



REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Up-134/95
Mar. 14, 1996

D E C I S I O N

In the process of deciding the constitutional complaint of D.C. from P., the Constitutional Court at its session of March 14, 1996

d e c i d e d:

1. The judgement of the Supreme Court no. I Uv 13/94-8 of Jul. 12, 1995 and the resolution of the Judicial Council no. 751-4/94 of Nov. 7, 1994 shall be abrogated. The case shall be sent back for reconsideration to the Judicial Council. The resolution of the Judicial Council no. 3/95-252 of Oct. 6, 1995 and any decision pronounced in the administrative lawsuit against this resolution shall thus become immaterial.
2. The procedure on invitation for applications, started by the announcement of a vacant post of a county court judge at the County Court of Piran, as published in the Official Gazette of the RS, No. 11 of Feb. 23, 1996, shall be abrogated.

R e a s o n i n g:

A.

1. The Judicial Council decided in the procedure of election of a judge to be assigned to the vacant judicial post at the Lower Court of Koper, Piran Office, at its session of Nov. 4, 1994 that the complainant would not be proposed to the National Assembly for election because of her failure to satisfy the conditions specified in Items 3 and 6 of Paragraph 1 of Article 29 of the Judiciary Office Act (Official Gazette of the RS, No. 14/94 - hereinafter: ZSS).
2. The Supreme Court decide with its disputed judgement that the request filed by the complainant on the basis of Article 66 of the Administrative Lawsuits Act (Official Gazette of the SFRY, No. 39/77) against the said resolution of the Judicial Council should be dismissed as unfounded. Having first established that the Judicial Council made the disputed decision after having found that the applicant satisfied the statutory conditions set in Article 8 of the ZSS for appointment to judicial office, that the disputed resolution of the Judicial Council was an individual rather than administrative act, and that the decision of the Judicial Council not to propose to the National Assembly the appointment of the complainant to judicial office did not mean an interference with her constitutional rights, the Supreme Court ends the reasons for its decisions, which is based on Paragraph 2 of Article 157 of the Constitution, by concluding that the Judicial Council acted in accordance with the statute and the Constitution, which is why its act of refusing to propose the complainant for election did not interfere with her constitutional rights, to which she makes reference (Articles 14, 22, 25, 29, 38, 49 and 153 of the Constitution). For, on the basis of the information accumulated, the Supreme Court cannot doubt that, prior to making its decision, the Judicial Council proceeded in accordance with Article 28 of the ZSS and that it correctly evaluated the criteria of Article 29 of the ZSS, in which connection the court expressly points out that the Constitution does not grant to a candidate a prior right to be proposed for appointment (to the office) by the Judicial Council, and that the appointment/refusal of a candidate is not a matter that should be examined within the framework of the review of conformity of the decision of the Judicial Council with the statute if the latter has prior to that acted in all respects in accordance with Articles 28 and 29 of the ZSS.

3. The complainant in her constitutional complaint reproaches to the Supreme Court that it had no reason to dismiss all the claims stated in her action; in reference with the decision of the Judicial Council, she states that it is contrary to the statute and that it violates her constitutional rights. As unlawful conduct on the part of the Judicial Council she primarily points out the fact that the Judicial Council changed the evaluations of staffing councils of the Lower and the Superior Court of Koper relating to Item 3 of Article 29 of the ZSS from positive to negative, and she also criticizes its incorrect evaluation of the criteria set in Article 29 of the ZSS, which is claimed to have been carried out on the basis of unverified, one-sided and false data with which the complainant was not acquainted, as well as its failure to take into consideration Articles 28 and 29 of the ZSS in the process of selection of the complainant for appointment to judicial office. In her application, she further describes the progress of the procedure of selection; in connection with the opinions and evaluations of judicial work prepared on the part of staffing councils of the Lower and the Superior Court of Koper she also points out that, in her case, the evaluation of her judicial office was exclusively within the competence of the staffing council of the Superior Court, that evaluation of her was positive with respect to all the criteria under Article 29 of the ZSS, also with respect to Item 6, and that the said evaluation is legally effective, but that, upon the request of the Judicial Council, the staffing council of the Lower Court engaged in the evaluation, and that the evaluation of the same is for this reason null and void, as well as not effective in law, because the complainant was not in a position to appeal against it in the sense of Article 36 of the ZSS. The complainant asserts that the Judicial Council with its disputed act interfered with her rights:

- under Article 25 of the Constitution, because it did not pass the resolution in the form of a decision that would include legal instruction as to the right of appeal, and because she was not in a position to contest the evaluation of the staffing council of the Lower Court of Oct. 24, 1994;

