown date the applicant appealed against the judgment to the Coimbra Court of Appeal. In particular, he contested the established facts as, in his opinion, he had not acted with the intention of attacking Commander M.C.'s honour and reputation.

18. On 19 September 2012 the Coimbra Court of Appeal upheld the first-instance court's decision. It considered that there were no reasons to change the facts established by the first-instance court and, as such, no reasons to reach a different conclusion with regard to the applicant's guilt and conviction.

C. Disciplinary proceedings against the applicant

19. On 3 August 2011 the General Command of the National Republican Guard instituted disciplinary proceedings against the applicant.

20. On 20 February 2013 the official in charge of the inquiry within the disciplinary proceedings against the applicant submitted a final report in which he concluded that the applicant had breached his duties. The relevant passage of the report reads as follows:

> "... the defendant breached the duty of loyalty... as being on duty and being part of the Góis Territorial Post in the quality of Deputy Commander of the Post, he did not inform his hierarchical superiors, in clear disregard of the functional hierarchy principles, of the acts allegedly committed ..."

21. In the report it was also taken into account that the applicant's allegations had been investigated by different authorities, all of which had discontinued their investigations. Additionally, it had regard to the fact that the applicant had been convicted by the domestic courts in the criminal proceedings against him. The report further analysed the existence of a fine which Commander M.C. had imposed on the applicant before the latter had sent the impugned email. However, the official responsible for the report considered that fact to be innocuous and irrelevant.

22. On 27 March 2013, at the request of the official responsible for the disciplinary proceedings, the General Command imposed on the applicant a disciplinary sanction consisting of suspension from duty for six days, its enforcement being suspended for a period of twelve months.

23. According to the material submitted in the case file, it seems that the applicant did not lodge an appeal against the disciplinary sanction with the Minister of Home Affairs.

II. RELEVANT DOMESTIC LAW

A. Relevant provisions of the Portuguese Criminal Code

Article 180 § 1

"Anyone who, when addressing a third party, accuses another, even if the accusation takes the form of a suspicion, or makes a judgment that casts a slur on the honour or reputation of the other, even when reproducing the accusation or judgment, shall be liable on conviction to a maximum of six months' imprisonment or 240 day-fines."

24. Article 180 § 4 provides that if the reporting agent has not complied with his duty to verify the information he has disclosed, he will not be deemed to have acted in good faith.

25. Article 184 of the Criminal Code increases the sentence by half if the victim is an agent of authority.

B. Relevant provision of the Statute of the Military Service of the National Republican Guard (Law-Decree no. 297/2009 of 27 November)

Article 16

Other duties

"1. Servicemen of the National Republican Guard also have the following duties:

...

(i) to refrain from making statements which could affect the cohesion and reputation of the [National Republican] Guard or which are in breach of the hierarchic and disciplinary principles ..."

C. Regulation on the disciplinary conduct of the National Republican Guard (Law no. 145/99 of 1 September 1999, in force at the material time)

Article 10

Duty of loyalty

"2. In the exercise of their duty of loyalty, servicemen of the Guard shall:

(a) truthfully inform their hierarchical superiors about any issue related to their job, when requested to do so;

(b) when the issue does not fall within their competences, communicate immediately to their hierarchical superiors any service-related faults or acts on the part of other servicemen which are against express legal provisions ...

(c) in submitting a petition, request, complaint or any other similar written statement, ensure that it is sent to the competent authority and always through the hierarchical channels ..."

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained under Articles 6, 7, 10 and 13 of the Convention that his conviction by the domestic courts for aggravated defamation had infringed his right to freedom of expression. The Court, being master of the characterisation to be given in law to the facts of the case, will consider this complaint solely under Article 10 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

28. The applicant submitted that his right to freedom of expression had been breached in that he had been convicted for denouncing an alleged misuse of public money within the National Republican Guard.

29. He maintained that he had acted in good faith in disclosing the suspicion of alleged misuse of money, as the veracity of the rumour could only be proved by means of an investigation. The only reason for his disclosure was to have the alleged facts investigated.

