

**Slovenia, Supreme Court, U 7/2019-8, supreme, 16 December 2019,
ECLI:SI:VSRs:2019:U.7.2019.8**

Member State

 Slovenia

Topic

Impartiality of the members of councils of judiciary

Independence (promotion of magistrates - right to adversarial trial)

Trust (judicial transparency)

Rule of law (prohibition of arbitrariness, non discrimination and equality before the law)

Deciding Court Original Language

Vrhovno sodišče Republike Slovenije

Deciding Court English translation

Supreme Court of the Republic of Slovenia

Registration N

U 7/2019-8

Date Decision

16 December 2019

ECLI (if available)

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EU legal sources and CJEU jurisprudence

Civil Service Tribunal (now General Court of the EU) (the CST) *Adriana Dragoman v. Commission of the European Communities*, F 16/07, 30 April 2008, para. 44.

ECtHR Jurisprudence

Steck-Risch and Others v. Liechtenstein, app. no. 63151/00, 19 May 2005

Oluji? v. Croatia, app. no. 22330/05, 5 February 2009

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

Pescador v. Spain, app. no. 62453/00, 17 June 2003

Micaleff v. Malta, app. no. 17056/06 [GC], 15 October 2009

Mežnari? v Croatia, app. no. 71615/01, 15 July 2005

Colak and Tsakiridis v. Germany, app. nos. 77144/01 and 35493/05, 5 March 2009

Westlund v. Iceland, app. no. 42628/04, 6 December 2007

Gaspari v. Slovenia, app. no. 21055/03, 21 July 2009

Andrejeva v. Latvia, app. no. 55707/00, 18 February 2009

Fortum Corporation v. Finland, app. no. 32559/96, 15 July 2003

Subject Matter

The SC interpreted the principle of impartiality and the right to adversarial trial in a case concerning a recruitment procedure for a high court judge, where a candidate, otherwise working as state attorney, appealed against the decision of the Judicial Council (the JC), which selected a local court judge.

Legal issue(s)

The SC first had to determine whether the acquaintance between one of the members of Judicial Council and the selected candidate raises such doubts regarding impartiality, that exclusion of that member is required. Second, the SC was faced with the question, whether the right to adversarial trial (Article 22 of the Constitution and Article 6 ECHR) requires the JC to serve (or at least show) the final opinion of the president of the court to all the candidates, even though they were previously sent the first reasoned opinions of the president of the court, but not his final opinion. There was no indication that the final opinion actually (formally) impacted the final decision of the JC, however it was taken into account when the JC made the first shortlist of candidates, which included the applicant.

National Law Sources

Article 16, 18, 28 of the Judicial Service Act

Article 27 of the Administrative Dispute Act

Articles 29 and 36 of the Judicial Council Act

Articles 9, 35, 36 and 237 of the General Administrative Procedure Act

Article 22 of the Constitution

Supreme Court, Order Cp 12/2013 of 19 September 2013

Supreme Court, Order I Kr 39962/2011 of 17 December 2015

Constitutional Court, Decision Up-217/15 of 7 July 2016

Constitutional Court, Decision Up-1094/18 of 21 February 2019

Constitutional Court, Decision Up-679/06, U-I 20/07 of 10 October 2007

Constitutional Court, Decision Up-671/04 of 5 May 2006

Constitutional Court, Decision Up- 498/08 of 15 April 2008

Constitutional Court, Decision Up-39/95 16 January 1997

Constitutional Court, Decision Up-271/07 of 3 July 2008

Constitutional Court, Decision Up-1378/06 of 20 May 2008

Facts of the case

A candidate was not successful in applying for the post of a high court judge. When the JC notified her that another candidate was selected, she also send a transcript of oral examination of candidates. She noticed that one of the members of the JC called the chosen candidate by his first name. She appealed to the SC, claiming that the JC was not impartial due to personal acquaintance of one of its members with the selected candidate. The member of the JC replied that he always calls by the name all the candidates he personally knows as judicial colleagues or co-workers and that he knew the elected candidate from the educational events, which he led and those led by the candidate. He also knew the candidate from first instance judgments that he reviewed as a high court judge at the High Court of Ljubljana. This was confirmed by the candidate and not opposed by the applicant.

Further, the applicant claimed a violation of her right to adversarial trial (Article 22 of the Constitution and Article 6 ECHR), because she did not have access to the final opinion of the president of the High court of Ljubljana, which was favourable to the elected candidate, even

though the opinion arguably had a direct impact on the decision of the JC.

Finally, she alleged that the decision of the JC was arbitrary. She claimed to have been a victim of discrimination on the basis of sex and that in the last four calls for applications, the chosen candidates had been judges, whereas she was a state attorney and thus had no chance due to JC's unfounded preference for judges.

