

**Slovenia, Supreme Court, U 3/2021-33, supreme, 7 June 2021,
ECLI:SI:VSR:2021:U.3.2021.33**

Member State

 Slovenia

Topic

Independence:

- Tenure, discipline, transfers and removal of magistrates

Trust:

- Freedom of Expression of judges
- Relationships with the media
- Limits in the dissatisfaction towards the Judiciary
- Integrity and diligence

Rule of law:

- Fair Trial/Access to Justice

Accountability:

- Disciplinary, civil and criminal liability of magistrates (judges and prosecutors)

Ensuring responsibility and accountability of magistrates without jeopardising independence, impartiality and rule of law standards (disciplinary, civil, and criminal liability); internal pressures to judicial independence, impartiality and accountability.

Deciding Court Original Language

Vrhovno sodišče Republike Slovenije, podpredsednik Vrhovnega sodišča

Deciding Court English translation

Supreme Court of the Republic of Slovenia, Vice President of the Supreme Court

Registration N

SuZ 53/2020 – Vice president of the SC

U 3/2021-33 – Supreme Court

Date Decision

11 August 2020, 7 June 2021

ECLI (if available)

Judgment of the Supreme Court: ECLI:SI:VSRS:2021:U.3.2021.33

EU legal sources and CJEU jurisprudence

Article 2 and 19 TEU; Article 47 CFREU (none mentioned in the decision)

ECtHR Jurisprudence

Not mentioned in the decision.

Subject Matter

Temporary suspension from judicial office based on a disciplinary procedure

Legal issue(s)

Independence and accountability of judges:

Does the Constitution, the ECHR and the CFREU allow the president of the supreme court to temporarily suspend a judge, who:

- publicly expressed his “disgust” to the judicial elites and informal networks, allegedly controlling the Slovene judiciary in radically inappropriate terms;
- stated during public pronouncement of the judgement in a case of murder that the accused had enjoyed fair trial only because he was willing to ruin his judicial career and explained that he was pressured to condemn him from the moment the case was assigned to him and that these pressures were consequences of decisions coming from the top of the judiciary (the Supreme Court), headquarters of the state prosecution service and the judicial council;
- in response to a blog commentary, publicly ridiculed and offended a doctor of philosophy who regularly comments political and societal issues on his blog;
- after being asked whether an ordinary citizen could expect fair trial at the District court of Ljubljana, stated on TV news, that one should do everything to avoid the case being heard by the

said court.

What are the legal standards concerning freedom of expression that should be applied in such a case?

National Law Sources

Articles 81, 95, 97 of the Judicial Service Act

Article 45 (4) of the Judicial Council Act

Facts of the case

One of the most notorious criminal case in the history of Slovenia was quashed by the SC. In the new trial, the president of the senate, when he publicly pronounced the judgment of acquittal, made an unusual supplement to the prescribed procedure. He stated that the accused had enjoyed fair trial only because he was willing to ruin his judicial career and explained that he was pressured to condemn him from the moment the case was assigned to him and that these pressures were consequences of decisions coming from the top of the judiciary (the Supreme Court), headquarters of the state prosecution service and the judicial council. His statements enjoyed large media coverage and a debate on Slovene judiciary erupted. In the following months, he gave interviews, appeared on TV news etc. where he insisted on his claims and often used inappropriate language.

Disciplinary prosecutor filled three disciplinary proposals against the judge in late 2019 and early 2020. In August 2020, the Vice president of the SC decided to suspend him on the basis of the power enshrined in the president of the SC in the Judicial Council Act (the JCA). The suspension was upheld by both the Judicial Council and the Supreme Court.

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

Under Article 45 (4) of JCA, the president of the SC has discretion to suspend a judge based on the character and gravity of the alleged disciplinary violation. Apart from Article 45 (4) of JCA, there is another legal basis for suspension: Article 95 (1-2) of the Judicial Service Act (the JSA) demands the president of the SC to suspend a judge, when criminal procedure is initiated for allegedly committing a criminal offence with the abuse of judicial function and empowers the president of the SC to suspend the judge, if the criminal procedure is initiated for a criminal offence, which is prosecuted ex officio and for which a sentence of imprisonment of more than two years may be imposed.

