

Italy, Disciplinary chamber of the Supreme Judicial Council, n 65/2013, Judicial Council, 10 May 2023

Member State

 Italy

Topic

Freedom of expression

Sector

Freedom of Expression and Association; Disciplinary proceedings

Deciding Court Original Language

Sezione disciplinare del Consiglio Superiore della Magistratura

Deciding Court English translation

Disciplinary chamber of the Supreme Judicial Council

Registration N

65/2013

Date Decision

10 May 2023

ECLI (if available)

N/A

National Follow Up Of (when relevant)

No follow up

EU legal sources and CJEU jurisprudence

N/A

ECtHR Jurisprudence

Article 10 ECHR

Buscemi v Italy

Subject Matter

Disciplinary proceedings against the deputy public prosecutor at the Juvenile Court of Milan for the statements made to the press and the television concerning her conduct in the identification and custody of a minor who gave rise to a political scandal.

Legal issue(s)

imitations to the freedom of expression of magistrates; balance between the duty of discretion that binds magistrates and the right to react publicly in order to restore the truth and the credibility and honour of a magistrate.

Request for expedited/PPU procedures

No

Interim Relief

No interim relief

National Law Sources

Article 2(1)(aa) and (n) of Legislative Decree No. 109 of 2006; Article 5 of Legislative Decree No. 106 of 2006

Facts of the case

In 2010 the Italian police apprehended a minor girl of Moroccan origin who was suspected of theft. The girl did not have any identification documents with her. The police contacted Ms Fiorillo, the deputy public prosecutor at the Juvenile Court of Milan, who required her fingerprints taken and asked for finding a centre where the girl could stay. During the evening, a politician who was member of the regional council of the Lombardy region, Ms Minetti, reached the police office and claimed to know the girl and asked for her custody. The police, after having contacted Ms Fiorillo, gave the girl in custody to Ms Minetti. However, Ms Fiorillo claimed that she never agreed to give the girl to the custody of Ms Minetti as she was not a family member. In the following days, the case became a political scandal in the media and the Minister of the Interior reported the matter to the Parliament. Ms Fiorillo, feeling the need to clarify her conduct in the case, made a series of statements to the press where she opposed the version of the Minister of the Interior. Then, she participated to a television program where she was interviewed on the matter, and later made further statements to the press. The Prosecutor General accused Ms Fiorillo of a series of disciplinary offences for breaching the duty of discretion that binds magistrates.

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

The disciplinary chamber of the Italian Judicial Council (Consiglio Superiore della Magistratura – CSM) found Ms Fiorillo guilty of the disciplinary offenses set forth in Article 2(1)(aa) and (n) of Legislative Decree No. 109 of 2006, which sanction, respectively, the soliciting of the publication of

news pertaining to official activities and the failing to comply with the provisions on judicial service adopted by the competent bodies. Ms Fiorillo was thus sentenced to the sanction of censure, that is, a formal statement of reprimand contained in the operative part of the disciplinary decision. The censure also entails some inconvenient consequences, such as the loss of the right to vote and to stand as a candidate at the elections of the CSM for ten years. It may also be accompanied with the ancillary sanction of the transfer of the judge concerned to another office or division.

The disciplinary chamber considered that was no doubt that Ms Fiorillo had violated the aforementioned provisions since she had made direct contact with the press and participated in a well-known television broadcast. The central issue in the case was rather whether such conduct could be justified by reason of the public dissemination, by, among others, the Minister of the Interior, of a version of the judicial affair different from how Ms Fiorillo had known and perceived it. In short, the question was whether there is a right for the magistrate to react publicly in order to restore the truth, as well as her own credibility and honour, and whether, in the case at hand, this right was properly exercised.

In this respect, the disciplinary chamber referred to the right to freedom of expression enshrined in Article 10 ECHR, which may be subject to limitations provided by law. Indeed, Article 10(2) ECHR itself imposes a general duty of discretion on the magistrate to ensure the authority and impartiality of the justice system. The disciplinary chamber referred to the interpretation provided by the ECtHR in *Buscemi v. Italy*, where the latter ruled that judicial authorities must observe utmost discretion with respect to the case with which they deal in order to preserve their image as impartial judges and must avoid using the press even once provoked. The disciplinary chamber also referred to the judgment 100/81 of the Italian Constitutional Court where the latter held that the freedom of expression of magistrate must be balanced with their role and authority. It considered that both decisions express the need to avoid that statements made by an individual magistrate endanger the appearance of independence of the judiciary.