- under Article 29 of the Constitution, because it did not allow her at the session of Nov. 4, 1994 (with her waiting at the door) to prove that the assertions made by the staffing council of the Lower Court were untrue;

- under Article 22 of the Constitution, because it did not ensure for her the equal protection of rights in the procedure of election as in the case of judges A.Š. and Dr. I.Ž., with whom the court had a discussion concerning new facts;

- under Article 14 of the Constitution, because it required from the staffing council of the Lower Court to prepare an evaluation only concerning the complainant, but not also concerning the other two candidates proposed for election, although the opinion of the staffing council was originally positive for all of the three candidates, because the court did not carry out special inquiries in connection with the other two candidates, and for instructing the staffing council of the Lower Court not to deliver the new evaluation of Oct. 24, 1994 to the complainant, although this was obliged to do so under Article 36 of the ZSS and also sent the evaluations to other candidates, as it was bound to do so in accordance with the resolution of the second session of the Judicial Council of Sep. 5, 1994;

- under Article 38 of the Constitution, because the record of the resolutions of 7th session of the Judicial Council of Nov. 4, 1994 was sent to all judges in Slovenia, and in it personal data of the complainant were mentioned, among other things also the address of her residence;

- under Article 49 of the Constitution, because it did not propose the election of the complainant but did so in the case of the other two candidates, although a positive evaluation was prepared by the staffing council of the Lower Court of Koper for all three of them, and with respect to the complainant also a positive evaluation of the staffing council of the Superior Court;

- she further asserts that Paragraph 4 of Article 153 of the Constitution was violated, because the disputed act of the Judicial Council is not based on the statute, more specifically, on the provision of Articles 28 and 29 of the ZSS, because the Judicial Council in its resolution stated that the complainant did not fulfil the conditions set in Items 3 and 6 of Article 26 of the ZSS, but failed to substantiate such a decision.

The complainant proposes to the Constitutional Court:

1. to abrogate ab initio or, subordinately, prospectively the disputed judgement of the Supreme Court;

2. to abrogate ab initio the disputed resolution of the Judicial Council;

3. to pronounce the evaluation by the staffing council of the Superior Court in Koper of Jul. 12, 1994 to be the only legally effective evaluation of judicial work of the complainant, and that the opinion of the staffing council of the Lower Court of Koper of Jul. 12, 1994 is the only legally effective opinion of the staffing council of the Lower Court, and that, consequently, the Judicial Council is obliged to take into consideration the said evaluation and the opinion in deciding the candidacy of the complainant;

4. to stay the execution of the disputed resolution of the Judicial Council and prohibit all the decisions of the Judicial Council on selection of another candidate applying for the announced judicial office for which the complainant applied on Jun. 12, 1994;

5. to find that the complainant fulfils all the conditions set in Article 29 of the ZSS and that the Judicial Council is obliged for this reason to propose her election to the National Assembly.

4. The Constitutional Court decided to accept and consider the constitutional complaint because it found that the complaint opened numerous important legal questions relating to the application of provisions of the ZSS, and because the consequences of supposed violation of human rights and fundamental freedoms would be of vital importance to complainant's life - for they relate to her possibility of employment. The Constitutional Court dismissed the request for staying the execution of the disputed resolution of the Judicial Council because the particular procedure on invitation for applications has already resulted in certain consequences, which is why the conditions for its staying do not exist.

5. The Supreme Court in its reply to the assertions made in the constitutional complaint states that, considering that the complainant's allegations are identical with those made by her in reference with her lawsuit, it invokes in its entirety its position taken in the judgement.

6. The Judicial Council in its reply to the Constitutional Court proposes that the constitutional complaint be dismissed as unfounded, claiming that both the decision of the Judicial Council not to select the complainant and the disputed judgement of the Supreme Court are in conformity with the Constitution and statute. The Judicial Council provides extensive reasons for holding such view and states substantially the following:

- that in the procedure of selection it made use of the statutory possibility granted under Paragraph 2 of Article 18 of the ZSS, according to which it is not bound in selecting a candidate by the evaluation of suitability provided by the staffing council, which is why it may evaluate the suitability of a candidate also on the basis of other information which it may collect within the framework of the procedure, or may even make other evaluation of the (un)suitability of a candidate than that made by the staffing council;

- that the decision not to propose the election of the complainant was made on the basis of its evaluation of the candidate's past acts and conduct, both on the job and outside of it, and was based on the information collected during the procedure and on the opinion of the staffing council of the Lower Court of Oct. 24, 1994, which established that the candidate did not fulfil the criterion set in Item 6 of Article 29 of the ZSS, but it also considered the opinions of the staffing council of the Superior Court, but could not use them as the basis for its decision because of their ambiguity;

