

## **Slovenia, Constitutional Court, U-I-772/21, constitutional, 1 June 2023, ECLI:SI:USRS:2023:U.I.772.21**

### Member State

 Slovenia

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### Topic

Independence (salaries of magistrates)

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### Sector

Judicial Interaction Techniques; Judicial Self-Government (Judicial Council, Court Presidents)

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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-772/21

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### Date Decision

1 June 2023

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### ECLI (if available)

ECLI:SI:USRS:2023:U.I.772.21

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### National Follow Up Of (when relevant)

N/A

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### EU legal sources and CJEU jurisprudence

Article 47(2) of the Charter of the Fundamental Rights of EU,

Articles 2, 4(3)(1) and 19(1)(2) of the Treaty on European Union

CJEU Judgement European Commission v the Republic of Poland, C-619/18, 24 June 2019,

CJEU Judgement Minister for Justice and Equality (Deficiencies in the system of justice),

C-216/18 PPU, 25 July 2018, CJEU Judgement Associação Sindical dos Juizes Portugueses v Tribunal de Contas, C-64/16, 27 February 2018.

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### ECtHR Jurisprudence

Zubko and Others v Ukraine, app. nos. 3955/04, 5622/04, 8538/04 and 11418/04, 26 April 2006.

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### Subject Matter

The CC determined the requirements of the Constitution in relation to the question of the proportion of growth of judicial salaries when compared to the growth of salaries of functionaries from the legislative and executive.

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### Legal issue(s)

The key legal issue in the present case was to ascertain whether the stagnation of growth of the judicial salaries when compared to the increase in the cost of living and the growth of salaries of other functionaries since 2012 was in accordance with the constitutional requirement of (material) judicial independence enshrined in Article 125 of the Constitution. In other words: the CC had to determine, whether the judicial salaries were manifestly inappropriate.

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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, 3(2), 14(2), 23(1), 125, 129, 132, 133 and 134 of the Constitution,

Articles 23(4)(10) of the Judicial Council Act (Official Gazette RS, no. 23/17),

Article 53 of the Judicial Service Act (Official Gazette RS, no. 94/07),

Articles 5(4), 5(5), 5(6), 10(2), 23(2), 23(3), 32.b of the Public Sector Salary System Act (Official Gazette RS, no. 56/02 et seq.),

Public Finance Balancing Act (Official Gazette RS, no. 40/12 et seq.),

Personal Income Tax Act (Official Gazette RS, no. 117/06 et seq.),

Referendum and Popular Initiative Act (Official Gazette RS, no. 15/94 et seq.),

Intervention Measures Act (Official Gazette RS, no. 94/10),

Ordinance on the Salaries of Functionaries (Official Gazette RS, no. 14/06),  
Decision of the Constitutional Court, no. U-I-60/06 of 7 December 2006,  
Decision of the Constitutional Court, no. U-I-159/08 of 11 December 2008,  
Decision of the Constitutional Court, no. U-I-15/14 of 26 March 2015,  
Decision of the Constitutional Court, no. U-II-2/09 of 9 November 2009,  
Decision of the Constitutional Court, no. U-II-1/09 of 5 May 2009,  
Decision of the Constitutional Court, no. U-I-512/18 of 23 April 2020,  
Decision of the Constitutional Court, no. Up-217/14 of 7 February 2018,  
Decision of the Constitutional Court, no. U-I-159/19 of 23 February 2023,  
Decision of the Constitutional Court, no. U-I-246/19 of 7 January 2021,  
Decision of the Constitutional Court, no. U-I-158/94 of 9 March 1995,  
Decision of the Constitutional Court, no. U-I-10/08 of 9 December 2009,  
Decision of the Constitutional Court, no. U-I-214/19, Up-1011/19 of 8 July 2021,  
Decision of the Constitutional Court, no. U-I-42/12 of 7 February 2013.

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## Facts of the case

The salaries of judges, as well as other functionaries and public employees, are regulated by the Public Sector Salary System Act (hereinafter: PSSSA) since 2006. The general idea of the PSSA was to prevent the emergence of salary disparities among different professionals and functionaries, employed in the public sector. The salaries are defined by 65 salary brackets and there are no provisions for revalorisation of the salaries. There were, however, some temporary downgrades made to the placement of different judicial functions due to the economic crisis with PSSSA-L (ZSPJS-L). Those temporary measures were found by the CC in the case U-I-14/15 to be in accordance with the constitution, considering the economic crisis. The temporary downgrades were never abolished, nor were the judicial salaries increased through a partial legislative action or collective bargaining agreements. The growth of judicial salaries was limited to promotions and occasional systemic corrections of salaries in the public sector. The judicial salaries were thus growing at a much slower pace than the salaries of other public employees, while also losing their real monetary value due to the increase in the costs of living over the years.

