

## Slovenia, Supreme Court, U 6/2020-29, administrative, supreme, 7 October 2020.

### Member State

 Slovenia

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### Topic

Impartiality (dismissal and appointment of members of the Judicial Council), Independence (removal of magistrates, legal remedies for individual judges against dismissal decisions)

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### Sector

Judicial Self-Government (Judicial Council, Court Presidents).

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### Deciding Court Original Language

Vrhovno sodišče Republike Slovenije

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### Deciding Court English translation

Supreme Court of the Republic of Slovenia

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### Registration N

Registration n. U 6/2020-29

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### Date Decision

7 October 2020

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### ECLI (if available)

ECLI:SI: VSRS:2020:U.6.2020.29

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### National Follow Up Of (when relevant)

N/A

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### EU legal sources and CJEU jurisprudence

EU case law (see below).

Civil Service Tribunal (now General Court as part of CJEU) Judgement Dragomirov v Commission of the European Community, app no. F-16/07

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### ECtHR Jurisprudence

Steck-Risch and others v Lichtenstein, app. no. 63151/00, 19 May 2005.

The following three cases are relevant, but were not invoked by the Judicial Council:

A.K. v Lichtenstein, app. no. 38191/12, 9 July 2015.

Micallef v Malta, app. no. 17056/06, 15 October 2009.

Nicholas v Cyprus, app. no. 63246/10, 9 January 2018.

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### Subject Matter

The Supreme Court established that disqualification of a member of the Judicial Council is in order when the relationship between the said member and a candidate (positively or negatively) deviates from a common relationship between judges. The SC also added that the selection of a candidate does not determine a right, obligation, or a benefit, for there is no such thing as a right to be elected judge. The candidate was selected on the basis of legal criteria, standards established by the Criteria for the selection of candidates for the post of judge, the opinion of the President of the Higher Court of Ljubljana and first-hand impression. The above is sufficient to dismiss the applicant's complaint that the choice was the result of an abuse of discretion. The SC cannot interfere in such a decision of the Judicial Council as this would be contrary to the Judicial Council's discretion in judicial selection

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### Legal issue(s)

The case relates to the impartiality of the members of the Judicial Council. The key legal issue in the case was whether the Judicial Council had acted impartially and thus in accordance with the law in the process of selection of a judge for a higher court. An unsuccessful candidate invoked close friendship between the selected candidate and one of the members of the Judicial Council. The SC nevertheless established the criteria necessary for the disqualification of a member of the Judicial Council were not fulfilled in this case.

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### Request for expedited/PPU procedures

NO

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### Interim Relief

NO

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### National Law Sources

Articles 22, 130 and 132 (2) of the Constitution.

Articles 20, 20 (2), 20 (3), 52 of the Judicial Council Act (Official Gazette RS, no. 23/17).

Judicial Service Act (Official Gazette RS, no. 19/94).

Administrative Litigation Act (Official Gazette RS, no. 105/106).

General Administrative Procedure Act (Official Gazette RS, no. 80/99).

Criteria for the selection of candidates for the post of judge (Official Gazette RS, no. 64/2017).

Final opinion of the President of the Appellate Court Su 396/2019-17 of 9. January 2020.

Judgement of the Supreme Court, no. U 7/2019 of 16 December 2019

Decision of the Supreme Court, no. I Up 511/2004 of 2 September 2004.

Decision of the Supreme Court, no. X Dor 134/2019 of 3 September 2019.

Decision of the Supreme Court, no. I Uv 26/1996 of 3 April 1997.

Decision of the Supreme Court, no. X Ips 333/2015 of 21 July 2017.

Decision of the Constitutional Court, no. Up-1094/18-13 of 21 February 2019.

Decision of the Constitutional Court, no. Up-562/14-29 of 2. March 2017.

### Facts of the case

An unselected candidate triggered an administrative dispute before the Supreme Court to challenge the decision of the Judicial Council of the Republic of Slovenia, filling a vacant post at the Criminal Division of the Higher court of Ljubljana. The President of the Higher Court of Ljubljana had supported the applicant as the most suitable candidate but had also given a favourable opinion on the candidate that was later selected by the Judicial Council. In her action before the Supreme Court, the applicant claimed the Judicial Council violated her right to impartial decision-making, for the procedure in which the participant was selected was unlawful; firstly, because one of the Council members should have been disqualified due to close friendship with the selected candidate, and secondly because the respondent (the Judicial Council) had abused the discretion.