- that the complainant was acquainted during the procedure of selection with all the information on the basis of which the Judicial Council made its decision and that she had a possibility of making her statement and providing such information as might be helpful in determining whether she fulfilled the conditions and criteria for holding the judicial office, and that she also used this opportunity;

- that it was not obliged to issue the decision on her refusal as a candidate because this is not required by any law or regulation, neither is this required on the basis of systemic interpretation of the ZSS;
- that in the procedure of nomination for judicial office what is involved is only the selection of a candidate by taking into consideration the criteria set in Article 29 of the ZSS, which the Judicial Council in this particular case also did and also informed the candidate of the criteria which she did not satisfy;
- that the complainant exhausted legal remedies by filing a request for protection of rights, which is why her right to legal remedies was not violated;
- that no legal remedy is provided against the opinions referred to in Article 16 of the ZSS, which is why the former are not delivered to candidates (the evaluation by the Lower Court of Koper of Oct. 24, 1994 is just such an opinion); in reference with the opinions, it also points out that in its initial opinion of Jul. 12, 1994 the staffing council of the Lower Court also did not expressly support the nomination of the complainant;
- that it has never heard a candidate at its sessions, and so also not Judges Š. and Ž.;
- that the complainant was the only candidate applying for the announced vacancy of a judicial post and that the other two judges, who are mentioned by the complainant, applied for two other vacant positions; in other respects, the Judicial Council in the case of all candidates examined their applications
- taking into consideration the statutory provisions on fulfilment of special and general conditions and based on the criteria set in Article 29 of the ZSS;
- that the Judicial Council did not use the complainant's personal data for any such purpose as would be contrary to the statute, and that, consequently, there was no misuse of personal data.

In concluding its reply, the Judicial Council points out that neither the right to be nominated for election to judicial office, and even less so the right to be elected to permanent judicial office, is guaranteed either by the Constitution or by the statute, which is why in this case no judicial or constitutional protection is provided for. Having in mind the role and powers of the Judicial Council, which are determined by the Constitution and statute, it is also impossible to have some other state body decide that a candidate fulfils the criteria required to be able to hold the office of a judge in accordance with Article 29 of the ZSS, or even to oblige the Judicial Council to propose that a candidate be elected, as proposed by the complainant.

7. The complainant in her answer to the assertions of the Judicial Council made in a reply to the constitutional complaint insists entirely on her claims from her constitutional complaint and again points out that the disputed resolution of the Judicial Council and the Supreme Court is not based on Articles 16 and 17 and Articles 28 and 29 of the ZSS, which is a violation of the last Paragraph of Article 153 of the Constitution. She then cites the subject matter of the opinions and evaluations by staffing councils, on the basis of which she proves that the finding of the staffing council, that she does not fulfil the criteria set in Items 3 and 6 of Article 29 of the ZSS, is not correct, while in connection with the information having been collected by the Judicial Council about her attitude towards other staff members and her conduct outside the job she provides extensive evidence of its falsity; in other respects, she repeats and explains again all the key claims from her constitutional complaint relating to the asserted instances of the violation of constitutional rights. Her proposal concerning the decision to be made, however, is supplemented by further request, that the proposal of the Judicial Council to the National Assembly should be replaced by a decision of the Constitutional Court.

8. The ombudsman in his opinion points out that, in the instant procedure of election of a judge, terms used to refer to individual acts have been used indiscriminately and inconsistently, thus for example the words "evaluation" and "opinion", as well as the frequently used word "conditions" in reference with the use of the criteria set in Article 29 of the ZSS. The position of the ombudsman is that, formally, the complainant has not been denied the constitutional right to appeal, because she made use of the

possibility of an appeal against the evaluation of judicial work in accordance with Article 36 of the ZSS, but in the actual case the complainant's constitutional right to legal remedies granted under Article 25 of the Constitution has been violated, because in the procedure relating to the appeal against the evaluation by the staffing council of the Superior Court the staffing council of the Supreme Court in its decision did not take any position concerning the claims made in the appeal, and in its reasoned opinion failed to specify with sufficient precision the reasons for its decision. He also asks himself whether "the supplemented evaluation" of the staffing council of the Lower Court of Koper should be deemed to be a new evaluation or an additional opinion based on Article 16 of the ZSS. If "the supplemented evaluation" is considered to be a new evaluation of the judicial work, which the Judicial Council mainly used in support of its decision, in the opinion of the ombudsman, the complainant's right to legal remedies (Article 25 of the Constitution) as well as the right to a fair trial (Paragraph 1 of Article 6 of the EKČP) have been violated, because the complainant was not in a position to be able to make her statement about these claims and evaluations and to offer her replies and provide her own evidence. In reference with the violation of the constitutional right to appeal, the ombudsman also states that the Supreme Court in the disputed judgement also did not enter into consideration of the reasons for an appeal and that in this connection it only stated that "it does not doubt that, prior to its decision not to propose to the National Assembly to elect the complainant, the Judicial Council acted in accordance with Article 28 of the ZSS".