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

Impartiality of the JC

The starting point for the SC's reasoning was the decision Up-1094/18 of 21 February 2019, where the CC extended the exigence of impartial decision-making to the JC. The SC thus acknowledged that the requirement of impartial decision-making applies to the JC and rejected the allegation of the JC, that its composition itself ensures that any personal acquaintance that can never be completely avoided in small communities, such as Slovenian, cannot affect the objectivity and impartiality of the organ's decision-making. (para. 11). The SC hence agreed with the CC, but highlighted that the CC has adopted merely an abstract opinion. According to the SC, the CC did not decide that the personal connection between the chosen candidate and two members of the JC, infringed the applicant's right to impartial decision-making. To the contrary, the CC found a violation of Article 22 of the Constitution, which prohibits partial decision-making and arbitrariness, because the AC failed to determine the merits of the applicant's well-founded claims related to partiality of members of the JC. The CC's decision hence cannot be read as confirming that certain connections between a member of the JC and a candidate impair the impartiality of the JC.

The SC thus sought further guidance in other cases. It first referred to the decisions of the criminal and civil chambers of the SC. It noted that in Order I Cp 12/13, the civil chamber held that the fact that judges were mentors of the defendant at the time of his traineeship at the court, without any additional circumstances, was insufficient to create in the public an impression that the impartiality was impaired. It also referred to Order I Kr 39962/2011, where the criminal chamber of the SC emphasized that the usual hierarchical and collegial relations between judges based on their profession cannot cast doubt on the external appearance of impartiality of the trial.

Second, the SC turned to the jurisprudence of the CC. It found that in decision Up-679/06, U-I 20/07, it was not the fact that the judge and the applicant in the proceedings had known each other, but rather that they had been in a dispute as to the appropriateness of the judge's conduct at the time when the applicant had been the president of the court, that was considered decisive. As to the decision Up-671/04, the SC observed, that the CC ruled that the party's acquaintance with the judge was not in itself a circumstance which cast doubt on the impartiality.

Third, the SC relied on the jurisprudence of the ECtHR. It described the factual circumstances of *Steck-Risch and Others v. Liechtenstein*, namely that the administrative judge G. W. and the

constitutional judge H. H. had shared their attorney office, when they had not been working at the courts, but the ECtHR held that their relationship was entirely professional, as they had worked as independent and equal partners in their attorney's office, and did not find a violation of Article 6. The SC noted that, according to the jurisprudence of the ECtHR, impartiality is in question when a judge has the case assigned to him for personal reasons (*Kyprianou v. Cyprus*), when the decision-maker expresses bias or hostility towards the party (*Oluji? v. Croatia*), when financial connections and dependence (*Pescador v. Spain*) or family connections (*Micaleff v. Malta*) between the judge and the party are established or when the judge appears in the case in two roles (*Mežnari? v. Croatia*). The SC continued that the same position, i. e. that acquaintance between a member of the competition jury and a candidate is itself insufficient to show that such member has a personal interest, capable of calling into question his/her impartiality, was taken by the CST in *Adriana Dragoman*.

The common feature of all these cases was that acquaintance between one of the members of the deciding authority and a candidate/party, and even stronger connections between the two, cannot be considered to raise sufficient doubts to impartiality. Accordingly, the SC held that the fact that a member of the JC and a candidate have participated in several joint educational events over the past five or six years cannot be considered to be a circumstance which casts serious doubt on the impartiality. The SC moreover opined that such stricter approach, as proposed by the applicant, would impede or at least make very difficult the exercise of the constitutional function of the JC, since in Slovenia, a very small number of people constitute the same professional community, and thus by nature know each other, and since the JC's decisions must be taken by absolute majority of the members.

Right to adversarial trial

The SC distinguished the procedure before the JC from classic administrative dispute procedures, since the right to be chosen for a judicial post does not exist. It held that the selection procedure for the position of a judge also does not have the nature of a dispute. Candidates participating in the selection procedure pursue their own interests and individually, with their own characteristics compete for the same judicial position. It further opined that, according to Article 18 (7) of the Judicial Service Act (the JSS), the JC is not bound by the opinion of the president of the court. Such opinion neither has a decisive impact on the JC's decision in accordance with the legislation, nor did it have such impact in the proceedings at hand, according to the SC. The SC thus rejected as unsubstantiated the applicant's allegation, based on ECtHR's and CC's case-law, as there the courts based their decisions on the documents not made available to the applicants, whereas here the JC's decision was not impacted by the court president's opinion. Moreover, the case-law invoked by the applicant concerned real disputes with two opposing sides, where the principle of adversarial trial is extremely emphasized, whereas the procedure at hand is not of such nature and does not allow the candidates to contradict the facts and object to evidence concerning other candidates. The right to adversarial trial is thus limited to facts, concerning one's own candidacy, namely to the first reasoned opinion of the president of the court, which is written separably for each and every candidate, and does therefore not apply to the final opinion, which represents a compilation of all first opinions and replies to them, and can include a recommendation of one

candidate or even an order of sequence of the candidates (for more, see vertical interaction patterns below).

