Slovenia, Constitutional Court, Up-455/15, constitutional, 24 January 2019, ECLI:SI:USRS:2019:Up.455.15

Member State

Slovenia

Topic

Trust (limits in the dissatisfaction towards the judiciary, public confidence and authority of the judiciary)

Freedom of expression of attorneys

Impartiality (personal bias towards the party in the proceedings)

Independence (professional ethics of the bar)

Deciding Court Original Language

Ustavno sodiš?e Republike Slovenije

Deciding Court English translation

Constitutional Court of the Republic of Slovenia

Registration N

Up-455/15

Date Decision

24 January 2019

ECLI (if available)

ECLI:SI:USRS:2019:Up.455.15

ECtHR Jurisprudence

Oberschlick v. Austria, [GC] app. no. 11662/85, 23 May 1991

Animal Defenders International v. The United Kingdom, [GC] app. no. 48876/08, 22 April 2013, para. 100.

Uj v. Hunagary, app. no. 23954/10, 19 July 2011

Ska?ka v. Poland, app. no. 43425/98, 27 May 2003

Mamère v. France, app. no. 12697/03, 7 November 2006

Nikula v. Finland, app. no. 31611/96, 21 June 2002

Morice v. France, [GC] app. no. 29369/10, 23 April 2015

July and SARL Libération v. France, app. no. 20893/03, 14 February 2008

Kyprianou v. Cyprus, app. no. 73797/01, 15 December 2005

?eferin v. Slovenia, app. no. 40975/08, 16 January 2018

Radobuljac v. Croatia, app. no. 51000/11, 28 June 2016

Subject Matter

The CC interpreted the right to freedom of expression of an attorney, who was fined with 1.500 EUR for making insulting remarks against a local court judge.

Legal issue(s)

The case is related to trust (public confidence in the judiciary) and to the limits of freedom of expression of attorneys.

The CC reviewed, whether the opinion of the Supreme Court (the SC) was contrary to Article 39(1) of the Constitution (freedom of expression). The SC ruled that the principle of proportionality does not apply to the case at hand, since insulting remarks in court are not acceptable in any case, with any of the participants, and especially not with the court, and as a result confirmed the imposed fine.

National Law Sources

Article 15(5), 39(1) of the Constitution

Article 78 of the Criminal Procedure Act

Constitutional Court, Decision Up-407/14 of 14 December 2016

Constitutional Court, Decision Up-530/14 of 2 February 2017

Constitutional Court, Decision Up-614/15 of 21 May 2018

Constitutional Court, Decision Up-1128/12 of 14 May 2015

Facts of the case

An attorney who acted in criminal proceedings in the capacity of an authorized representative of the injured party acting as a subsidiary prosecutor appealed against the acquittal decision of the Local Court in Nova Gorica. In the appeal against the judgement, the applicant wrote, inter alia, that “the judge should already have known […]; things that he should know, he doesn’t know; he was not capable of realizing and understanding [something] correctly; he is just absurd in his reasoning, unprofessional and superficial; his statements are a shame to the court” and that “the mentioned judge [...] has such an obvious tendency towards accused individuals who ‘represent something in public life’ as well as to the accused in these concrete proceedings that it makes it distasteful and unhygienic (and not only contrary to the law and the Constitution) for him to judge in the case at issue.” Due to these statements in the appeal, the High Court of Koper imposed on the applicant a fine of EUR 1,500.00 for contempt of court.

The applicant appealed to the Supreme Court. There, her appeal was rejected. The Supreme Court opined that the principle of proportionality does not apply to the case at hand, since insulting remarks in court are not acceptable in any case, with any of the participants, and especially not with the court, and warnings with regards to partial decision-making can be expressed in an objective and inoffensive manner. It added that an insulting manner of communication could neither be tolerated, nor could it be weighed on the basis of the principle of proportionality with any constitutional or procedurally guaranteed right of individual participants. The wording of Article 78 of the Criminal Procedure Act is also written in such a manner that it obliges the court to punish a person who has committed such contempt. The SC thus confirmed the imposition of a fine. The applicant, who disagreed with the SC, filed a constitutional complaint to the CC.

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

General principles

At the outset of its reasoning, the CC established the general principles, which later served as guidance for the examination of the concrete case. It found that Article 10(2) ECHR explicitly provides grounds for limitations of freedom of expression and that the case at hand concerns the last, namely “maintaining the authority and impartiality of the judiciary”. It continued by citing the famous Handyside formula: “freedom of expression 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.” It further noted that limitations should be interpreted narrowly and convincingly justified. It recognized that according to the case law of the ECtHR, the protection of the right to freedom of expression does not cover insulting statements that constitute wanton, arbitrary denigration, such as statements whose sole purpose is to insult or shame. However, the limits of criticism under the jurisprudence of the ECtHR are broader, if the statements target civil servants acting in an official capacity.