B. - I.

9. Article 49 of the Constitution (freedom of work) guarantees in Paragraph 3 that there shall be no unjust discrimination in work opportunities available to each person. Being a basic human right and freedom, the said right shall be exercised directly on the basis of the Constitution, as stipulated by the provisions of Article 15 of the Constitution; however, the manner in which it shall be exercised may be regulated by the statute whenever such regulation is necessary by the reason of the particular nature of it.

10. The election of judges is regulated by Articles 129 and 130 of the Constitution. According to Paragraph 1 of Article 129, the conditions of election of a judge shall be such as are determined by the statute. According to Article 130, the National Assembly shall elect judges upon the recommendation of the Judicial Council. Having regard to the above mentioned Article 49 of the Constitution, the statutory regulation of election of a judge and, consequently, the decision of the competent authority in each particular case shall be such as will ensure that the office will be accessible to each candidate under equal conditions, and in this connection the legislator is directly bound by the Constitution, and the decision-making bodies by the Constitution and by the statute.

11. The conditions relating to the election of a judge who has already held the judicial office, for a permanent term of office, which is the object of consideration in the instant case, is regulated by the ZSS in Section 1 of Chapter II (Conditions relating to the election of a judge and appointment to the office of a judge). According to the provision of Article 7, only such person may be elected as judge as fulfils the general conditions relating to the election and the special conditions relating to the election and appointment to the office of judge as specified by the said statute. The general conditions are listed in Article 8 in an exhaustive manner, and the special conditions, such as satisfactory discharge of the office over a specified number of years, are prescribed in subsequent Articles 9, 10, 11 and 12. The procedure of election of a judge is regulated in Section 2 of Chapter II of the ZSS (Procedure of election and appointment of a judge), and its subject matter relates directly to Section 1 (Conditions relating to the election of a judge and appointment to the office of a judge) and Section 4 (Criteria for selection and promotion of a judge and the procedure of evaluation of the judicial work). In the framework of provisions concerning the procedure of election and appointment of a judge, also regulated in greater detail is the conduct of the Judicial Council in connection with the selection of a candidate to be proposed to the National Assembly for election. The Judicial Council proposes to the National Assembly the election of one candidate for each office of a judge announced to be vacant (Article 19 of the ZSS), if at least one candidate has applied who fulfils all the prescribed conditions. As conditions may in accordance with Article 129 of the Constitution only be prescribed by the statute, it is the statute also which determines who and in what manner should determine the fulfilment of such conditions (according to Articles 31 to 36, the Judicial Council shall not take part in the determination of fulfilment of special conditions and the general condition of Item 6 of Paragraph 1 of Article 8 of the

ZSS, save in the case of a negative evaluation referred to in Item 1 of Article 32 of the ZSS). It is thus bound by the evaluation of the judicial office and judicial work as prepared by the competent staffing council (according to Articles 31-36 and Article 104), but it is not bound by any other evaluation of the suitability of candidates, that is, such an evaluation as may be prepared by (some other) staffing council under Articles 16-18 of the ZSS. The Judicial Council must, according to the provision of Paragraph 1 of Article 28, in selecting a candidate act in accordance with the criteria of Article 29 of the ZSS, that is, the same criteria that the competent staffing councils have had to observe in preparing the first and second above mentioned evaluation (evaluation of the judicial office and "opinion about all the applicants" or evaluation of the suitability of candidates).

12. On the basis of the said provisions of the ZSS, the Judicial Council, as an authorized proposer, in the procedure of election in the case of the complainant decided not to propose her to the National Assembly for election, "because she does not fulfil the conditions set in Items 3 and 6 of Paragraph 1 of Article 29 of the Judicial Office Act".