Prohibition of arbitrariness and discrimination

The SC rejected the applicant's claims. It held that the JC has a wide discretion to choose the candidate it sees the most fit for the post and that the SC only reviews the legality (and not the appropriateness) of the decision. It found that the procedure was conducted according to the law and that the JC sufficiently reasoned its decision. With regard to the applicant's allegations concerning unequal treatment, the court opined that in the last four calls for application, only one male candidate was elected, which proves the applicant's complaint of discrimination on the basis of sex is ill-founded. It also ruled that the fact that the candidate currently served as state attorney, did not impact the procedure or the decision of the JC and that the fact judges were normally elected for judicial posts, did not necessarily entail unequal treatment of external candidates, but could, at least to some extent, be attributed to the fact that the vast majority of the candidates are judges.

Relation of the case to the EU Charter

The SC did not invoke the CFREU. However, it referred to Adriana Dragoman case, where the the CST invoked Article 11bis (11a) of Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, which prohibits EU officials to deal with matters, in which, they have direct or indirect, family, financial or other personal interest capable of impairing their independence. If an official is confronted with such situation, he/she must inform the superior authority, which then decides whether exclusion is necessary. The CST held that personal connection (acquaintance) between a member of the competition jury and a candidate alone is not sufficient to demonstrate that the jury member has a personal interest within the meaning of the article 11 bis of the Staff Regulations, which as such could call into question his/her impartiality.

Since the CFREU was not yet binding in 2008, the CST did not invoke it, even though it would be applicable and relevant: Article 41 CFREU (the right to good administration) guarantees every person a right to have his or her affairs handled impartially by the EU. What is interesting though, is that the SC used the CST's interpretation of an EU law provision, which clearly does not apply in the national context, as an additional argument to support its decision, and arguably even as a benchmark of the EU law standard of impartiality in nomination procedures, which should guide the courts and other national bodies.

Relation between the EU Charter and ECHR

The SC found that the standards under ECtHR jurisprudence and the Adriana Dragoman case are equal (para. 16 - 17).

Use of Judicial Interaction technique(s)

Comparative reasoning with ECtHR, CST, CC and SC jurisprudence

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

The SC invoked its own case-law in civil and criminal cases (as well as the jurisprudence of the CC, the ECtHR and even the CST) to determine, whether the member of the JC, who personally knew the selected candidate, should be excluded. The SC's previous decisions were not shortly described were arguably regarded as equally important as the jurisprudence of the CC the ECtHR and the CST.

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

The SC invoked the jurisprudence of the CC, the ECtHR and even the CST to determine, whether the member of the JC, who personally knew the selected candidate, should be excluded. The invoked jurisprudence was shortly described and were arguably regarded as equally important.

When the SC assessed the applicant's claim that the final opinion of the president of the court was not made available to her, it held that the JC did not base its decision on such opinion. Further, it distinguished the present case from ECtHR case-law in *Jurisi? v. Croatia*, where, according to the SC, the court obtained a document not served to the applicant *proprio mutuo*, and relied on it in its decision, which was the reason for the ECtHR found a violation of the right to adversarial trial. The SC continued that the reference to other ECtHR and CC cases was unmerited, since all the cases concerned disputes with two opposing parties, with opposite interests, where the principle of adversarial trial is extremely emphasized.

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

With regards to impartiality, the SC used the interaction technique to show that the acquaintance between a member of the JC and a candidate itself does not justify the exclusion of the former. With such position, the SC protected the SC from problems to secure efficient decision-making that would arise if any acquaintance would lead into exclusion. This was explicitly mentioned in the judgment. However, a more implicit reason might be the fact that the stricter standard, proposed by the applicant, would impact the other courts as well and could lead to frequent exclusions of judges and thus hence adversely affect the effectiveness of the Slovene judicial system as a whole.

Connected national caselaw / templates

Connected templates:

- Constitutional Court, Order Up-757/19-14 of 9 September 2019, Supreme Court, Judgment U 2/2019-14 of 12 June 2019

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

- Administrative Court, IV U 213/2014 of 5 November 2014

Connected cases:

- Supreme Court, X Ips 333/2015 of 21 July 2016 (see template IV U 213/2014)

Other

With regards to access to the final opinion of the president of the court, the SC relied on its recent case, Judgment U 2/2019-14 of 12 June 2019. The decision to withhold the opinion from the unelected candidate is currently pending before the CC (case Up-757/19).

The SC's decision arguably disregards the soft-law instruments, which demand that the selection procedure is open and transparent. The ENCJ's Dublin Declaration of for example provides that "[w]here the appointment process includes assessment based on reports and comments from legal professionals (such as practising judges, Bar Associations, Law Societies etc) any such consultation must remain wholly open, fair and transparent, adding that the views of any serving judge or Bar Association should be based on the relevant competencies, should be recorded in writing, available for scrutiny and not based on personal prejudice."

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

1. Judicial Council, Su 239/2019-20 of 5 September 2019

2. Supreme Court, Judgment U 7/2019-8
