Portugal, Supreme Court of Justice, Decision, 26th October 2016

Member State
Portugal

Topic
Trust, freedom of expression of judges; integrity and diligence

Deciding Court Original Language
Supremo Tribunal de Justiça

Deciding Court English translation
Supreme Court of Justice

Registration N
75/15.8YFLSB

Date Decision
26th October 2016

ECLI (if available)
Not available

National Follow Up Of (when relevant)
Not applicable.

EU legal sources and CJEU jurisprudence
Not applicable.

ECtHR Jurisprudence
The Court quotes EctHR jurisprudence in general, not any particular case

Subject Matter

Trust – freedom of expression of judges – integrity and diligence

Legal issue(s)

The legal issue here is to know what the reserve duty imposed on judges is.

More specifically, whether a judge can comment with the parties to the proceedings any question relating to the same proceedings, in a context other than that of judgment

Request for expedited/PPU procedures

Not applicable.

Interim Relief

Not applicable.

National Law Sources

Portuguese Constitution – articles 202, 203, 205 (1) and 216 (1)

Statute of Judicial Magistrates, approved by Law No. 21/85, of 30 July, in its current wording - article 7-B (1) and (2).

Facts of the case

A judge, after a hearing and before the decision, made some comments to the defendants, leading them to believe that they would lose that action, without the judge having yet decided. This judge was subject to disciplinary proceedings. Dissatisfied, she appealed to the Supreme Court.

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

The Supreme Court gave the judge no reason. Is stated several important conclusions:

- First, the duty of reserve constitutes a restriction on the freedom of expression of the judge, based on the independence, impartiality of the judge and social trust in the administration of justice.
- The duty of reserve prevents a judge from issuing valuation judgments on any lawsuits and,

in particular, on those in charge, by requiring him to refrain from making comments or considerations that can reasonably be interpreted as prejudices in relation to the matter to be decided, thereby preventing the decision recipients and the general public from creating mistrust about their decision and affecting the community's confidence in the administration of justice.

- So, since it was the applicant who addressed the defendants, that the conversation was maintained before people who were not involved in the litigation, it is impossible to conclude that the facts in question are devoid of disciplinary relevance.
- Finally, the Supreme Court also concluded that the fact that the comments referred to were given in the courtroom does not detract from the compromise of the image of impartiality and exemption in the administration of Justice that results from them, which the appellant should have had prevented

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Relation of the case to the EU Charter

Not applicable.

Relation between the EU Charter and ECHR

Both the Supreme Court and the High Council of Judiciary have interpreted Article 10 ECHR in line with paragraph 2 of the same article, which stipulates restrictions and limitations on freedom of expression (not only, but also, of judges). On this basis, these two bodies have made a rather narrow reading of the duty of reserve as enshrined in article 7-B of the SJM.

Use of Judicial Interaction technique(s)

In part, one can speak of a consistent interpretation. As we said before, to limit the judge's freedom of expression in the context of this decision, the Supreme Court also makes use of Article 10 of the ECHR, concerning freedom of expression, namely paragraph 2 of that article.

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

Not applicable.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

Not applicable since we’re talking about the Supreme Court.

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

A conflict of norms was at issue: namely, between those that confer the freedom of expression and those who impose the duty of reserve. The court, adopting its understanding, and through a consistent interpretation, gave priority to the duty of reserve, contrary to what the appellant

wanted.

Impact on Legislation / Policy

Not applicable.

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

Not applicable.

Impact on national case law from the same Member State or other Member States

Note on the general panorama of judges' freedom of expression in Portugal

In this decision, the Supreme Court of Justice does not make much use of case-law, since there is little jurisprudence in Portugal on the freedom of expression of judges. However, it makes use of the most important Deliberation of the High Council of the Judiciary (HCJ) on the duty of reserve of judges and consequent limitation of their freedom of expression, and we can use it as a basis to make a state of the art regarding the limitation of the freedom of expression of judges in Portugal.