The CC later turned to the ECtHR jurisprudence concerning the limitations of the freedom of expression of lawyers in order to protect the authority and impartiality of the judiciary. It drew attention to the special role of the judiciary, which, as a guarantor of justice, a fundamental value in a state governed by the rule of law, must largely enjoy the public confidence in order to be capable of fulfilling its role. It is therefore essential that courts protect themselves against gross and manifestly unfounded attacks (where there is therefore a lack of link between attacks and the conduct of the person to whom the attacks relate), especially as judges who are subject to criticism are limited in their ability to respond. However, the functioning of the judiciary is a matter of public importance, so the ECtHR emphasizes that the limits of acceptable criticism of judges in the performance of their duties are wider than the limits of acceptable criticism of ordinary citizens. Thus, under Article 10 of the ECHR, sharp criticism of a judge's work is also protected if it is not personally offensive and does not constitute destructive and fundamentally unjustified attacks on

judges. The CC concluded that limitation of attorney's freedom by imposing a fine, even if it is mild, to protect the authority of the courts is only allowed in exceptional circumstances, due to the chilling effect that such fine could have on the freedom of expression of attorneys and the right to fair trail from Article 6 ECHR. Consequently, according to the ECtHR, it is allowed to criticize the manner in which the judge is conducting the procedure or the judge's actions in a concrete case. Criticism, which is expressed in a courtroom or in a judicial remedy and thus entails internal communication between the attorney and the court, enjoys higher protection as criticism, expressed, for instance in the media (in the public eye). Not only the content, but also the context in which the statements were made and their form are important.

Application of the above described principles to the concrete case

The CC first referred to the threefold test, established under its jurisprudence, which demands the lower courts first to weigh the freedom of expression on the one hand against the public interest of ensuring public confidence in the judiciary, second to take into consideration the relevant circumstances and standards enshrined in the jurisprudence of the CC and the ECtHR and third to strike an adequate balance between the competing values.

The CC then turned to the opinion of the SC, outlined in facts of the case. It highlighted that courts have to accept critical assessments of their work that are admissible from the point of view of freedom of expression. Such admissibility has to be assessed not only in accordance with Article 78 of the Criminal Procedure Act, but also with the criteria formed by the ECtHR and the CC. Reference to exigence of ethics from Article 18 of Code of Professional Ethics of Attorneys, which prescribes that attorneys must protect the reputation of the courts in their work and that it is their duty to strengthen public confidence in the work of the courts, is therefore applicable only in so far as it is consistent with Article 39(1) of the Constitution and Article 10 ECHR. In the assessment of the CC, punishing an attorney for contempt of court necessarily also presupposes an assessment by a court of the necessity of imposing a fine in a democratic society in order to protect the authority and impartiality of the judiciary. A subjective assessment that the remarks of an attorney are insulting and that he or she could have expressed the criticism in an appeal in a more appropriate manner thus does not suffice to impose a fine; in order to impose a fine it is decisive to assess that in the circumstances of the case punishment is necessary to protect the authority and impartiality of the judiciary. Such assessment thus points to the importance of protecting the authority and impartiality of the judiciary in relation to the importance of protecting the right to freedom of expression of an attorney, and in this respect all circumstances of the case also need to be taken into account. In the case at issue, these were the following: a) the position of the complainant, who defended the interests of her client in the criminal proceedings in her capacity as an attorney, b) the fact that the complainant expressed the criticism in an appeal, thus in a legal remedy, c) the context in which the criticism was expressed and the form of the expressed criticism, and (d) the severity of the imposed fine and the potential chilling effect of the imposed fine could entail.

The CC also underlined that despite the text of the first paragraph of Article 78 of the Criminal

Procedure Act is written in affirmative terms, this does not entail that a court does not have to take into account Article 10 of the ECHR, Article 39 of the Constitution, and thus also the principle of proportionality. Quite the contrary. Since, in accordance with the established case-law of the CC and the ECtHR, freedom of expression also protects expressions that shock, offend, or disturb if their sole intent is not to insult or to shame, such weighing is necessary prerequisite for imposition of a fine. As the challenged position of the SC did not take this into account, it violated the right to freedom of expression from Article 39 of the Constitution. As a result, the CC abrogated the order of the SC and remanded the case thereto for new adjudication.

Use of Judicial Interaction technique(s)

Consistent interpretation, proportionality, comparative reasoning with case-law of the ECtHR

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

The whole case revolves around the interpretation of the SC, which was in the end found to be contrary to Article 39(1) of the Constitution and Artcile 10 ECHR.

The CC rejected the position adopted by the SC and the High Court of Koper, who ascribed important role to a provision of professional ethics of the bar, which prescribed that attorneys must protect the reputation of the courts in their work and that it is their duty to strengthen public confidence in the work of the courts. The CC held that ethical norms are applicable only in so far as they are consistent with Article 39 of the Constitution and Article 10 ECHR.

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

The CC extensively referred to the jurisprudence of the ECtHR, which provided the framework and fundamental standard for the examination of the alleged violation of freedom of expression.

