Slovenia, Administrative Court, I U 1478/2016-19, ordinary, 30 August 2017, ECLI:SI:UPRS:2017:I.U.1478.2016.19

Member State

Slovenia

Topic

Independence (removal of magistrates, legal remedies for individual judges against dismissal decisions), accountability (Councils of the judiciary)

Deciding Court Original Language

Upravno sodiš?e Republike Slovenije

Deciding Court English translation

Administrative Court of Republic of Slovenia

Registration N

I U 1478/2016-19

Date Decision

30 August 2017

ECLI (if available)

ECLI:SI:UPRS:2017:I.U.1478.2016.19

EU legal sources and CJEU jurisprudence

CJEU, C-175/11, H.I.D., 31 January 2013

ECtHR Jurisprudence

Vilho Eskelinen and Others v. Finland (app. no. 632335/00, Grand Chamber, 19 April 2007)

Oleksander Volkov v. Ukraine (app. no. 21722/11, 9 January 2013)

Baka v. Hungary (app. no. 20261/12, Grand Chamber, 23 June 2016)

G v. Finland (app. no. 33173/05, 27 January 2009)

Harabin v. Slovakia (app. no. 58688/11, 20 November 2012)

Oluji? v. Croatia (app. no. 22330/05, 5 February 2005)

Mitrinovski v. the Former Yugoslav Republic of Macedonia (app. no. 6899/12, 30 April 2015)

Parlov-Tkal?i? v. Croatia (app. no. 24810/06, 22 December 2009)

Henryk Urban and Ryszard Urban v. Poland (app. no. 23614/0830 November 2010

Maktouf and Damjanovi? v. BiH (app. nos. 2312/08 and 34179/08, Grand Chamber, 18 July 2013)

Paluda v. Slovakia, (app. no. 33392/12, 23 May 2017)

Saghatelyan v. Armenia, (app. no. 7984/06, 20 October 2015)

Poposki and Duma v. the Former Yugoslav Republic of Macedonia (app. nos. 69916/10 and 36531/11, 7 January 2016)

Jakšovski and Trifunovski v. The Former Yugoslav Republic of Macedonia, (app nos. 5681/09 and 58738/09, 7 January 2016)

Moiseyev v. Russia (app. no. 62936, 9 October 2008)

Agrokompleks v. Ukraine (app. no.23465/03, 6 October 2011)

Scordino v. Italy, (no.1) (app. no. 36813/97, 29 March 2006, Grand Chamber)

Hirschhorn v. Romania (app. no. 29294/02, 26 July 2007)

Hornsby v. Greece (app. no. 18357/91, 19 March 1997)

Kyrtatos v. Greece (app. no. 41666/98, 22 May 2003)
Immobiliare Saffi v. Italy (app. no. 22774/93, 28 July 1999)

Matheus c. France (app. no. 62740/00, 31 March 2005)

Sabin Popescu v. Romania (app. no. 48102/99, 2 March 2004)

Subject Matter

The Administrative Court (the AC) assessed, whether the Constitution and the ECHR demand the use of principle of proportionality in cases of removal from office on the basis of negative grade in the evaluation of judicial service, or does such requirement apply only to disciplinary procedures.

Legal issue(s)

The case primarily refers to independence and accountability of judges. The fundamental question of the case is whether a dismissal of a judge on the basis of incompetence could be considered in accordance with constitutional guarantee of judicial independence (the principle of irremovability of judges) and ECHR fair trail and private life standards if it is adopted without prior use of less intrusive means.

National Law Sources

Articles 2, 3(2), 8, 15, 23, 49(3), 125, 129, 132 of the Constitution

Articles 28, 29, 31, 32, 33, 34, 80, 81, 82 of Judicial Service Act (Official Gazette of RS, no. 94/07)