13. The Constitutional Court concludes on the basis of the above cited constitutional and statutory provisions that the decision of the Judicial Council, not to propose the complainant to the National Assembly for election, represents a decision concerning the right of each person referred to in Paragraph 3 of Article 49 of the Constitution. The Constitution does not grant to a candidate prior right to be proposed for appointment (to the office) by the Judicial Council, but it does ensure that the office will be accessible to him/her under the equal conditions as apply to all other candidates, which means that it is only the decision of the competent body based on the statute which ensures the realization of the constitutional right of an individual candidate (in this case of the complainant).

14. The judicial protection of rights of each person is guaranteed by Article 23 of the Constitution; and the judicial protection of human rights and fundamental freedoms, which include the right dealt with by Article 49 of the Constitution, is in particular and expressly guaranteed in Article 15, this including the right to have the consequences of their violation eliminated. As the ZSS does not include the express provisions on judicial protection, the protection of legality should in the case under consideration be ensured on the basis of Article 157 of the Constitution through an administrative lawsuit.

15. Thus, the Supreme Court was in the case under consideration obliged, under Article 157 of the Constitution, through the administrative lawsuit to examine the disputed resolution of the Judicial Council from the viewpoint of litigious claims by which the complainant contested in particular the legality of the decision-making on the part of the Judicial Council, and to substantiate its decision as appropriate. In an administrative lawsuit, which is a means of ensuring legality, a court should, it is true, not enter into the appropriateness of that part of decision-making by the Judicial Council which is based on discretion, which was essentially pointed out also by the Supreme Court, but, if in this case the discretionary decision-making was really involved, it should have in addition to correctness in the application of substantive and procedural law evaluated whether the purpose and scope of discretionary power have been exceeded, which still falls, in accordance with the provision of Article 10 of the ZUS, and in line with *mutatis mutandis* application of Article 4 of the ZUP as dictated by the nature of decision-making in reference with the election procedure, within the framework of review of legality. From the assertions made in the reasons for the disputed judgement, that "prior to its decision not to propose to the National Assembly to elect the complainant, the Judicial Council undoubtedly acted in accordance with Article 28 of the ZSS", and that "the court has no doubts that the Judicial Council correctly evaluated the criteria set in Article 29 of the statute", it follows that the review of legality with respect to the alleged use of discretionary power was at least implicitly carried out (because the purpose and scope of the discretionary decision-making by the Judicial Council in the selection of candidates are determined precisely in Articles 28 and 29 of the ZSS). The question of whether such, merely implicit review of legality would in this case be sufficient, however, did not have to be answered, because the disputed judgement had to be abrogated *ab initio* already for other reasons (see the following section below).

16. For the judgement in the administrative lawsuit did not adjudicate on those instances of unlawfulness of the disputed act that were expressly claimed to be such in the lawsuit (violation of the right to appeal under Article 36 of the ZSS and thus of the right to legal remedies, and of constitutional rights granted in Articles 22 and 49 of the Constitution, etc.), in the review of which it would only turn

out unequivocally whether in the disputed act what was involved was a decision (not) to select the candidate for the announced vacancy of the office of a judge, or whether something else was concerned, namely, the exclusion from nomination procedure for the reasons of alleged non-fulfilment of the statutory conditions.

Concerning incorrect assertion in the resolution of the Judicial Council, that the complainant does not fulfil the "conditions set in Items 3 and 6 of Paragraph 1 of Article 29 of the Judicial Office Act", the Supreme Court in just summarizing the views of the Judicial Council stated, in parentheses only (obviously as its opinion), merely that those "conditions" were in reality the criteria (without drawing any conclusion from such a finding) - while in the reasons for its decision, where it should have substantiated why in its opinion the asserted violation of the right granted under Article 36 of the ZSS and the asserted violation of constitutional rights did not exist, absolutely no mention is made concerning the asserted violation of Article 36 of the ZSS, and in reference with the asserted violation of the total of seven constitutional provisions - after having confined itself in the reasoning opinion to substantiation, that the (non)-selection of the candidate (if carried out by taking into consideration the criteria set in Article 29 of the ZSS) "is not a matter concerning the review of conformity of the decision of the Judicial Council with the statute" - it only asserted, in a general manner, that the disputed act did not interfere with any of the said constitutional rights. In this way, the Supreme Court in the opinion of the Constitutional Court violated the complainant's right to due process of law of Article 23 in connection with Article 157 of the Constitution, which the complainant substantially points out when she says that the Supreme Court dismissed all her assertions without providing any reasons for doing so. For the right to judicial protection of the allegedly violated rights, which is in connection with the administrative and other matters referred to in Article 157 of the Constitution restricted to the review of legal validity of a disputed individual act, is not ensured solely by the fact that, in accordance with the statute and in the concrete case, it is possible to file an application for use of a relevant legal remedy, if in the process of consideration of such a legal remedy the court should then not decide on controversial matters being the object of judicial protection - in this case in particular concerning the legal validity of the disputed decision of the Judicial Council, which is why the complainant rightly claims that her constitutional right to equality in the protection of rights of Article 22 of the Constitution has been violated as well. Due to such treatment - and having regard to what has been said in Section 13 of this reasoning - the right of the complainant granted to her by Article 49 of the Constitution (accessability of each job under equal conditions) has thus been violated as well.