The present request for the review of constitutionality of provisions of PSSA and the Public Finance Balancing Act was brought by the Judicial Council. In its request, the Judicial Council maintained that the salaries of judges were manifestly inappropriate both in regard to material independence of judges, which is enshrined in Article 125 of the Constitution, as well as when compared to salaries of functionaries from the executive and legislative branches of government, thus also not in accordance with Article 3 of the Constitution (separation of powers).

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

At the beginning of reasoning, the CC held that judicial independence in itself is enshrined in the Article 125 of the Constitution. Then it turned to Article 23(1) of the Constitution, which deems judicial independence to also be an element of the right to a fair trial. The CC also emphasised, that the Constitution enshrines institutional requirements for judicial independence in Articles 3(2) (separation of powers), 129 (permanency of judicial office), 132 (termination and dismissal from office), 133 (incompatibility of judicial office) and 134 (immunity of judges) The CC also made recourse to several legally binding and non-binding documents of the international law, inter alia, Article 10 of the Universal Declaration on Human Rights, article 47(2) of the EU Charter, Article 6(1) of the ECHR, and Article 2 of the TEU.

Further, the CC emphasized judicial independence is a safeguard for the right to a fair trial and it is essential for the legitimacy and public trust in judiciary. The CC also reiterated the different aspects of judicial independence, such as collective, internal, external, organizational, and material independence. The CC further noted the judicial branch plays a crucial role in the lawful functioning of the system (judicial branch is the backbone of the legal system) and it is therefore of utmost importance that judges are appropriately remunerated so that they can focus entirely on the judicial service.

The CC emphasized that the legislator in principle enjoys a certain margin of appreciation in regulating jobs and salary brackets in the public sector. However, judicial salaries that are manifestly inappropriate are contrary to the Constitution. The CC's review shall not be limited only on the basic salary, as it does not provide sufficient information on whether material independence of the judges is ensured. The CC cited international legal sources, even though some of them were not binding, as they are the standards which are inalienable in a democratic society, and can thus serve as a tool for interpreting Article 125 of the Constitution.

The CC then ruled that, in determining the requirements of the principle of judicial independence (Art. 125), recourse must be taken to the jurisprudence of the ECtHR. Further, it relied on the EU law standard, based on Articles Article 4(3) of TEU) and 19(1)(2) of the TEU: Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. In order to ensure such protection, independence of the body guaranteeing such protection is essential, as proven by Article 47 (2) of the Charter. The CC then held that in interpreting Article 125 of the Constitution, the concept of material independence as was shaped in EU law (by the CJEU) has to be taken into account. In this relation, the CC also made a reference to the CJEU's statement that ensuring the judges are paid in accordance with the importance of the judicial function is inextricably connected with judicial independence.

The CC then extrapolated legal standards concerning material independence of judges from international legal sources and its own case-law:

- The fundamental principles of the status of judges must be set out in the Constitution and more concrete rules have to be set out at a statutory level (and can thus only be adopted by the legislator).
- Judges are involved (through their representatives and professional organizations) in decisions related to the management and budgeting of the courts at the national and local level. They are consulted in the same manner over plans to modify their position, and over the determination of the terms of their remuneration and of their social welfare.
- Judicial salaries must be adequate, to ensure that the judge has true economic independence.
- It is generally important to make specific legal provisions safeguarding the judges' salaries from reduction and ensuring their growth commensurate to the growth of the costs of living.
- In case of social risks, the income security of judges should also be adequately addressed.
- Judges' income should be sufficient to protect them from undue influence. It should also be commensurate with the dignity of their profession and their responsibilities.
- The fact that judges should not be able to earn additional income, to prevent conflicts of interest should be considered when determining judicial salaries.
- Judges' income should be stable and protected from reduction. To achieve the latter, judicial salary should be assessed regularly to ensure it is appropriate.