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

Firstly, the Supreme Court explained that according to Article 36 of the Judicial Council Act, the administrative dispute against the Judicial Council's decisions on the selection of judge candidates is limited. The applicant can only challenge the lawfulness of the selection procedure and the decision of the Judicial Council about meeting general legal requirements for the appointment in the said post.

Secondly, the SC explained that under Article 30 of the Judicial Council Act, a member of the Judicial Council cannot take part in decision-making if the matter concerns his/her candidature or whether he/she is related by blood or marriage (disqualifying reason – *iudex inhabilis*) with a candidate or a judge in proceedings or if there are any other circumstances that raise doubts on impartiality (reason for refusing – *iudex suspectus*)

Considering Constitutional Court (decisions Up-1094/18-13 and Up-217/15) and ECtHR case law (*Steck-Risch and others v Lichtenstein*, app. no. 63151/00) on the meaning, purpose and content of the requirement of impartiality in the subjective sense and the appearance of impartiality in the objective sense, the SC agreed with the applicant that the Council has to comply with both the subjective and objective aspect of impartiality. The SC then assessed whether the objective aspect of impartiality was curtailed in the case at hand. The Judicial Council claimed that the very way in which the Judicial Council is elected and composed makes it impossible to exclude all personal acquaintances (which, in any case, can never be completely avoided in small communities such as Slovenia's), and that they cannot therefore affect the objectivity and impartiality of the body's decision-making. The SC established that the said is true but only partly: the composition of the Judicial Council, even if known in advance and "permanent", does not mean there cannot be any doubt about impartiality. The Council must decide in such a composition that a reasonable person cannot objectively seriously doubt its impartiality. The assessment is to be done on a case-by-case basis.

Considering the applicant's claim that the relationship between a member of the Council and the selected candidate was amical, and thus casted a doubt upon impartiality, the SC had to assess whether the intensity of the relationship had been such that the objective aspect of impartiality was curtailed. The SC established that it is impossible to expect a complete ignorance between all the members of the Council and candidates. Therefore, the SC set a rule: the disqualification of a council member is necessary when the relationship between a member and a candidate (negatively or positively) deviates from ordinary relationships between judges. The Court established the relationship between the said member and the candidate suited a common manner of conduct between colleagues (the two occasionally gathered for lunch or coffee, telephoned each other, and among others also talked about their personal lives, hugged when

they met and referred to each other as friends).

Lastly, the Supreme Court explained the Judicial Council makes its decisions on the basis of discretion, for it has a special role inside the judicial branch in the system of checks and balances. That role is defined in Article 130 and in the second paragraph of Article 132 of the Constitution. It establishes that in order to execute its role and responsibilities, the Judicial Council must be granted a wide margin of discretion. The Council cannot become a “paper” decision-maker but is given the freedom to critically examine and balance all the material in the selection process as a qualified body, within the limits of its discretion, and then to make an independent decision. The justification for the selection of the best candidate does not require the Judicial Council to make a comparison between all the candidates taking part in the procedure who are each pursuing their own interest and are each competing for the same judicial post, so that the selection procedure does not have the nature of a dispute between the candidates.

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#### Relation of the case to the EU Charter

N/A

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#### Relation between the EU Charter and ECHR

N/A

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#### Use of Judicial Interaction technique(s)

Comparative reasoning with foreign legislation or foreign caselaw.

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

N/A

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

External: The SC referred to one case the European Court of Human Rights (Steck–Risch). It also invoked a judgement of the Civil Service Tribunal (now General Court as part of CJEU).

Internal: the SC referred to the case law of the Constitutional Court of Republic of Slovenia

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

The SC used the jurisprudence of the ECtHR to interpret the meaning, content and purpose of the requirement of impartiality in the subjective sense or the appearance of impartiality in the objective sense. However, it referred to only one case, the Steck–Risch, even though there is a variety of similar cases, such as the ones cited above, (e.g., A.K. v Lichtenstein, Micallef v Malta, Nicholas v Cyprus, etc.). In that way, the SC missed the opportunity to substantiate its decision better with referring to the said case law. That jurisprudence is also relevant for a potential reader to be able to form a position about the SC’s decision in question.

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#### Impact on Legislation / Policy

N/A

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

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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(Link to) full text

[sodnapraksa.si](http://sodnapraksa.si) (full text- Slovenian)

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

1. The Selection Decision of the Judicial Council was not published.
  2. Supreme Court, decision no. U 6/2020-29 of 7 October 2020
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