17. The right to make discretionary decisions and freedom not to take into consideration an evaluation of suitability made by a staffing council in accordance with Article 18 of the ZSS has also been invoked, on the *mutatis mutandis* basis, by the Judicial Council in its reply to the constitutional complaint, where it states that it may evaluate the suitability of a candidate also (or exclusively) on the basis of other information which it may collect within the framework of the procedure, or may even make other evaluation of (un)suitability of a candidate than that made by the staffing council; concerning the issuance of a decision on (non)-selection of a candidate, it considers that it is not its duty to issue such a decision because this is not prescribed by any statute or regulation.

18. In its decision U-I-98/91 (OdlUS I, 101), the Constitutional Court has already taken a position that the purpose of the provision of Article 25 of the Constitution, which is invoked by the complainant in her constitutional complaint and which provides that each person shall be guaranteed a right to legal redress in relation to the decisions which determine the rights, obligations or legal entitlements of such a person, is not only that it enables a person to apply for a legal remedy but primarily that by applying for such a remedy he can effectively protect his legal interests. If a regulation makes this impossible, it is, according to the position taken in the said decision, in disagreement with the Constitution. Such interpretation also follows from the Universal Declaration of Human Rights, which in Article 8 speaks of the right of each person to an effective legal remedy against the acts which violate the fundamental rights recognized by the Constitution or statute, as well as with the European Convention on Human Rights, which in Article 13 guarantees to each person effective legal remedies in the event of violation of the rights and freedoms guaranteed by it. From the foregoing it follows that the guaranteeing of the constitutional right to legal remedies is reasonable only if these can be used effectively by the individual in the protection of his or her rights, or - according to the provision of Article 25 of the Constitution, which has wider applicability than the above mentioned international instruments, also of his or her legal entitlements.

19. According to the ZSS, there shall be no appeal to the decision of the Judicial Council on selection of a candidate which it intends to propose to the National Assembly for election, but there is no doubt that an administrative lawsuit can be commenced (in accordance with Article 157 of the Constitution), by which the Constitution guarantees to each person - candidate to whom a decision of the Judicial Council applies the judicial protection of his or her right granted under Article 49 of the Constitution. It is true that neither the ZSS nor any other regulation prescribes that the Judicial Council must in such a case issue a decision, but it is in line with the said position of the Constitutional Court obliged to make it possible for the candidate through such an administrative lawsuit as may be commenced to effectively contest such a decision, which he or she cannot do if the reasons for the decision are not provided.

20. In the case under consideration, the Judicial Council informed the complainant of its decision just by a letter no. 751-4/94 of Nov. 7, 1994, the whole content of which reads as follows: "We hereby inform you that the Judicial Council at its session of Nov. 4, 1994 decided not to propose you to the National Assembly for election, because you do not fulfil the conditions set in Items 3 and 6 of Paragraph 1 of Article 29 of the Judicial Office Act. The Judicial Council has also established that your office of a judge came to an end with the expiry of the term of office on Oct. 28, 1994." Such a decision - considering the fact that the matter is not expressly regulated by the statute - violates the complainant's constitutional right to effective legal remedies (under Article 157 of the Constitution) already in that it is not supported by the reasoning.