In the case at hand, the disciplinary chamber found that Ms Fiorillo had not properly exercised her right to provide clarifications to dispel misinterpretations and distortions of her actions, and therefore this right could not be balanced against the principles of the ECtHR case law. Had she asked for protection from the CSM and her office, and such protection had been denied, it would have been reasonable to grant her the possibility to make clear her versions of the facts and restore her honour. Instead, Ms Fiorillo had made her initial statements the day after she sought protection from the CSM, an insufficient amount of time to allow the CSM or her office manager to intervene. In addition, she had not considered that the actual course of events covered by her statements could be ascertained in criminal court with the consequent recognition of the correctness of her actions. In such a scenario, the disciplinary chamber found that there was no need, urgency, or indispensability for a media disclosure of the truth by Ms Fiorillo realised before the outcomes of the criminal trial, the action of the CSM, the intervention of the Public Prosecutor at the Juvenile Court of Milan, and in violation of the provisions of the law and the directives of the head of her office.

Relation of the case to the EU Charter

The EU Charter was not invoked.

Relation between the EU Charter and ECHR

The disciplinary chamber of the CSM cited only Article 10 ECHR but not the Charter as EU law was not applicable to the case.

Use of Judicial Interaction technique(s)

Consistent interpretation with the ECHR

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

The Disciplinary Chamber of the CSM does not refer to other national judgments, nor cites the jurisprudence of a foreign court.

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

The disciplinary chamber of the CSM referred to the case law of superior Italian courts. In particular, it quoted the judgment n. 100/81 of the Italian Constitutional Court where the latter affirmed that, even though magistrates enjoy the right of freedom of expression as any other citizen, the constitutional values of impartiality and independence of the judiciary must be protected as a deontological rule. As a result, the freedom of expression of magistrates must be balanced with the need to protect the consideration that the magistrates enjoy in public opinion, to ensure the prestige of the entire order and the trust of citizens towards the judicial function. The disciplinary chamber also referred to the case law of the Italian Court of Cassation – as well as its own case law – affirming the magistrate's right to provide the clarifications necessary to dispel misunderstandings and prevent distortions about his or her work when the informational activity of the bodies in charge was not sufficient (Court of Cassation, sez. un., 5/2001; CSM disciplinary chamber 20/2000).

Furthermore, the Disciplinary Chamber quoted the ECtHR judgment in *Buscemi v Italy* after mentioning the limitations to the freedom of expression of magistrates in Article 10(2) ECHR. In that judgment the ECtHR had stressed that judicial authorities shall exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges and, moreover, that discretion should dissuade them from making use of the press, even when provoked. The Disciplinary Chamber considered that the meaning of the ECtHR judgment is to bind the magistrate to the special duty that characterize his or her entire activity, even outside the performance of duties, and even when he or she is not accountable through media and information organs.

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

The aim (presumably) pursued by the national court when using judicial interaction techniques was to solve a conflict of between freedom of expression and the duty of discretion that binds magistrates.

Impact on Legislation / Policy

N/A

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

N/A

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?

The disciplinary chamber quoted the ECtHR judgment in *Buscemi v Italy*. See point 6.3.

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

N/A

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

The national court took into account the case law of the Constitutional Court on limitations to the freedom of expression of magistrates. See point 6.3 above.

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

The judgment was appealed before the Court of Cassation which set it aside and referred the case back to the disciplinary chamber in a different composition. The Court of Cassation balanced then interest protected by the disciplinary rules – that is the independence and impartiality of the magistrates – with the justification provided by Ms Fiorillo. It found that the disciplinary chamber of the CSM erred in considering that the legal interest behind the conduct of Ms Fiorillo was the protection of the freedom of expression. Instead, the Court of Cassation considered that her action was meant to protect her right to professional honour by restoring the truth of the facts. The question was thus whether the action of Ms Fiorillo to restore her honour – and, thus, the breach of the value of judicial independence – was proportionate and there were no less restrictive means available. Such a balance must be struck by the disciplinary chamber not in abstract but rather considering the actual results that the magistrate could have obtained in restoring her honour by using different means than the ones at issue. Accordingly, the disciplinary chamber of the CSM must hear again the case and adhere to the following principle of law: “the conduct of the magistrate defending herself from the attribution of a measure different in content from that adopted and irreconcilable with her duties of the magistrate is not, in itself, in contrast with the value of impartiality but it can be because of the means used. It follows that, in the case in which the magistrate resorts to interviews and press releases to defend herself, the legitimacy of the conduct at the disciplinary level must be assessed with an *ex ante* judgment that, having regard to the specific circumstances that have connoted the injury to the magistrate’s honour, cannot be limited to identifying abstract viable alternatives, without foreseeing what actual results the magistrate could have achieved with them to protect his professional honour”.

Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?

N/A

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

N/A

Connected national caselaw / templates

N/A

Other

N/A

(Link to) full text

Unofficial link to the full text of the judgment:

https://www.questionegiustizia.it/data/doc/123/sezione_disciplinare_csm_sentenza_65_-_2013_.pdf

Author

Martina Coli, University of Florence

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

1. Disciplinary Chamber of the Supreme Judicial Council, judgment no. 65 of 10 May 2013
 2. Court of Cassation, joint chambers, judgment no. 6827 of 28 January 2014
 3. Disciplinary Chamber of the Supreme Judicial Council, judgment no. 154 of 17 July 2014
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