PORTUGAL

Contents

1. National court system

The Portuguese judicial system includes judicial courts and administrative courts, both of them falling within the appellate jurisdictions of two supreme courts: respectively, the Supreme Court of Justice and the Administrative Supreme Court.

Despite the separation by subject matter, these two courts' rules and principles are exactly the same. Both the judicial courts and the administrative ones are independent and judge exclusively according to the law.

There is still one higher judicial authority, the Constitutional Court, whose competence is defined *ratione materia* and only judges issues related to the constitutionality of the rules themselves or as they have been applied by common courts.

As for the judicial courts, these include 3 levels of judicial courts: the lower courts *Tribunais de Primeira Instância (Courts of first instance*), the second instance courts *Tribunais de Relação (Courts of Appeal*), and the Supreme Court (*Supremo Tribunal de Justiça*).

The lower courts decide over the majority of disputes, and an appeal to a second instance court can be made depending on the monetary value and issues being disputed, except when personal rights (e.g. family cases) are under trial (in these cases appeals can be allowed notwithstanding the monetary value at issue).

The second instance courts decide mainly the appeals of the decisions of the lower courts. But they also decide other lawsuits. Amongst those issues these are the most important: the cases against law judges, military judges, district-attorneys, in relation to their functions; the crimes perpetrated by these officials; and lawsuits related to the international judiciary cooperation in criminal matters.

The supreme court of justice is designed to judge appeals from the lower courts, but also the following: cases against judges of the supreme court and district-attorneys regarding the official actions within the jurisdiction of the courts; crimes perpetrated by these judges and district-attorneys related to their official functions; matters of *habeas corpus* related with illegal arrests; among other things.

In the appellate system there are essentially two types of appeals that are subdivided into two categories:

- ordinary appeals – those appeals that are presented within a period of 30 days after the sentence notification;

- appeal to the merits of the case with this appeal, a losing party tries to obtain a new decision about the merits of the sentence of the lower courts in the second instance courts;

- appeal to the higher courts**;** with this appeal, a losing party can obtain a new decision regarding the merits of the sentence passed by a second instance by application to the Supreme Court.

- extraordinary appeals – those appeals that are presented after that period of 30 days;

- appeal to unify the jurisprudence; with this appeal, the parties can present the appeal to the plenary of the Supreme Court when this court has decided differently in a previous case, about the same legislation and about the same fundamental question of law;

- revision appeal; with this appeal the parties can apply to have the decision of a lower courts, or of a second instance courts, re-evaluated under very strict circumstances, namely:

  - another sentence as considered proved that the previous decision was the result of a crime committed by the deciding judge;

  - a document, judicial act, expert opinion, arbitrator was false or untrue, and determined (influenced) the sentence and this issue was not discussed in the previous process;

  - a document that the party was unaware of, or could not have knowledge of, and, is so pivotal to that it could change the previous decision to be in favour of the losing party;

  - the transaction, confession, desistance was invalid;

  - the previous decision is incompatible with a final decision of an international court that has binding application; or

  - the dispute was decided based upon a simulated act of the parties and the court was not aware of that simulation.

Regarding administrative courts, these are also divided into three levels: the lower courts, the second instance courts and the Administrative Supreme Court.

The criteria to divide the jurisdiction among those three levels are the same as explained above for judicial courts and the rules related to appeals are similar given that the administrative appeal system is mainly the same as the established in the Code of Civil Procedure (CCP).

When it comes to general rules related to appeals, it has to underline that also before administrative courts generally the appellant must present a reasoned request within 30 days after the appealed decision came to his/her knowledge.

Usually the appeal does not suspend the court's decision but there are some exceptions.

Most of the decisions do admit only one, not two successive appeals. However, the administrative judicial system also recognises appeals to unify the jurisprudence **(***recurso de uniformização de jurisprudência*) before the plenary of the Administrative Supreme Court.

As far as the proceedings before the Constitutional Court are concerned, the following can be stated. Appeals against judicial decisions made to the Constitutional Court are restricted to questions raised regarding unconstitutionality or illegality.

Appeals before the Constitutional Court may be presented by individuals in circumstances such as the following court decisions:

- rejecting the application of a rule on the grounds of unconstitutionality;
- applying a rule where the unconstitutionality of which has been raised during the proceedings.

Deadlines are however more strict and an appeal with the Constitutional Court must be filed within 10 days. This appeal interrupts the period for filing other appeals that may be made to the decision, which may then be filed after interruption has ceased. Once the appeal is accepted deadline for allegations are 30 days as from the respective notification.