In the deliberation of the Plenary of the HCJ of 11 March 2008, the HCJ bases the duty of reserve - which is currently enshrined in Article 7-B of the Statute of Judicial Magistrates (SJM) - on the "protection of impartiality, independence, institutional dignity of the courts, as well as [on] citizens' confidence in justice", combining these grounds with the "freedom of expression" (paragraph II). From here, the HCJ concludes that this duty "covers, in essence, the statements or comments (positive or negative), made by judges, which involve evaluative assessments about cases they are in charge of" (parahraph IV). If one notices, this is exactly the situation of this decision, which is the reason why this deliberation is cited: in fact, and taking into account the case, the judge in question made comments on a case he was in charge of, going against the SJM and the deliberation referred to. Moreover, the Supreme Court considers that such comments would only be admissible if, perhaps, they were part of a perspective of collaboration with the parties and their representatives, citing to this effect a 2006 Decision of the Italian High Council of the Judiciary – see, Sentenza de 24.11.2005/14.3.2006, n.º 146/2005, of the Consiglio Superiore della Magistratura.

Taking this case as a starting point and further analysing the deliberation, we note that it is also important insofar as paragraph VI of the deliberation states that the duty of reserve applies to "pending cases and cases which, although already finally decided, deal with undeniably topical facts or situations". In other words, judges have their freedom of expression limited both in relation to cases before them (as is the case of the current decision under analysis), and also in relation to those which, although already decided, are in the media.

This understanding becomes even more relevant when we cross-reference what follows from paragraph V of the deliberation: "all judges, even if they do not hold the cases, may be agents of the violation of the duty of reserve". Thus, in other words, even if a judge is not responsible for a case, he may not comment on the case, whether or not it is in the media.

It is important to note that these specific points of the deliberation did not meet with a consensus within the HCJ, with some members voting against, citing an excessive limitation on the freedom of expression of judges. This was the case of Alexandra Leitão and Edgar Lopes, who considered that this solution causes judges to be pushed into a "situation of impediment to participation in public debate on matters of the area of justice" and that the opposite solution would contribute towards keeping "wrong ideas (and even harmful to the image of Justice) of the existence of corporate solidarity" away from public opinion.

Even so, and as stated above, it was the opposite understanding that prevailed, which was materialised in the deliberation in question. This has been the understanding of the Supreme Court. And the High Council of the Public Prosecutor’s Office has a similar understanding for the respective magistrates - see, thus, the Deliberation of the High Council of the Public Prosecutor’s Office, of 15 October 2013, and article 102 of the Statute of the Public Prosecutor’s Service, approved by Law no. 68/2019, of 27 August.

Taking into account paragraphs IV and V of the HCJ Deliberation, it is important to note two recent cases that had some echo in society:

- The first, already reporting in Template_Trust_5, concerns judge Carlos Alexandre, who was subjected to disciplinary proceedings for, precisely, being responsible for a highly media case, having given an interview to the public television channel, raising suspicions about the assignment of judge to the second phase of that same case;
- The second concerns Judge Clara Sottomayor, of the Supreme Court of Justice, and the comments she made on her Facebook page regarding the murder of a nine-year-old child by her father. When it was made public that the father had killed the child, in June 2020, Clara Sottomayor - who had no connection to the process regarding the custody of the child - made a post on Facebook stating: "How many times has this girl told the court that she didn't want to go to her father's house? Was there a process of parental responsibilities with shared custody? Was the child heard? This has to be investigated to the end. It is necessary to know why the court ordered shared custody”. At the time, these comments generated a wave of criticism from judges and lawyers, who felt that the judge violated her duty of reserve. In turn, Clara Sottomayor understood that she had not violated any rule and that she was only exercising her right to civic participation as a citizen. The truth is that the HCJ, in a deliberation of 8 September 2020, although it did not open disciplinary proceedings, decided

to apply to the judge a sanction of an unrecorded warning – see, Press Release of the HCJ, 8th September 2020: https://www.csm.org.pt/2020/09/09/nota-de-imprensa-conselheira-clara-sottomayor/

Also with regard to this duty, it should be noted that Article 7-B(2) of the SJM, in line with the Deliberation of the Plenary of the HCJ of 19 January 2011, states that judges may only make public statements or comments on any judicial proceedings when this becomes necessary for the defence of honour or other legitimate interest and if authorised by the HCJ. This is an attempt to reconcile the duty of reserve with freedom of expression, particularly in those situations where, from the outset, freedom of expression, when weighed against the duty of reserve, should prevail.