The CC found judicial salaries that lag significantly behind inflation are unconstitutional. Promotions do not count as appropriate salary harmonisation mechanisms and do not ensure the appropriate value of judicial salaries. The CC examined the growth of judicial salaries between 2012-2023 and found that inflation was 25.4% while judicial salaries grew by only 8.5%.

Thus, the CC held that judicial salaries are manifestly inappropriate as they have significantly lost their de facto value and are not in accordance with the Article 125 of the Constitution.

Afterwards, the CC examined only as obiter dicta some of the allegations of the Applicant, as current regulation was already found to be unconstitutional.

Firstly, the CC agreed that judicial salaries must follow economic development and the standard of living. A significant lag in value of the judicial salaries compared to other salaries can point to manifest inappropriateness. In Slovenia, the average judicial salary is only 1.5 times the average salary, which is well below the CoE average quotient of 2.3. This disparity could mean judicial salaries do not correspond to the dignity and responsibilities of the judicial profession. The proportion between the average salary in the public sector and the average salary of a judge must also be appropriate.

Secondly, the CC also held that the judicial salaries must not be such as to discourage the best legal professionals from applying for judicial posts. However, the CC analysed statistics for the past ten years and found that in the present case, there is enough interest on the labour market for the positions of judges.

Thirdly, the CC also examined the Applicant's argument that more and more judges are entitled to social transfers. In this connection, the CC noted, that such circumstance could be of significance when determining, whether the salaries of judges are manifestly inappropriate. However, the argument will not be relevant, should the regulation of such social transfers by itself be widely accessible to the public (including individuals with relatively high income).

Lastly, the CC turned to Article 5 of PSSSA, which provides that salary harmonisation in the public sector in principle takes place on a yearly basis. The CC ruled that such wording of a provision does not guarantee judges that such harmonisation would actually take place and guarantee judges their salaries won't lose de facto value. Thus, the provision of Article 5 of PSSSA was found to be unconstitutional, insofar as it relates to the material independence of the judges from Article 125 of the Constitution.

#### Reasoning in relation to Article 3(2) of the Constitution

The Applicant also argued that the current legal framework is unconstitutional because of disparity in salaries of judges and functionaries from the executive and the legislative branch of power. The CC focused on the comparison between the salaries of judges and other holders of state power: government ministers and members of the National Assembly (MPs). It dismissed the Applicant's suggested comparison of judicial salaries to the salaries of state secretaries and of advisor to the President of the Republic, as these two functions do not entail authoritative exercise of power.

The CC stated that the cornerstone of the system of checks and balances is the constitutional equality of the three branches of power. The three branches should be treated equally, including in terms of the material status of functionaries. This means that judicial salaries should be comparable to the salaries of functionaries in the executive and legislative branches. If there is a significant disparity between the salary brackets, the regulation of judicial salaries will not be in accordance with the Constitution.

The Applicant alleged significant disparity based on the following criteria: the median value and the mode value of the salary brackets of functionaries from the each of the branches of government; the average salary of the functionaries from each branch of government; the actual placement of functionaries in the salary brackets of PSSSA; and supplements, as well as reimbursements of costs that significantly impact the material status of the MPs. The CC held that all of the above criteria as relevant in principle, however, due to the unknown statistical methodology employed by the Applicant to calculate the median and the mode value (whether salary brackets for all functions were considered, or was it limited to MPs, judges and ministers), the Court chose to disregard these two criteria. The median value and mode value also only allow us to compare the salary bracket of each branch of the government as a whole. It is also of importance to consider that there are several instances, where most judges are the judges of first instance, who have lower salaries than the Supreme Court judges.

A new aspect that the CC examined in the present case was the Applicant's argument that not only the basic salary but also certain supplements and benefits that the MPs enjoy (allowance for education, state-provided flats, less rigorous restrictions related to incompatibility of functions, a monthly lump-sum reimbursement of costs for working at their constituency areas) have to be

taken into account when comparing their material situation to the material situation of the judges.

The CC found that allowance for education (EUR 800/year) does not significantly add up to the monthly income of the MPs. It found the same regarding the 49 state-provided flats for the MPs, as not every member can get it and there are criteria why certain members need the flat more than others. The CC then disregarded the criterion of less rigorous restrictions on incompatibility of functions and focused on the monthly lump sum reimbursement of costs which ranges from EUR 500 to EUR 800. The MPs are entitled to the reimbursement regardless of the fact whether they have incurred any costs connected to the work done in their constituency offices (no proof is required). Thus, the CC held that this “reimbursement” could be relevant when assessing the relevant income of the MPs for comparison with the judges, since it represents an additional income and not merely compensation for costs that MPs have actually incurred. The CC concluded that the difference between the lowest salary bracket of a local judge and the lowest salary bracket of an MP amounts to 11-13 salary brackets which amounts to significant disparity. In addition, it also noted that most MPs in the current composition of the National Assembly is not placed in the lowest salary bracket for MPs. Thus, the disparity is even greater and not in accordance with the principle of separation of powers.