The decision on the appeal determines *res judicata* regarding the question of unconstitutionality or illegality. Should the Constitutional Court find the appeal to be well-founded, even if only partially, the proceedings drop back to the court from which they came, so that this same court, depending on the case, can change the decision or have it changed in agreement with the judgement on the question of unconstitutionality or illegality.

2. Restrictions regarding access to justice

No restrictions affecting the right to access have been reported. According to Article 20 of the Portuguese Constitution and Article 1 of the Code of Civil Procedure (CCP), there is a general access to a judicial body when the exercise of a legal right is involved. It means that all substantive rights – created by national, community or international law – must have a legal way to be exercised.

3. Length of judicial proceedings

Courts are usually slow in such decisions (more than one year). Administrative bodies make decisions in a short period of time (one month or less).

4. Are procedures concluded within a reasonable time?

Administrative procedures are concluded in a very short period of time whereas judicial proceedings tend to take longer than one year.

5. Does provision exist for speedy resolution of particular cases?

Usually, there are no provisions available to speed up administrative procedures. Nevertheless, it is possible to appeal to a court and ask for an interim decision. Urgent principal procedures – such as the one related to the protection of fundamental rights before administrative courts – are a kind of expedited procedure and the court's decision must come out within a very brief period (around 15 days).

6. Is it possible to waive the right of access to a judicial body?

According to Law 31/86, the parties involved in a dispute can chose to stipulate by agreement the acceptance without review of a decision adopted by an *ad hoc* court. By ad hoc one means that parties to a dispute are authorised to compose the court with judges they choose. Those do not include personal rights. Said *ad hoc* courts can never decide on personal rights, such as family rights and rights involved labour issues.

7. Access to non-judicial procedures

As regards racial discrimination, there is a special commission called the *Comissão para a Igualdade e Discriminação Racial* (CERD) [Commission for Equality and against Racial Discrimination], which was established by Law n.º 134/99, 28/0. The Commission works under the auspices of the *Alto Comissariado para a Imigração e para o Diálogo Intercultural* (HCIID) [High Commission for Immigration and Intercultural Dialogue] which define and applied sanctions. The Commission is a non-judicial body and can apply fines involving multiplications of the minimum wage. The decisions taken by the Commission are subject to appeal to judicial courts. The *Provedor de Justiça* [the Portuguese Ombudsman] also deals with complaints related to discriminatory practices.

The HCIID is a public institute enjoying administrative autonomy. However, it is still integrated into the Public Administration and is overseen by the Prime Minister. The High Commissioner cannot be dismissed by the Government and does not receive direct orders from the Executive. The High Commissioner is completely free to decide how the budget will be spent. According to Decree-Law n. 167/2007, 3rd May,[1] the HCIID currently has a wider structure because its responsibilities have been broadened in order to include inter-religious dialogue.

The CERD is now chaired by the HCIID. It forms part of the agency charged with the defence and protection of immigrants and ethnic minorities. Created before the Directive – by Law 134/99 and set up in 2000 - the CERD is still a body empowered to promote equal treatment on the grounds of race or ethnic origin. Some powers are shared between the HCIID and CERD. For example, providing assistance to victims of discrimination in pursuing their complaints about discrimination a responsibility of the HCIID. Conducting independent surveys related to discrimination, publishing independent reports and making recommendations regarding issues of discrimination are the responsibility of the CERD.

To initiate the procedure required to apply fines, anyone can report a case of racial discrimination to the member of the Government responsible for equality and ethnic minorities to the HCIID, to CERD, or to the general inspectorate relevant to the matter. Moreover, any public body aware of a racial discrimination case has a duty to inform CERD (Article 9. Law n. 18/2004).

[1] http://www.acidi.gov.pt/docs/ACIDI/Lei_organica_ACIDI.pdf (31.3.2009).

The CERD recommends that a complaint should be accompanied by the following: the name of the person lodging the complaint; a report of the facts including the identification of the alleged offender; eye-witnesses and a list of injuries (both emotional and physical) suffered by the person making the complaint.

It is the responsibility of CERD to monitor the enforcement of legislation regarding racial discrimination. It also has a duty to maintain a register of discriminatory behaviours and the sanctions applied. It also has the power to reveal publicly discriminatory occurrences.

However, the decision to impose a fine or other sanctions is attributed to the High Commissioner. The CERD plays the role of a consultative body thus forming an opinion regarding the general inspectorate's final report.