21. Further, this decision violates her constitutional right to equality in the protection of rights in the procedure before state bodies (Article 22 of the Constitution), because in her case the Judicial Council - differently than in other cases - deemed that, in spite of the submitted evidence of fulfilment of the special condition of Paragraph 1 of Article 9 of the ZSS applying to the election to the office of a district court judge, that is, in spite of the legally effective positive evaluation of judicial work, the complainant did not fulfil the "conditions set in Items 3 and 6 of Paragraph 1 of Article 29 of the ZSS". Although these statutory provisions do not at all apply to the election of a judge (in this case to the election for a permanent term of office) but are just the criteria that must be taken into consideration not only by the competent staffing councils in their preparation of the evaluation of judicial office (judge's work) but also by the Judicial Council in choosing one from among the candidates who fulfil the conditions for nomination (see Article 28 of the ZSS), just because of this mistake in the use of right word the disputed decision of the Judicial Council would not be unlawful and unconstitutional, if the Judicial Council were under the ZSS competent to make such a decision, that is, to find that, in spite of the legally effective positive evaluation of judicial work as issued by the competent staffing council, the candidate does not satisfy the special condition set in Article 9 of the ZSS. Such a decision, however, is not within the competence of the Judicial Council, because according to the provision of Paragraph 2 of Article 18, the Judicial Council is not bound by the evaluation of suitability on the part of a staffing council (that is, by the opinion or evaluation referred to in Articles 16 and 17 of the ZSS, by which the staffing council (not necessarily the same as the staffing council competent for the preparation of evaluation of judicial work) "only forms an opinion about all applicants" and by which it specifically identifies the candidates deemed by it to be most appropriate for filling the vacant post, and provides the reasons for doing so" (thus, the Judicial Council is in the case of several candidate not bound by the order of candidates from the opinion of the staffing council, if its different opinion can be justified on the basis of the criteria set in Article 29 of the ZSS - but is bound by the evaluation of judicial service of the competent staffing council referred to in Article 35 and Article 104 of the ZSS on whether a judge satisfies the requirements specified for the office of a judge (or promotion), or not. For, according to Paragraph 2 of Article 33 of the ZSS, it is only the negative evaluation under Item 1 of Article 32 of the ZSS (evaluation: not suitable for judicial office) that "must be, before becoming effective, submitted for approval to the Judicial Council" (and even in the case of this evaluation, the Judicial Council is not empowered to change it on its own but must, in the case of refusal to approve it, return it to the competent staffing council who must prepare a new evaluation), while with respect to all other evaluations referred to in Article 32 the Judicial Council has no such authorization in the statute.

22. Such interpretation of the Council's powers is fully in accord also with the above mentioned content of Articles 16, 17 and 18 of the ZSS, which specify the meaning of "an opinion about all the applicants" and "the evaluation of suitability of candidates" including the determination of the most

appropriate from among the several applicants, by which, however, the Judicial Council is not bound, as well as with the content of Article 28 of the ZSS, which instructs the Judicial Council to act in accordance with the criteria of Article 29 of the ZSS in "selecting the candidates", that is, in selecting between the candidates who fulfil the general and special conditions for nomination at least minimally - and the Judicial Council (while bound by the statute to observe the criteria of Article 29 of the ZSS) is autonomous in evaluating who among the several candidates best satisfies the said criteria, and such a candidate is then proposed to the National Assembly for the appointment to judicial office, or is appointed to the announced post of judge by the Council itself, on the basis of Article 25 of the ZSS. The "determination of whether a candidate has professional qualifications for discharging the office of a judge" (that is, the evaluation of judicial office or work), which must, according to Article 28, also be carried out on the basis of the criteria set in Article 29, is in line with the provisions of Section 4 of Chapter II of the ZSS and the provision of Article 104 of the ZSS within the competence of bodies other than the Judicial Council. (Having regard to the role of the Judicial Council as the proposer of judges to be elected, upon which this obligation has been imposed in the Constitution, it would be possible to raise the question of conformity with the Constitution of the regulation by the statute now in force, but the parties to the proceeding did not raise this question).

23. The disputed resolution of the Judicial Council is thus unlawful in two respects. First, because, with the general and special statutory conditions having been fulfilled, it should have proposed the complainant as the only candidate for election (that is, in line with the regulation of the statute currently in force, in particular with regard to Articles 19 and 33 of the ZSS - although with regard to the constitutional role of the Judicial Council as the only proposer of new judges different regulation by the statute could have been even more acceptable), but the Judicial Council did not propose her for election, and it decided to do so for the alleged non-fulfilment of "conditions" which in actual fact are not conditions for election but the criteria for evaluation of whether a candidate fulfils the so-called special conditions set in Articles 9 to 12 of the ZSS and the general condition set in Item 6 of Paragraph 1 of Article 8 of the ZSS (for fulfilment of all these conditions is determined through evaluation of judicial office in accordance with Article 29 of the ZSS and is presented in synthesized form in one of the four "findings" or evaluations referred to in Article 32 of the ZSS). If the Judicial Council had been of the opinion that the candidate (under the foregoing criteria) did not fulfil any of those conditions, it could only have rejected her nomination (on the analogy with the provision of Paragraph 4 of Article 15 of the ZSS), if it were of the opinion that it was allowed by the statute to do so - however, such an action would only have come into consideration in the case if the Ministry of Justice had in the procedure under Article 15 of the ZSS overlooked the non-fulfilment of any of the general conditions set in Items 1 to 5 of Paragraph 8 of the ZSS (nationality, command of the Slovene language, age, etc.), but not also in the case when the fulfilment of the general condition under Item 6 and the fulfilment of special conditions had been demonstrated by the candidate on the basis of legally effective evaluation of judicial office or judicial work.