Constitutional Court, Decision Up-132/96 of 24 October 1996

Constitutional Court, Decision Up-134/95 of 14 March 1996

Constitutional Court, Decision Up-1096/06 of 13 December 2007

Constitutional Court, Decision Up-664/02 of 7 January 2003

Constitutional Court, Decision U-I-184/14 of 17 September 2014

Supreme Court, Order X Ips 270/2007 of 27 July 2010

Administrative Court, Judgment I U 1917/2006-13 of 21 December 2006

Administrative Court, Judgment I U 1103/2013 of 13 May 2015

Facts of the case

A circuit court judge was dismissed on the basis of a negative grade of judicial service after 28 years of working as a judge. He was found to fell short of minimal requirements concerning six out of nine criteria. However, according to previous examinations, which took place in 2003, 2007 and 2011, he fulfilled the requirements for promotion. He brought his case to the AC, which quashed the decision of the Judicial Council (JC), because it *inter alia* failed apply the principle of proportionality. The JC adopted a new decision once more confirming the negative grade, given by the Personnel Councils of High Court of Ljubljana and the Supreme Court. The JC held that one has to discern between termination of judicial function on the basis of negative grade of judicial service and dismissal as a disciplinary sanction, since the first is somewhat similar to termination of employment contract on the basis of incapability, where guilt plays no role, whereas the second is based on individual accountability (based on guilt) for concrete offences that can fall under the statute of limitation. Therefore, the gradualness is not necessary with respect to evaluation of judicial service. Moreover, the principle of proportionality is inapplicable in cases of evaluation of judicial service and has no legal basis in provisions of the Judicial Service Act (JSA). The applicant judge once again appealed to the AC.

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

The AC first held that in principle, international soft-law instruments recognize the possibility of termination of judicial office on the basis of a negative grade. However, such possibility is limited to "incapacity" "incompetence" "indolence" or "blatant incompetence", "incapability or unwillingness to perform judicial duties to a minimum acceptable standard". Further, these instruments primarily mention disciplinary sanctions as means for removal from office, and only to a lesser extent refer to evaluation of judicial service in this respect.

Second, the AC held that a removal from judicial office constitutes an interference with the right to equal access to employment, guaranteed under Article 49 (3) of the Constitution and not merely a way of realization of the said right, as it would in case of other employees. To support such holding, the AC invoked jurisprudence of the Constitutional Court, its own case-law, practice of the UN Human Rights Committee concerning Article 25c ICCPR, which recognizes that disputes related to termination of judicial function concern the right to equal access to jobs in the public sector, and practice of Inter-American court of Human Rights. The AC went on to explain that an interference, demanding a test of proportionality, (and not a way of realization, where the court uses only a test of reasonableness) is required in order to protect principles of judicial independence and irremovability of judges. Such stricter approach is merited since a removal, which does not take due account to the said principles, can have a chilling effect in the sense of Parlov-Tkal?i? v. Croatia, para. 94 and Oleksandr Volkov v. Ukraine, para. 205, or constitute undue pressure, as described in Opinion no. 3 of the Consultative Council of European judges (CCEJ), para. 51. The AC further strengthened its position by holding that international soft-law instruments recognize a strong connection between the evaluation of judicial service and judicial independence and that according to jurisprudence of the ECtHR and CJEU, conditions for removal from judicial office are relevant for determination, whether sufficient guarantees exist for judicial independence. The AC then invoked the current circumstances of decline of judicial independence in members states of CoE and EU, which prompted an approach that does not concentrate merely on judicial independence as an abstract principle, safeguarding the independence of the judiciary as a whole, but recognizes the existence of a subjective right of a judge to independent decision-making. In this respect, the AC referred to Baka v. Hungary and stressed that the ECtHR recognized an individual civil right of a judge not to be removed from office unlawfully (in violation of ECHR) and to have access to judicial protection of the said right. It even cited the concurring opinion of judge Sicilianos, where he argued that the rule of law is hardly imaginable without an obligation on the State to offer safeguards for the protection of judicial independence and, hence, without the corresponding right of judges themselves to independence (para 15). Against this astonishing argumentative force, the AC noted that the impugned decision of the JC does not have a single line concerning judicial independence.

Third, the AC turned more specifically to the principle of proportionality. It held that the European Charter on Statute of Judges and other soft-law instruments do not distinguish between disciplinary sanctions and evaluation of judicial service in the sense that the principle of proportionality would apply to one and not to the other. By citing Oleksandr Volkov, where the judge was dismissed on a basis of a special procedure of violation of judicial oath (and not

disciplinary procedure), and Baka, where the ECHR found a connection between the the judge's critical comments on the Hungarian judicial reforms and his early retirement, the AC extrapolated a rule, that the principle of proportionality applies irrespective of the kind of legal procedure leading to dismissal, whether it is a disciplinary sanction, evaluation of judicial service or other. The AC then relied two cases against FYRM, where the ECtHR did not invoke the principle of proportionality, since it found a violation of Article 6 on the basis of lack of impartiality. However, the ECtHR explicitly referred to Macedonian legislation that did not enable the council of judiciary to adopt a less intrusive measure in cases of professional misconduct, in contrast to disciplinary proceedings, for which other measures were available. The AC linked the above observation of the ECtHR in the cases against FYRM to Oleksandr Volkov's demand for a multilevel scale of possible measures (para. 173-187) and held that such requirement should also apply to evaluation of judicial service in the case at hand on the basis of Article 8 ECHR. To round up its argumentation, the AC held that even in absence of the described international standards, the JC should be familiar with the jurisprudence of the CC and AC, which confirms the application of principle of proportionality in cases of removal from judicial office on the basis of evaluation of judicial service. As a result, the AC found a violation of Articles 49 (3) 125, 129 and 132 of the Constitution as well as Article 8 ECHR.