It is interesting to compare the approach taken in this case to the one, adopted in Decision Up-309/05-25, which was later found to be contrary to Article 10 ECHR in ?eferin v. Slovenia. There, the CC relied on the instrumental nature of the freedom of expression and the specific context of judicial proceedings, where the attorney acts in a formalized procedure and is bound by professional ethics, to limit the scope of freedom of expression. It also implicitly upheld the position of the High Court, which opined that the applicant could have expressed criticism towards the expert witnesses in countless different (not insulting) ways. The focus was therefore on the attorney and evaluation of his behaviour. In the case at hand, the logic is the inverse: the question is not whether the attorney could express his/her criticism in a way, that is not insulting, but ratherif the protection of the public confidence and authority of the courts outweighs the freedom of expression of the attorney. In other words, the question is, whether the courts can “survive” with insulting remarks of this kind or not. The different approach is clearly a consequence of the ECtHR and is still not accepted among legal professions at large, especially the judges.

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

The CC referred to the ECtHR case-law in order to adopt an interpretation of Article 78 of the Criminal Procedure Act, consistent with the ECHR and the Constitution, as well as to refute the materially wrong interpretation of the SC.

Connected national caselaw / templates

Constitutional Court, Decision Up-309/05-25 of 15 May 2008; ?eferin v. Slovenia

Constitutional Court, Decision U-I-145/03 of 23 June 2005; Constitutional Court, Decision Up-150/03 of 12 October 2005; Pe?nik v. Slovenia, app. no. 44901/05, 27 September 2012

Supreme Court, Order II Up 1/2019/9 of 22 January 2020

Other

The approach taken by the CC in the case at hand is not yet settled in the Slovene courts. A recent SC case, Order II Up 1/2019/9 of 22 January 2020, provides an example of a different approach, leaning towards protection of reputation of the court at the expense of freedom of expression.

In this case, a notary, who acted as a legal representative of the claimant in the administrative

dispute proceedings, wrote an insulting extraordinary appeal to the SC. The SC fined him for contempt of court on the basis of Article 109 of the Civil Contentious Procedure Act (the CCPA). The appeal was first dismissed by the SC. However, the applicant referred the case to the CC, which found a violation of Article 25 of the Constitution (the right to appeal) in Decision Up-593/16-14 of 7 February 2019. The SC was thus forced to hear the appeal on the merits. It upheld the imposition of the fine. The SC extensively copy-pasted the general principles from Up-455/15 (this case). Then it turned to the specific circumstances of the case. It distinguished the insinuations of corruption and liability to corruption of the deciding judges from the rest of the statements. The latter were found to be permitted, whereas the former were held to be unacceptable. The SC found that these allegations did not serve in any way to criticize the judgment, but were intended solely to insult or embarrass the panel and judges. According to the SC, they could not be defined as harsh criticism of the work of judges, but were personally offensive, as they actually constituted a reproach of committing a crime. The SC held that the position of the ECtHR in Radobuljac v. Croatia, paras. 62 and 66, where the ECtHR held that criticism, which is expressed in a courtroom or in a judicial remedy and thus entails internal communication between the attorney and the court, enjoys higher protection, could not be taken into account. The SC continued: “Quite the opposite. The statements in the extraordinary appeal (or other written application) must be well thought out, aimed at criticizing the contested decision and not intended for personal reckoning with the author of the contested act. It may be different at the public hearing, where a party or his or her attorney may be challenged by statements of the opposing party, witnesses, experts or judges, and therefore react emotionally and state something what may be defined as an insult. Therefore, if the legal representative insults the court or judges in his written submission, this only indicates that such allegations are deliberate and, as in the present case, their sole purpose is embarrassing the judges and the panel.” The CC concluded that a notary, a person of public trust and public authority, should especially be aware of these limitations.

This position of the SC is controversial since it explicitly goes against the ECtHR’s and CC’s logic of balancing the harm to the public confidence and authority of the courts against the freedom of expression. The SC’s approach, namely that when somebody insults the court or judges in a written submission, this shows that the author’s remarks were deliberately insulting and thus not protected, whereas scope of freedom of expression could be wider with regards to statements made at public hearing, seems entrenched in the approach, which revolves around the question, whether the criticism could be expressed in an inoffensive manner. This was estimated as wrong in ?eferin v. Slovenia. The SC therefore seems to emphasize (the wrongfulness of) the statements themselves, whereas the ECtHR and the CC concentrate on the impact these statements could have on the public confidence and authority of the courts. Such impact was obviously minimal, since the insult appeared in a written legal remedy, which is not publicly available, and could only be seen by the parties and the judges. This begs the question: is the SC in fact protecting “the judicial pride” rather than the public confidence and authority of the courts?

(Link to) full text

Full text (Slovene): http://odlocitve.us-rs.si/sl/odlocitev/US31769?q=Up-455%2F15

Summary (English): http://odlocitve.us-rs.si/en/odlocitev/AN03986?q=Up-455%2F15

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

1. 1.High Court of Koper, Order VSK II Kp 8696/2014 of 23 October 2014

2. 2.Supreme Court, Order I Kp 8696/2014 of 8 January 2015

3. 3.Constitutional Court, Decision Up-455/15 of 24 January 2019

4. 4.Supreme Court, Order I Kp 8696/2014 of 21 March 2019