Both the HCIID and CERD have no powers to investigate or lead an audit since these powers are exclusively attributed to general inspectorates. The CERD may only launch a process after having receiving complaints or reports of racial discrimination.

Regarding labour issues it should be noted that since 2006 there is an alternative dispute resolution process for cases concerning a contract of employment, except for matters relating to accidents and inalienable rights. This process was conceived to resolve disputes between workers and employers without the court intervention, but with the aid of a specially trained and certified labour mediator. It is called the system for labour mediation (SLM) and appeared after a protocol involving the Ministry of Justice and several confederations of employers and the two principal trade unions.

Since the beginning of the operation of the SLM on 19.12.2006, more than 80 entities have signed the form of mediation, including professional associations, employers and other unions of national relevance.

The SLM has the power to mediate disputes arising under the employment contracts such as those relating to the termination of a contract, promotions and disciplinary procedures. This means that some issues related to racial or gender-based discrimination in employment and work can also be resolved through mediation

The employer and the worker who have a dispute may voluntarily and by their joint decision, submit the dispute to mediation. Also the judge may, in accordance with Article 279-A of the

Code of Civil Procedure, request such mediation, unless either party expressly opposes such a referral.

The use of the SML costs €50 for each party, regardless of the number of mediation sessions. However, the fee is waived when legal aid has been granted to one or more parties. This amount is far less (at least a third) than the amount due in judicial procedures.

Mediation work has a time limit of 3 months (a judicial process would last at least 8 months on average) to obtain an agreement. However, the parties, in agreement with the mediator may extend the duration of the mediation if they wish. On average, a process in SLM has a duration of 28 days.

At present the SML functions throughout Portugal's mainland.

8. Legal aid

According to Law 24/2004 (Article 8-A), people lacking financial means are entitled to free legal representation in court as well as legal advice. The criteria for determining who is eligible is based on the assessment of an individual's income.

NGOs that combat racism and promote non- discrimination on the grounds of race or ethnicity, may also provide legal assistiance. These NGOs can legitimately engage (either on behalf of or in support of the complainant) in judicial and administrative procedures (Article 5. Law n. 18/2004).

NGOs are also represented by the CERD, and this enables them to express their views in investigation procedures. However, NGOs do not participate in these investigations.

NGOs play an important role as awareness raisers among minorities. Information about minority rights and support for the victims plays a major part in ensuring the effectiveness of legislation addressing racial or ethnic discrimination. The list of NGOs can be seen on the web site.[2]

Since 2005, the High Commission for Immigration and Intercultural Dialogue (HCIID) has made an agreement with the Portuguese NGO Association for the Support of Victims of Crimes (ASVC).Within this NGO a special unit has been created aimed at giving support to immigrants and victims of racial or ethnic discrimination. Such support takes the following forms: legal aid,

[2] http://www.acidi.gov.pt/docs/Associacoes/dados_AI_15-07-07.xls (31.3.2009).

psychological assistance and emotional support. From May 2006 to April 2007, 232 cases were treated by ASVC. The most frequent cases involve domestic violence, exploitation at work, threats and insults.[3]

In general, legal advice is well provided by NGOs but very few of them offer legal representation in court.

9. Forms of satisfaction available to a vindicated party

In general terms, financial compensation can be awarded in non-discrimination proceedings. Regarding the compensation in labour discrimination cases, an employee or job applicant who is the victim of a discriminatory act is entitled to receive compensation (Article 28 of the Labour Code (LC)).

10. Adequacy of compensation

The amount of compensation is usually very low. It was only possible to identify two cases of compensation for non-physical damages. In both cases, the amount paid to the plaintiff/appellant did not exceed 2,800 Euros, a relatively small sum of money.

11. Rules relating to the payment of legal costs

The successful party may recover the amounts paid within the proceedings.

Legal procedures in discrimination cases are not covered by special rules regarding financial risk. This means that court fees and fees of the attorney are paid by the plaintiffs, shared with the State or paid by the State. In that case, the fee depends on the amount of the plaintiffs' income.

[3] http://www.acidi.gov.pt/modules.php?name=News&file=article&sid=1772 (31.3.2009).

12. Rules on burden of proof

The shift of the burden of proof is now part of the Portuguese legal system, with specific regulations regarding the Labour Code. When civil compensation is at stake (in other words, when the victim is suing the alleged perpetrator of a discriminatory act for damages) the burden of the proof shifts to said perpetrator, who now has to prove that he/she had no discriminatory intention.