

## **Slovenia, Constitutional Court, U-I-445/18, 14 October 2021, ECLI:SI:USRS:2021:U.I.445.18**

### Member State

 Slovenia

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### Topic

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

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### Deciding Court Original Language

Ustavno sodišče Republike Slovenije

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### Deciding Court English translation

Constitutional Court of the Republic of Slovenia

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### Registration N

U-I-445/18

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### Date Decision

14 October 2021

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### ECLI (if available)

ECLI:SI:USRS:2021:U.I.445.18

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### National Follow Up Of (when relevant)

VSRS Judgement and Order, no. U 2/2018-17 of 14 December 2021

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### EU legal sources and CJEU jurisprudence

Articles 47 and 48 of the Charter of the Fundamental Rights of the European Union,  
Article 19 of the Treaty on European Union.

CJEU Judgement European Commission v the Republic of Poland, C-791/19, 15 July 2021.

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### ECtHR Jurisprudence

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

Fey v Austria, app. no. 14396/88, 24 February 1993,

Ferrantelli and Santangelo v Italy, app. no. 19874/92, 7 August 1996,  
Švarc and Kavnik v Slovenia, app. no. 75617/01, 8 February 2007,  
Pullar v the United Kingdom, app. no. 22399/93, 10 June 1996,  
Mitrinovski v the Former Yugoslav Republic of Macedonia, app. no. 6899/12, 30 April 2015,  
Piersack v Belgium, app. no. 8692/79, 1 October 1982,  
Grieves v the United Kingdom, app. no. 57067/00, 16 October 2003,  
Miller and Others v the United Kingdom, app. nos. 45825/99, 45826/99 and 45827/99, 26 October 2004,  
Kyprianou v Cyprus, app. no. 73797/01, 15 December 2005,  
Puolitaival and Pirttiaho v Finland, app. no. 54857/00, 23 November 2004,  
Mežnari? v Croatia, app. no. 71615/01, 15 July 2005,  
Daktaras v Lithuania, app. no. 42095/98, 10 October 2000.

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### Subject Matter

The CC determined the constitutional requirements for impartiality of the Disciplinary Court of the Judicial Council. In its reasoning, the CC considered the systemic connection between the Judicial Council and the Disciplinary Court, the competence of the Judicial Council to bring petitions before the Disciplinary Prosecutor and that members of the Judicial Council are also always members of the Disciplinary Court.

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### Legal issue(s)

The case relates to the independence and impartiality of the members of the Disciplinary Court of the Judicial Council. The key legal issue in the case was whether it was in accordance with the constitution and the ECHR that the members of the Disciplinary Court are also members of the Judicial Council, which has competence to petition for initiation of the disciplinary proceedings. The Constitutional Court assessed this from the requirements of impartiality, including the question of separation of procedural functions.

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### Request for expedited/PPU procedures

N/A

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### Interim Relief

N/A

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### National Law Sources

Articles 2, 15(2), 22, 23, 125, 129 and 130 of the Constitution,  
Articles 40(1), 40(2), 45(2) and 45(3) of the Judicial Council Act (Official Gazette RS, no. 23/17),  
Criminal Procedure Act (Official Gazette RS, 63/94 et seq.),  
Judicial Service Act (Official Gazette RS, no. 94/07),  
Decision of the Constitutional Court, no. U-I-238/12 of 23 January 2014,

Decision of the Constitutional Court, no. U-I-127/16 of 9 February 2017,  
Decision of the Constitutional Court, no. U-I-204/16 of 15 March 2018,  
Decision of the Constitutional Court, nos. U-I-143/07, Up-1310/05 of 5 June 2007,  
Decision of the Constitutional Court no. Up-399/04 of 7 April 2005,  
Decision of the Constitutional Court no. Up-217/15 of 7 July 2016,  
Decision of the Constitutional Court, no. Up-1094/18 of 21 February 2019,  
Decision of the Constitutional Court no. Up-52/99 of 21 November 2002,  
Decision of the Constitutional Court, no. Up-679/06 and U-I-20/07 of 10 October 2007,  
Decision of the Constitutional Court, no. U-I-149/99 of 3 April 2003,  
Decision of the Constitutional Court, nos. U-I-51/16 and Up-185/14 of 28 September 2016,  
Decision of the Constitutional Court, no. Up-799/13 of 22 January 2015,  
Decision of the Constitutional Court, no. Up-1094/18 of 21 February 2019,  
Decision of the Constitutional Court, no. U-I-18/02 of 24 October 2003.