The CC then examined whether the fact that the lowest salary bracket for a minister is above the highest possible salary bracket of a judicial functionary (Supreme Court Judge Councillor) is by itself contrary to the principle of separation of powers. The current difference between lowest salary bracket for ministers and the highest judicial salary bracket is 1 bracket, or two brackets if the Supreme Court Judge does not hold the function of a councillor. The difference between salary brackets of highest placed minister and Supreme Court Judge Councillor is currently 4 salary brackets. The CC held that it would not be appropriate to interpret the principle of constitutional equality of three branches of government in such way that functionaries’ salaries should be equal. Rather, only situation with significant disparity in salaries would render the legal framework unconstitutional (in the past the CC found difference of 12 brackets amounted to significant disparity).

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### Relation of the case to the EU Charter

The case relates to the EU Charter through Article 47(2) of the EU Charter, as the CC used the interpretation of that provision by the CJEU to establish the normative premise of legal syllogism. It is the equivalent of the right to a fair trial under Article 23 of the Constitution. It thus emphasised the connection between institutional requirements and human rights (considering also articles 4(3) and 19(2)(1) of the TEU), where the former are crucial to achieve the effectiveness of the latter. In this aspect it relied on the famous Portuguese judges case (CJEU Judgement Associação Sindical dos Juizes Portugueses v Tribunal de Contas, C-64/16, 27 February 2018).

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### Relation between the EU Charter and ECHR

The CC also relied upon a single ECtHR judgement and several non-binding CoE instruments that at least indirectly serve as a tool for interpretation of Article 6(1) of ECHR.

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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: Decision of the German Federal Constitutional Court, no. 2 BVL 4/18 of 4 May 2020.

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

External: The CC referred to the case-law of the CJEU and a single judgement of the ECtHR.

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

The CC relied primarily on the interpretation of Article 19(1)(2) TEU in connection to Article 4(3) of TEU in the cases against Poland, as interpreted by the CJEU to emphasise the importance of an independent judicial system for the rule of law. To the same ends, the CC also made recourse to the CJEU's interpretation of Article 47(2) of the EU charter, according to which income of the judge is inextricably linked to the importance of judicial function and the independence of the judges. Moreover, the connection between the two standards shows the CC connected the institutional requirement of independence being an integral part of a human right to a fair trial.

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Impact on Legislation / Policy

The Minister of Public Administration announced on 7 July 2023 that the Government has reached agreement with the representatives of the judiciary on the increase of judicial salaries and an additional allowance for incompatibility of functions which will be included in the upcoming reform of the Public Sector Salary System Act.

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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?

Yes. It quoted the following:

Magna Carta of the Judges of 17 November 2010.

UN Basic Principles on the Independence of the Judiciary of 6 September 1985.

Committee of Ministers Recommendation no. R(94)12 on Independence, Efficiency and the Role of Judges. European Charter on the Statute for Judges of 10 July 1998.

Consultative Council of European Judges Opinions:

- Opinion 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges,

- Opinion 2 (2002) on the Funding and Management of Courts with Reference to the Efficiency of the Judiciary and to Article 6 of the ECHR, and
- Opinion 21 (2018) on Preventing Corruption Among Judges.

Venice Commission:

European Standards on the Independence of the Judiciary.

Judge's Charter in Europe of 4 November 1997.

The Universal Charter of the Judge of 17 November 1999.

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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

Decision of the Constitutional Court, no. U-I-60/06 of 7 December 2006, -  
<https://cjc.eui.eu/data/data/data?idPermanent=253&trial=1>

Decision of the Constitutional Court, no. U-I-159/08 of 11 December 2008, - for more detail, see casenote of Decision U-I-60/06 (link provided above)

Decision of the Constitutional Court, no. U-I-15/14 of 26 March 2015.

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(Link to) full text

<https://www.us-rs.si/odlocitev/?q=U-I-772%2F21&order=desc&id=120179>

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