Decision of the Vice-President of the Supreme Court:

According to the Vice president, Article 45(4) constitutes a separate legal basis, which enables the suspension in cases of disciplinary offences that do not constitute a criminal offence when the president of the SC deems necessary and proportionate to ensure undisturbed work of the court and the judiciary as a whole. In the case at hand, where the accused judge committed several serious disciplinary offences, that could, even taken individually, lead to the supreme sanction, i.e. removal from office, and taking into account the judge's persistence, the number of alleged disciplinary offences, and the public nature of alleged offences, the Vice president was convinced that the temporary suspension should be imposed.

Judgment of the Supreme Court:

The Supreme Court supplemented the reasoning of its Vice president. It held that suspension jeopardises the judicial independence and that as a result, an appropriate balance between judicial independence on the one hand and the need to protect the authority and public trust in the judiciary on the other hand must be struck, taking into account the principle of proportionality (para. 34-35). The SC found that this was adequately done by the Judicial Council. With regards to freedom of expression, the applicant invoked *Kudeshkina v Russia* and *Tuleya v. Poland* (pending). The Supreme Court in principle agreed with the applicant that a judge who publicly speaks about internal pressures and warns against inadequacies in conducting activities of the courts, cannot be sanctioned only on the basis of such allegations. It however found that the disciplinary proceedings and the suspension had not been granted due to his public warnings and revelations, but primarily as a result of the entirely unacceptable manner of how they were expressed. He was reproached several relentless and direct verbal attacks on individual (named) judges and prosecutors, as well as important institutions of the judicial system and other individuals, violation of the judicial function and a refusal to comply with a judicial duty. This cannot be justified by the allegations that such warnings justify the use of stronger words, as the applicant crossed the limits of permitted speech, since judges are bound by a duty of discretion and restraint, with the aim to safeguard the authority of the judiciary and public trust.

Other

Decision of the Vice-President of the Supreme Court:

The decision itself is poorly reasoned and does not mention any supranational instruments or refer to the Constitution, ECHR or EU law. It turns a blind eye to the relevant questions of constitutional nature: judicial independence, freedom of expression of judges, right to fair trial etc. Therefore, it is problematic from the point of view of *Cimperšek v. Slovenia*, paras. 66 - 69, where the ECtHR found a violation of Article 10 precisely because the national authorities failed to balance the competing interests (namely the protection of authority of the court and the right to freedom of expression) and explain why the interference with Article 10 was necessary in a democratic society.

In my opinion, the decision itself is correct, but could turn out to be a heavy blow for internal independence of judges, since the discretion of the president of the SC was interpreted very broadly. According to the decision, the president of the SC can suspend a judge in case of serious disciplinary offence if he/she deems it necessary to ensure the undisturbed work of a court and the judiciary as a whole. According to Article 81(3) of the JSA, 16 out of 27 disciplinary offences, enlisted in Article 81(2) are serious. Among the serious, there are minor offences such as poor efficiency (alinea 8, 23, 24). In addition, the wording of the disciplinary offences is broad and can cover almost any irregularity (see for instance alinea 2, which constitutes a serious offence: failure to fulfil or unjustified refusal to perform the duties of a judge). Bearing in mind that according to Article 45 (2) of the JCA, the president of the SC has the right to initiate a disciplinary procedure, the president of the SC could (at least according to the arguments from this case) suspend any judge for practically any flaw in his work. However, the judicial council has already proposed amendments concerning disciplinary liability of judges, where it advocated for a more concise definition of disciplinary offences – see <http://www.sodni-svet.si/doc/disciplinski-organi/lzhodi%C5%A1%C4%8Da%20sprememb%20in%20dopolnitev%20zakonskih%20dolo%C4%8Db,%9>

In response of this decision, Jan Zobec (SC judge and a former judge of the CC) argued that Article 45 (2) JCA should have been interpreted in the light of Article 95 JSA and that the president of the SC could suspend a judge only in cases of criminal offence, committed with the abuse of judicial function or in case of criminal offence, which is prosecuted ex officio and for which a sentence of imprisonment of more than two years may be imposed.