30. The applicant acknowledged that he could have used the existing channels within the internal hierarchy [of the National Republican Guard] to make the disclosure. However, he contended that the disclosure was made by email to an authority which had competence within the Ministry of Home Affairs to investigate the alleged facts. As such, he had complied with the chain of command. He concluded that demanding that the disclosure of information be made only within the hierarchy of the General Republican Guard would limit freedom of expression.

31. Referring to the case of *Heinisch v. Germany* (no. 28274/08, ECHR 2011), the Government contended that the protection of the workplace afforded by Article 10 of the Convention could be guaranteed only when a disclosure of information was made in good faith and favoured the internal channels of disclosure. They considered that the allegations reported by the applicant could have been an issue of public interest given that the alleged misuse of public money was at stake. However, the applicant's allegations were based on a rumour which was none the less investigated by three different entities and not proved.

32. The Government submitted that the duty of loyalty was particularly binding on servicemen in the National Republican Guard, who were subject to special duties arising from the disciplinary regulations to which they were bound.

33. The applicant was subject to a chain of command and should have disclosed the allegations to his hierarchical superiors – namely, the commander of his territorial post or the commander of the territorial unit; there were internal channels of disclosure which, where used, had been proven effective.

34. Lastly, the Government submitted that past events – the fact that the applicant had allegedly been fined by Commander M.C. and that there was a poor relationship between Commander M.C. and the servicemen working at the Arganil territorial post – could lead to suspicion that the applicant may have felt some animosity towards Commander M.C.

2. The Court's assessment

35. It has not been disputed that the applicant's conviction by the domestic courts for aggravated defamation constituted interference by the public authorities with his right to freedom of expression under the first paragraph of Article 10 of the Convention. Such interference will constitute a breach of Article 10 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" for the achievement of those aims.

36. The Court observes that the applicant's conviction was based on Article 180 § 1 and Article 184 of the Portuguese Criminal Code, and pursued the legitimate aim of protecting Commander M.C.'s reputation.

37. It remains to be ascertained whether the interference was "necessary" in a democratic society.

(a) The principles established by the Court's case-law

38. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10 § 2, this freedom is subject to exceptions, which must however be constructed strictly, and the need for any restrictions must be established convincingly. The general principles for assessing the necessity of an interference with the exercise of freedom of expression have been summarised recently in *Pentikäinen v. Finland* ([GC], no. 11882/10, § 87, ECHR 2015) and *Bédat v. Switzerland* ([GC], no. 56925/08, § 48, 29 March 2016).

39. The Court further reiterates that the protection of Article 10 of the Convention extends to the workplace in general and to the public service in particular (see, among other authorities, *Guja v. Moldova* [GC], no. 14277/04, § 52, 12 February 2008).

40. Furthermore, under the Court's case-law, the signaling by an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (see *Guja*, cited above, § 72 and *Heinisch v. Germany*, no. 28274/08, § 63, 21 July 2011).

41. The Court is at the same time mindful that employees owe to their employer a duty of loyalty, reserve and discretion. In the light of these duties, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information can, as a last resort, be disclosed to the public. In assessing whether the restriction on freedom of expression was proportionate, the Court must therefore take into account whether the applicant had any other effective means of remedying the wrongdoing which he or she intended to uncover (see *Guja*, cited above, § 73; *Heinisch*, cited above, § 65).

42. The Court also reiterates that when it is called upon to rule on a conflict between two rights that are equally protected by the Convention, it must weight up the interests at stake. The State is called upon to guarantee both rights and if the protection of one leads to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued. In this context, the Court accepts that the State has a wide margin of appreciation (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 123, ECHR 2014).

43. In the present case, the Court must ascertain whether the domestic authorities struck a fair balance between, on the one hand, the applicant's right to freedom of expression under Article 10 and, on the other, the protection of reputation of Commander M.C., a right which, as an aspect of private life, is protected by Article 8 of the Convention (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 91, 10 November 2015). In this regard, the Court's task is not to take the place of the national courts but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their discretionary powers (see *Stankiewicz and Others v. Poland (no. 2)*, no. 48053/11, § 36, 3 November 2015).