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### Facts of the case

The case originated as an administrative dispute before the Supreme Court against the Decision of the Disciplinary Court of the Judicial Council of the Republic of Slovenia, no. Ds-ss 1/2017 of 9 April 2018 in the proceedings against a judge of the Ljubljana District Court. The judge (hereinafter: applicant) was found responsible for untimely exercise of the judicial service by exceeding the legislative time limit for producing a written judicial decision between 2014 and 2016. In the lawsuit, the applicant argued that her right to an impartial tribunal stemming from the Article 23 of the Constitution was infringed due to the composition of the Disciplinary Court. According to Article 40 §2 of the Judicial Council Act, the court consists of 3 members of the Disciplinary Court, at least one of them being a member of the Judicial Council. In the applicant's case, it was the Judicial Council that petitioned for the initiation of the disciplinary proceedings, which allegedly compromised the impartiality of the proceedings, given that one of the members of the Disciplinary Court was a member of the Judicial council.

The Supreme Court suspended the proceedings with order no. U 2/2018-6 of 19 June 2018, and lodged a request for the review of constitutionality of Article 40 § 1, Article 40 § 2, Article 45 § 2 and Article 45 § 3 of the Judicial Council Act.

The Constitutional Court has delivered its judgement, no. U-I-445/18 on 14 October 2021.

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

Firstly, the CC established that for an organ to be referred to as a "court" within the meaning of the Constitution, it has to fulfill the criteria stemming from Articles 125 (independence of the judiciary), 129 (permanent mandate of the judges) and 130 (proposed by the Judicial Council and elected by the parliament) of the Constitution. The CC then stated that the Disciplinary Court of the Judicial Council does not exercise the judicial function within the meaning of the Judicial Service Act and the Courts Act and is therefore not a "court" within the meaning of the Constitution. The CC concluded that the Disciplinary Court however is an administrative authority that decides on rights, obligations and legal interests of an individual, as judicial review against the decisions of the Disciplinary Court is possible in the administrative dispute proceedings

before the Supreme Court.

Secondly, the CC explained that a link between guarantees enshrined in Articles 22 and 23 of the Constitution from its own jurisprudence. It stated that Article 23 of the Constitution is only applicable to the proceedings before courts within the meaning of the Constitution. However, CC went on to elaborate that the standards and guarantees of Article 23 of the Constitution (and, by extension, also Article 6 § 1 of ECHR and Articles 47 and 48 of CFREU) are also applicable to proceedings before the administrative authorities as they fall under the scope of Article 22 of the Constitution (equal protection of procedural rights), which is broader than Article 23. It also follows from the second subparagraph of the first paragraph of Article 19 of TEU and the case of *Commission v the Republic of Poland* (C-791/19) that MS shall establish a legislative framework to ensure independence and impartiality of the disciplinary bodies which decide on the disciplinary responsibility of the judges. Furthermore, the disciplinary bodies should also fulfil the standards, stemming from Articles 47 and 48 of CFREU and Article 6 § 1 of ECHR.

Thirdly, the CC reiterated the standards of impartiality from its own jurisprudence and the jurisprudence of ECtHR, namely the subjective and objective test. The goal of the subjective test is to ascertain the personal conviction of the adjudicating judge. On the other hand, the objective test is meant to assess whether the tribunal has respected the procedural guarantees throughout the proceedings in a way as to exclude any doubt on its impartiality. In this connection, the CC also noted that appearance of the courts is also of importance in a democratic society, in which the courts have to inspire confidence in the society. The foregoing is not a decisive factor to determine impartiality, however, it is crucial to ascertain, whether the doubt on impartiality is objectively justified. It also follows from the jurisprudence of the ECtHR that objective impartiality can be hindered when the adjudicating judge also has another function in the proceedings that is not compatible with the function of a judge or is in a hierarchical or any other relationship with other participants in the proceedings that objectively justify doubt in the impartiality of the tribunal. The CC also stated that the fact that a member of the Disciplinary Court exercised two procedural functions in a single procedure is of great significance for adjudicating on their impartiality.

Fourthly, the CC reiterated that relevant criteria for adjudicating on impartiality of a judge are applicable by analogy in the proceedings, when an administrative body is not exercising a judicial function per se, decides on the individual's rights, obligations or legal interests. It emphasised the importance of the external appearance of impartiality in the proceedings, i. e. that the personal composition of the Disciplinary Court has to be such as to rule out any circumstances that would warrant the appearance of impartiality.