I partly agree with Zobec in the sense that the president of the SC should use his/her discretion only in exceptional cases. However, I do not see constitutional or other obstacles for suspension in the case at hand, since I consider it exceptional. Faced with serious accusations aimed at the Supreme court, the JC, the judicial elites and the District court of Ljubljana, the president could not pretend nothing happened. He had to react to protect the right to fair trial of the parties. In case of no suspension, the parties' doubts about the judge's capacity to discern and properly adjudicate in their case would seem justified. On the other hand, if the president would deem the judge's remarks to be true or justified, he would have to act against all the top judicial functionaries. But this was obviously not an option, since this would jeopardize the functioning of the judicial system and entail an even more serious interference with the right to fair trial with many unpredictable consequences.

Judgment of the Supreme Court:

Even though the Supreme Court managed to strengthen a relatively weak reasoning of its Vice-president and that the decision itself is correct in my opinion, several problematic points in the reasoning should not be disregarded, due to the fundamental importance of this case for potential future suspensions:

- The applicant maintained that the suspension decision was issued only about 7 months after the last of the three proposals for the imposition of a disciplinary sanction was filed. The Judicial council did not reply to this argument. The Supreme Court shortly explained that its Vice president was notified of the fact that the disciplinary proceeding was initiated only a few days before he issued his decision to suspend the applicant. According to the SC, there was no legal basis for suspension before. This explanation is controversial, since Article 45 (4) of the JCA clearly affords legal basis to suspend a judge as soon as a proposal for the imposition of a disciplinary sanction is filed. Further, if the aim of the suspension is to protect the trust of the society in the judiciary and its reputation by temporary excluding a potentially "problematic" judge, such a late suspension appears to delegitimize the suspension itself. If nothing was done for 7 months and the judge could continue to hear cases, how can a suspension be regarded as a response to the pressing social need in the sense of the ECtHR jurisprudence? Can such a late suspension even attain the legitimate aim of defending the authority of the judiciary? These are very relevant questions that remained unanswered.
- The Supreme Court was unconvincing when it diminished the importance of the jurisprudence of the ECtHR for the case at hand. It held that the case law of the Strasbourg court deals with cases, where the measures concerned had a lasting impact on the applicants' position, whereas this was not the case in the present case. It seems that for the SC, the ECtHR case law concerns different scenarios and is thus inapplicable. It added that, in none of the cases, the ECtHR had hold that a suspension cannot be issued against a judge that warns against internal pressures and that such warnings can never be regarded as unacceptable. These arguments cannot be rejected as false, but they do not in any way explain, why the ECtHR case law invoked and the standards stemming therefrom, do not have an important role to play in the case at hand.