(b) Application of the above principles to the present case

44. Turning to the facts of the present case, the Court agrees with the Government's position that the applicant's allegations could concern an important question of public interest: the possible misuse of public money by a civil servant (see paragraph 31 above). It notes that the defamation claim originated in the applicant's correspondence with the General Inspectorate of Internal Administration, which forwarded the applicant's email to the General Command of the National Republican Guard and to the Lousã public prosecutor's office. In his email, the applicant alleged that Commander M.C. had been misusing public money. He claimed that his intention was to prompt an investigation into the allegations, which he admitted were based on a rumour (see paragraph 7 above).

45. In order to assess the justification of a statement which is in issue, a distinction must be made between statements of fact and value judgments.

While the existence of facts can be demonstrated, the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, among other authorities, *Pinto Pinheiro Marques v. Portugal*, no. 26671/09, § 43, 22 January 2015).

46. The Court considers that, in the present case, the applicant's allegations constituted a statement of fact. For a civil servant working for a law-enforcement authority, the accusation that he misused public money was a particularly serious one capable of affecting his reputation and, to an even larger extent, that of the National Republican Guard. Thus, even if the applicant had intended to prompt an investigation, he had to have a factual basis on which to base his allegations. However, he based his allegations on a mere rumour and had no evidence to support them. The Court therefore concludes that the domestic courts' finding that he had not acted "in good faith" (see paragraph 9 above) was proportional and justified. In this regard, the situation differs from that examined by the Court in the case *Bargão and Domingos Correia v. Portugal* (nos. 53579/09 and 53582/09), where the applicants believed that the information disclosed was true and were able to prove it (ibid., §§ 41-42).

47. In fact, the applicant, knowing that his allegations were based on a rumour, made no attempt to verify their authenticity before reporting them to the General Inspectorate of Internal Administration. The Court notes that the applicant had no evidence to support his allegations and that none of the three different entities which investigated them were able to establish their veracity. Additionally, none of the three entities established that Commander M.C. had committed a criminal act or had acted unlawfully (see paragraphs 9-12 above). The Court further notes that, in the criminal proceedings against the applicant, the domestic courts were not able to establish the existence of the rumour which had given rise to the applicant's allegations (see paragraph 16 above).

48. As to the addressee of the disclosure, the Court observes that the applicant was aware that he had internal channels within the hierarchy of the National Republican Guard to which he could have reported the rumour – namely, as pointed out by the Government, the commander of his territorial post or the commander of the territorial unit (see paragraph 33 above). Notwithstanding that, he did not convincingly explain why he did not disclose the allegations to a superior. By not doing so, the applicant did not comply with the chain of command and denied his hierarchical superior the opportunity to investigate the veracity of the allegations.

49. In the light of the above, the instant case has therefore to be distinguished from cases of justified information of the superior or "whistle-blowing", an action warranting special protection under Article 10 of the Convention (compare with *Guja* and *Heinisch*, both cited above).

50. Finally, as regards the "proportionality" of the sanction, the Court notes that the applicant was ordered to pay a fine of 80 day-fines (EUR 720) plus EUR 1,000 in damages to Commander M.C. Those amounts appear very moderate taking into account the gravity of the applicant's allegations, the harm caused to M.C. and the fact that the applicable maximum fine was 360 days-fine according to Articles 180 and 184 of the Criminal Code. Therefore, the sanction imposed cannot be found disproportionate.

51. Having regard to the above considerations, the Court considers that the reasons advanced by the domestic courts in support of their decisions were "relevant and sufficient" and that the interference was not disproportionate to the legitimate aim pursued, namely, the protection of reputation. The interference could thus be reasonably considered "necessary in a democratic society" within the meaning of paragraph 2 of Article 10 of the Convention. Therefore, the Court sees no serious reason to substitute its own assessment for that of the domestic courts, which examined the question at issue with care and in line with the principles laid down by the Court's case-law.

52. Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 21 June 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli Registrar	András Sajó President