Fifthly, the CC reiterated that the petitioners who can request the disciplinary proceedings against the judge have significant procedural power, since they can compel the disciplinary prosecutor to initiate the proceedings even if the prosecutor initially dismisses the petition. It follows that when the petitioner is Judicial Council, the members of the Council have already formed an opinion on the matter. The fact that members of the Judicial Council might vote differently when deciding whether to adopt a petition for the disciplinary prosecutor does not preclude the individual member from forming their own opinion regarding the matter in advance. Consequently, the participation of a member of the Judicial Council when voting on the petition for initiation of the disciplinary proceedings is indubitably an objective circumstance which causes a reasonable individual to doubt about impartiality of such member of the Judicial Council when acting as member of the Disciplinary Court (*Mitrinovski v the Former Yugoslav Republic of Macedonia*).

Lastly, the CC emphasised that the Disciplinary Court and the Judicial Council were systemically connected bodies, as the latter provides the former with financial means, as well as professional and administrative assistance in accordance with Article 42 of the Judicial Council Act. Moreover, the President of the Disciplinary Court is always a member of the Judicial Council, who also decides on the personal composition of the Disciplinary Court. Further, it is the Judicial Council that decides on the requests for recusal of the President of the Disciplinary Court. Thus, the membership in the Judicial Council by itself is a circumstance that can cause reasonable doubt on the impartiality of the proceedings before the Disciplinary Court when a member of the Disciplinary Court is also a member of the Judicial Council. It concluded that

Articles 40 § 1, 40 § 2 and 45 § 2 are not in accordance with Article 22 of the Constitution, as the interference with the Article 22 of the Constitution does not pursue a legitimate aim.

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### Relation of the case to the EU Charter

Article 19 of TEU, Articles 47 and 48 of the CFREU and the case of the Commission v the Republic of Poland were used to support the reasoning of the CC, as it has based the decision mainly on its own jurisprudence and the jurisprudence of ECtHR.

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### Relation between the EU Charter and ECHR

ECtHR jurisprudence on Article 6 § 1 of ECHR was used extensively, which is the equivalent of Articles 47 and 48 of CFREU.

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### Use of Judicial Interaction technique(s)

Comparative reasoning with foreign legislation or foreign case law

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

External: the CC briefly used the reasoning of Lord Hewart, C. J. in the case of R v Sussex Justices ex parte McCarthy [1924] 1 KB 256, 259; [1923] All ER 233: "Justice should not only be done but should manifestly and undoubtedly be seen to be done."

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

Internal: The case is in itself a demonstration of internal vertical judicial interaction, as it originated in a request by the Supreme Court for the review of constitutionality of the Judicial Council Act.

External: The CC referred extensively to the jurisprudence of the European Court of Human Rights and a single judgement of the CJEU.

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

The CC used the jurisprudence of the ECtHR and CJEU to interpret the scope of Articles 22 and 23 of the Constitution to define the upper premise of legal syllogism. It referred extensively to the jurisprudence on the Article 6 § 1 of the ECHR. It also briefly made a recourse to the Articles 47 and 48 of the CFREU and the CJEU Judgement in the case of Commission v Poland (C-791/19 of 15 July 2021).

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### Impact on Legislation / Policy

The legislator has not yet adopted a new law that would change Article 45 of the Judicial Council Act. The CC prescribed a period of 1 year in which the legislator was to bring the law in accordance with the constitution (the deadline expired on 14 October 2022).

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### Notes on the national implementation of the preliminary ruling by the referring court

N/A

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Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred

to by the CJEU in its decision) or the Explanations?

Yes (see above).

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Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

No

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Did the national court take into account national case law on fundamental rights?

Yes (see above).

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If the court that issued the preliminary reference is not a last instance court, and the “follow up” was appealed before a higher court, include the information

N/A

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Impact on national case law from the same Member State or other Member States

N/A

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Connected national caselaw / templates

N/A

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Other

N/A

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(Link to) full text

<https://www.us-rs.si/odlocitev/?q=U-I-445%2F18&type=search-2&order=desc&id=116980> (Full text – Slovenian)

<https://www.us-rs.si/decision/?lang=en&q=U-I-445%2F18&type=search-2&order=desc&id=117084> (Summary in English)

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

1. Supreme Court of the Republic of Slovenia, order no. U 2/2018-6 of 19 June 2018;
  2. Constitutional Court of the Republic of Slovenia, judgement no. U-I-445/18 of 14 October 2021;
  3. Supreme Court of the Republic of Slovenia, judgement and order no. U 2/2018-17 of 14 December 2021.
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