- The applicant also alleged that his right to be heard from Article 41 of CFREU was violated, since he was heard neither before the Vice President nor before the Judicial Council. The SC held that this right is not absolute, that in any case, he was heard before the SC and that the facts of the case are undisputed. This reasoning is problematic, since the suspension was effectuated before the applicant was heard and it is questionable, whether giving the opportunity to be heard months after the judge is suspended is in accordance with Article 6 ECHR, which was applicable (according to Vilho Eskelinen v Finland). Moreover, the fact that the facts of the case were undisputed has no bearing on the right to be heard. It appears that the Supreme Court fails to differentiate between the right to be heard and the hearing of a party to the proceedings.
- Throughout the proceedings, the applicant maintained that the authorities have to send preliminary questions to the CJEU. He argued that the Judicial Council violated his right to fair trial when he failed to address preliminary questions to the CJEU. The SC opined that the JC is not a court or a tribunal within the meaning of Article 267, as this possibility (duty) is only applicable to courts. This is a rash explanation, as the CJEU recognizes as courts or tribunals for the purpose of Article 267 various national bodies, even if they are not considered “courts” under the national law. Hence, the SC failed to explain why, under the standards developed by the CJEU, the JC cannot be considered a court or tribunal for the purposed of Article 267.
- The SC also rejected the applicant’s argument, that the SC should request a preliminary ruling from the CJEU. The applicant invoked CJEU case C-831/18P where the court decided that before immunity of the EU official is lifted, the person concerned has the right to be heard, except if another legitimate interest would overweigh the individual’s right. The SC fails to provide a convincing explanation, it merely repeats the above described arguments (right to be heard is not absolute, the applicant was heard before the SC).
- In *Baka v Hungary*, the ECtHR held that any interference with the freedom of expression of judges calls for close scrutiny: the Slovene authorities appear to have fallen short this standard in the present case. According to the doctrine of subsidiarity, the national authorities are first called to ensure HR protection and under the ECtHR jurisprudence, they are required to take into account the relevant factors, that were described for example in *Baka v Hungary* (paras.162-167). It is questionable, whether the SC carried out a thorough enough analysis of the interests at stake. Therefore, the decision of the SC is still problematic from the point of view of *Cimperšek v. Slovenia*, paras. 66 – 69.
- Another relevant aspect of the case was not mentioned: the principle of irremovability of judges. We do not know the reason why, perhaps the applicant did not invoke it or because the SC deems the principle of irremovability applicable only in cases concerning dismissal and not suspension.

To conclude, the SC seems to have failed to recognize the importance of the implications of the case at hand for the internal independence of Slovene judges even though, it offered several passages, that in principle,

Other accountability measures taken against the judge at hand:

- Ethics and Integrity Commission of the Judicial Council, Decision Su Ek 34/2019-6 of 21 January 2020: the Commission decided that the judge, who in response to a blog commentary, publicly ridiculed and offended a doctor of philosophy who regularly comments political and societal issues on his blog, violated principle X (reputation) of the Code of Judicial Ethics.
- Ethics and Integrity Commission of the Judicial Council, Decision Su Ek of 3 September 2019: the Commission decided that the judge, who stated during public pronouncement of the judgement in a case of murder that the accused had enjoyed fair trial only because he was willing to ruin his judicial career and explained that he was pressured to condemn him from the moment the case was assigned to him and that these pressures were consequences of decisions coming from the top of the judiciary (the Supreme Court), headquarters of the state prosecution service and the judicial council, violated principles IX (relationship) and X (reputation) of the Code of Ethics
- In June 2021, the Personnel Council of the Higher court of Ljubljana issued a negative assessment of the judicial service, since the judge was considered to be “personally inappropriate” for judicial function as a result of the above described actions, that led to the disciplinary proceedings. A negative grade leads to dismissal of a judge.
- In January 2021, his immunity was lifted by the parliament in almost unanimous vote. He is being prosecuted for crimes of slander and insult.
- Disciplinary proceedings were discontinued as the judge decided to end his judicial career.

[\(Link to\) full text](#)

First instance disciplinary decisions are not publicly available. However, the decision was sent to the media by the judge, and can be found on: <https://www.demokracija.si/fokus/podpredsednik-vrhovnega-sodisca-dordevic-suspendiral-sodnika-radonjica-radonjic-vse-to-je-posledica-sojenja-v-zadevi-novic-ki-ni-potekalo-po-njihovih-zeljah.html>

Decision of the Judicial Council is not publicly available.

Decision of the Supreme Court:

[http://www.sodnapraksa.si/?q=id:2015081111449021&database\[SOVS\]=SOVS&_submit=i%C5%A1%C4](http://www.sodnapraksa.si/?q=id:2015081111449021&database[SOVS]=SOVS&_submit=i%C5%A1%C4)

Author

Mohor Fajdiga, UL

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

1. Vice President of the Supreme Court, Decision SuZ 53/2020 of 11 August 2020
 2. Judicial Council, Su 293/202-5, 17 September 2020
 3. Supreme Court, judgment U 3/2021-33, 7 June 2021
-