The AC found further violations of the Constitution and ECHR since the JC failed to comply with a final judgment of the AC in this case. It recognized that this falls under the right to access to court guaranteed by Article 6 ECHR and referred the relevant jurisprudence of the ECtHR, according to which the this right would be rendered meaningless if the legal system of the member states would not safeguard the respect and execution of judicial decisions. The execution of a final judgment must be complete and precise, it should not be prevented, invalidated or unduly delayed, still less, the substance of the decision should not be undermined, since this contradicts the rule of law and Article 6 ECHR. From the point of view of rule of law, this requirement is especially important in cases, where the body failing to honor the judgment is not a court. As a result, the AC found a violation of principle of state governed by law, principle of separation of powers (Articles 2 and 3 (2) of the Constitution) and right to effective judicial protection (Article 23 of the Constitution and Article 6 ECHR).

Use of Judicial Interaction technique(s)

a. Consistent interpretation - interpretation consistent with the ECHR and the Constitution:

The AC recognized that JSA lacks explicit reference to the principle of proportionality and does not prescribe less intrusive measures in the case of negative grade of judicial service. According to the AC, one cannot invoke a simple analogy with the disciplinary regime and use the multilevel scale prescribed there, since this would be contrary to the will of the legislator, which apparently did not want a similar approach to be adopted in the case of evaluation of judicial service. However, the AC held that a constitutionally consistent interpretation prevails in cases of conflict with the presumed will of the legislator, logically following from the systematics of JSA, as long as such constitution-compliant interpretation does not go beyond the limits, clearly set by grammatical interpretation. The AC concluded that consistent interpretation is possible and held that the JC

could use the less intrusive measures available under the evaluation regime or disciplinary sanctions.

b. Comparative reasoning with international soft-law instruments

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

At the outset of its reasoning, the AC referred to different approaches to removal from judicial office, depending on the level of legal culture and democracy. It invoked the British Act of Settlement from 1701, which enables the judge to stay in office as long as they behave themselves (quamdiu se bene gesserint).

As mentioned above, the AC invoked the practice of the Inter-American Court of Human Rights.

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

As described above, the AC extensively relied on the jurisprudence of the ECtHR and used it as a basis for establishing the general principles applicable to the case at hand, especially that the principle of proportionality applies. The ECtHR case-law was also used to point to a consistent interpretation of the JSA and to conclude that a referral to the CC would not be merited. To further support its reasoning, that the principle of proportionality applies to the case at hand, the AC invoked the jurisprudence of the CC.

The AC held that the jurisprudence of the ECtHR confirms the existence of an individual civil right of a judge not to be removed from office unlawfully. Implicitly, the AC provided argumentative support for the removed judges to file a constitutional complaint to the CC (see fn. 13 of this template).

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

The interaction techniques used by the AC in this case allegedly pursued several interconnected aims: to solve a conflict of judicial interpretation by imposing a constitutionally-compliant interpretation of the JSA to the JC; at the same time, the AC filled the legislative gaps and battled an ongoing institutional conflict with the JC. The latter seems the most apparent form the part of the reasoning, where the AC provides extensive description of supranational standards, based on ECHR, ICCPR, soft-law instruments etc. which all emphasize judicial independence, and concluded that the decision of the JC did not dedicate a single sentence to it.

Impact on Legislation / Policy

For the moment, the case has not impacted the legislation, policy or jurisprudence, since the

Supreme Court sided with the JC is a subsequent decision in this set of proceedings (see Judgment U 1/2018-6 of 7 May 2018 described bellow)

Connected national caselaw / templates

Administrative Court, Judgment I U 1103/2013 of 13 May 2015

(Link to) full text

http://sodisce.si/usrs/odlocitve/2015081111411509/

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

1. Personnel Council of High Court of Ljubljana, SuZ 141/2012 of 12 March 2015 - not published
2. Personel Council of Supreme Court, SuZ-ps 38/2015 of 8 July 2015 - not published
3. Judicial Council, Decision no. 2/15-219 of 5 November 2015 - not published
4. Administrative Court, Judgment I U 1718/2015 of 6 July 2016
5. Judicial Council, Decision no. 2/16-202 of 1 September 2016 - not published
6. Administrative Court, Judgment I U 1478/2016-19 of 30 August 2017
7. Supreme Court, Order X Ips 328/2017 of 22 November 2017
8. Judicial Council, Decision no. ? - not published

9. Supreme Court, Judgment U 1/2018-6 of 7 May 2018