This is, therefore, the rationale behind possible conflicts between freedom of expression and the duty of reserve in relation to judges:

- On the grounds of protecting the impartiality, independence and institutional dignity of the courts, all judges should refrain from making comments, either on the cases in hand or on other cases for which they are not responsible, especially the "media" ones;
- If any judge feels that his or her honour has been harmed, then they may exercise their freedom of expression, but only after authorisation from the HCJ;
- If this set of obligations is disrespected by judges, the HCJ may impose sanctions on them, which may range from a simple warning to the suspension of the referred judge.

If we look at the decision under analysis, we see that it supports precisely this understanding. In fact, if it is true that it even refers to Article 10 of the ECHR, it is also true that, together with that reference, and in order to justify the framework just explained, it makes use of paragraph 2 of that same article, which provides limits and restrictions to freedom of expression, reaching the conclusion that the duty of reserve is part of those restrictions.

In fact, this understanding is not unusual, to the extent that, as we have been showing, it fits an understanding that is supported both in the HCJ and in the courts, namely in the Supreme Court of Justice. To better understand this, see the following two decisions:

- Ruling of the Permanent Council of the Supreme Judicial Council of the Magistrature of 9 November 2004. In this case, in summary form, a judge had given an interview to a well-known generalist television channel, in which she stated that there were "lobbies' ' in the HCJ who, in her understanding, vitiated the distribution of cases and compromised the image of Portuguese justice. In the decision, it highlighted the importance of the right to freedom of

expression, referring that it is expressly consecrated in the ECHR, in the Declaration of Human Rights and in the International Covenant on Civil and Political Rights. Later, however, it concludes that there are no absolute rights and, citing jurisprudence of the Spanish Constitutional Court - v.g., Sentence No. 270/1994, of 17 October 1994 - and of the ECHR - Case of Haes and Gisjsels v. Belgium, of 24.02.1999 -, states that "there are sectors or groups of citizens subject to stricter or specific limits as regards the exercise of the right to freedom of expression, on the basis of the function they perform, a line of thought also adopted by the ECHR, in its interpretation of Article 10 of the ECHR". It concludes, therefore, that although the judge was "fully within her rights to give opinions, express her positions and exercise her right to criticism", and although the statements did not refer to any type of case underway, whether under her responsibility or not, she should not have forgotten that she was still subject to the constraints "arising from her position as a judge and her particular knowledge, having exceeded the limits of what is permissible (in view of her status and her special responsibilities to the community)". It was not by chance, therefore, that the decision in question ultimately determined the application of a disciplinary penalty to the judge;

- Ruling of the Supreme Court of Justice of 27 October 2009, Case No. 21/09.8YFLSB. Again, this is a case of a judge who gave an interview and made statements on justice and corruption. Here, the STJ adopted the understanding that we have been explaining: although referring to Article 10 of the ECHR, it referred, at the same time, that the duty of reserve is included in the restrictions allowed by paragraph 2 of that article, concluding that the judge should have "paid attention to the intensity that her words could bring in terms of the credibility of public opinion, thus violating the duty of reserve and of correction".

These examples are important because, invoking the judge's freedom of expression and the duty of reserve contained in the SJM (which, at the time, had a wording that was very similar to the current one), they reach the conclusion that, even when the assumptions for the application of that duty are not fulfilled, the judge's freedom of expression is still limited in view of his or her "status" and "special responsibilities" - in reality, and as the first decision argues, "one cannot speak on television (. ... the same that one speaks or says at home with and to friends, or at a coffee table with colleagues: the demands are different, the audience is different, the degree of danger is incomparable. What can be seen as a simple and inconsistent venting (...), in the other becomes news and is treated as such".

We therefore conclude that Portugal is characterised by still having a limiting framework for the freedom of expression of judges, imitations that may act on two levels:

i. Firstly, invoking the duty of reserve if it is understood that the respective assumptions are fulfilled;
ii. Secondly, and in the event that the first situation cannot be effected, invoking the special responsibilities of the judge in the protection of impartiality, independence, the institutional dignity of the courts and also the confidence of citizens in justice.

Connected national caselaw / templates

CIDP_Trust_5: Rule of law, freedom of expression of judges; relationship with the media.

(Link to) full text

http://www.dgsi.pt/jstj.nsf/-/78126F81DAB8129080258065003FFD84