

**Slovenia, Constitutional Court, U-I-225/16-15, constitutional, 6 December 2017,  
ECLI:SI:USRS:2017:U.I.225.16**

Member State

 Slovenia

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Topic

Rule of law:

- Prevention of abuse of powers
- Prohibition of arbitrariness

Independence:

- Recruitment, appointment, salaries and promotion of magistrates

Impartiality

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Deciding Court Original Language

Ustavno sodišče Republike Slovenije

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Deciding Court English translation

Ustavno sodišče Republike Slovenije

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Registration N

U-I-225/16-15

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Date Decision

6 December 2017

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ECLI (if available)

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## Subject Matter

Promotion of High court judge to the Supreme court

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## Legal issue(s)

Does the power of the parliament to decline a candidate, chosen by the Judicial council (the JC) for Supreme Court judge strike an inadequate balance between the branches of power and thus violate the principle of judicial independence?

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## National Law Sources

Articles 3(2), 125 of the Constitution

Article 21 (3) of the Judicial Service Act (the JSA)

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## Facts of the case

In Slovenia, judges are elected by the national assembly (lower house of the Slovene parliament) (the NA) on the proposal of the JC. Article 21 (3) of the Judicial Service Act gives the NA the power to elect or to turn down the candidate for the Supreme Court, proposed by the JC. Traditionally, the NA acted as a rubber-stamping institution and always elected the proposed candidate. In the last 5 years, this constitutional custom was eroded. In the case at hand, the candidate was a high court judge that has recently heard an appeal against a first instance judgment, sentencing a right wing politic to imprisonment. The first instance decision was controversial as the investigation judge was accused of being biased against the defendant due to their conflicts from the time when one was a deputy president of the Slovene Security-Intelligence Agency and the second was member of the parliamentary committee in charge of controlling the said agency. At the High Court, the first instance decision was upheld, but was latter quashed by the Supreme Court. The case then reached the statute of limitation. As a result of the second (and of course the first) instance decision, the politic lost his mandate as deputy of the National Council (upper house of the Slovenian parliament). Against this background, the parliamentary committee unanimously decided to halt the promotion of the applicant judge even before the NA could vote on it. The unelected judge therefore referred the case to the CC.

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

The CC dismissed his application. With regards to Article 3(2) of the Constitution (the principle of separation of powers), the CC held that concrete implementation of this principle is so different in each country that it is not possible to lay down a general rule on issues such as the regulation of the appointment of judges. The separation of powers allows very different systems of appointing judges, including supreme judges, since the manner of balancing the powers depends on the specific constitutional arrangement of each individual state that arises and lives in certain historical, cultural and social circumstances. The CC added that the decision of the NA is an act of political discretion and that the NA does not have to state reasons for its decision. The CC implicitly rejected the argument that it was contrary to the principle of judicial independence that the NA turned down the candidate due to his involvement in a politically sensitive case. It held that

the NA may debate on all the aspects it deems relevant.

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## Other

Dissenting judges Jadek Pensa and Sovdat rightly criticized the majority of the CC for failure to address the issue of political discretion of the DZ in the case of promotion of judges from the perspective of separation of powers and judicial independence, especially since the discretion does not originate from the Constitution, but has been “appropriated” by the DZ with the adoption of Article 21 (3) of the Judicial Service Act. The unfettered discretion of the NA to reject SC candidates due to their involvement in politically sensitive cases is arguably contrary to Article 19 of the TEU, as it entails indirect control over the judicial decisions, which is prohibited by the CJEU.

The applicant was once again turned down by the SC in 2021 along with another colleague, who adjudicated in a case concerning alleged pedophilia of a priest, that was later quashed before the SC. In 2020 a professor of criminal law, that criticized the decision of the CC in the Patria case (see template Up-879/14-35 Patria), was also turned down by the NA, but was eventually successful in his second attempt. Working version of the amendment of the JSA proposes that the power of the NA to elect supreme court judges would be transferred to the JC. This would be a very welcomed development as it would enhance judicial independence and prevent politicization of the SC.

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(Link to) full text

<https://www.us-rs.si/odlocitev/?q=U-I-225%2F16&df=&dt=&af=&at=&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=112647>

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## Author

**Mohor Fajdiga (UL)**

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History of the case: (please note the chronological order of the summarised/referred national judgments.)

1.U-I-225/16-15 of 6 December 2017

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