24. As this case does not concern the rejection of nomination due to the non-fulfilment of conditions but (in the opinion of the Judicial Council and the opinion of the Supreme Court in reference with the administrative lawsuit) just the (refusal of) selection under Paragraph 2 of Article 19 of the ZSS, the unlawfulness of the disputed resolution consists in the first place in that, according to the said statutory provision, the Judicial Council is obliged for each post announced to be vacant to propose for election one candidate - save where there is no candidate who fulfils all the conditions. (In our case, the only candidate that applied for the post fulfilled all the conditions - having been evaluated positively in accordance with Article 104 of the ZSS, also the so-called special conditions of Article 9 of the ZSS, because, according to Article 33 of the ZSS, the Judicial Council is not authorized to change or disregard a positive evaluation of judicial work, but only to disregard a negative evaluation). In the case of there being several candidates who fulfil all the conditions, it can choose from among them, but if there is only one such candidate, it is obliged, in line with the provisions of Paragraph 2 of Article 19 and Article 33 of the ZSS, to propose for election such an only candidate, which is also in agreement with the public interest that all the judicial posts be filled. The decision of the Judicial Council on choosing one from among the several candidates (as well as on refusal to select the only candidate, if such a decision were allowed by the statute), however, should also be substantiated. For, in accordance with the provision of Article 28 of the ZSS, the Judicial Council is in selecting candidates expressly bound by the criteria mentioned in Article 29 of the ZSS, which means that this is not a decision that is not at all bound by the statute and is "political", as is the case with the subsequent

decision of the National Assembly on whether to appoint the proposed candidate to judicial office or not, but is a discretionary decision in which the state body concerned must act "within the limits of authorization and in accordance with the purpose for which the authorization has been given to it" (Article 4 of the ZUP).

25. With the above position, that the ZSS does not allow to the Judicial Council to disregard a legally effective evaluation of judicial office, and that in the case of just one candidate who fulfils the conditions the Judicial Council is obliged to propose such a candidate for election, as well as with the position that the Judicial Council shall be obliged, both in the case of not selecting any candidate at all and in the case of selecting a candidate, to substantiate its decision, the Constitutional Court just interpreted the regulation now in force, and in this way naturally did not take its position on the question of whether such regulation was reasonable and whether any other regulation in conformity with the Constitution was available which would take into account to a greater degree the constitutional position of the Judicial Council. In the case of modifying the current regulation, the legislator will of course have to thoroughly examine all the questions relevant from the viewpoint of constitutional jurisprudence, so as not to introduce - in the attempt to ensure a regulation that would be more reasonable from any particular point of view - a regulation that would be inconsistent with the constitutional rights of candidates, the constitutional principles of independent judicature or any other constitutional provisions.

26. As both of the disputed acts were found to have violated the complainant's constitutional rights, they had to be abrogated ab initio and the case had to be sent back to the Judicial Council for reconsideration. As the Judicial Council will for this reason have to decide the matter in a procedure concerning the filling of the vacant office of a judge, which was completed by a final decision already prior to the filing of the constitutional complaint in reference with the instant case, the new procedure for filling the same office of a judge which was commenced in the meantime on the basis of a new invitation for applications has become immaterial, which also applies to all the hitherto decisions in reference with this procedure. In making a new decision, the Judicial Council will have to take into consideration the interpretation of applicable regulation by the statute as explained herein.

B. - II.

27. While the new procedure of invitation for applications for filling the same vacant office of a judge mentioned in the preceding section of this reasoning was announced in conformity with the statute, but has become immaterial due to the present decision of the Constitutional Court, the third procedure of invitation for applications for the same office of a judge of Feb. 23, 1996 was announced in violation of the statute, because the second procedure of invitation for applications which followed the commencement of an administrative lawsuit against the resolution of the Judicial Council for the second time not to propose the complainant for election has not been completed yet and should be terminated by the Ministry of Justice on the basis of analogous application of Paragraph 6 of Article 15 of the ZSS - as the same did, invoking in that connection the said statutory provision, on the occasion of commencement of an administrative lawsuit in the framework of the first procedure of invitation for applications for the same office of a judge.

As this third procedure of invitation for applications for the same office of a judge was unlawful, the Constitutional Court had to abrogate it, so that the execution of such an unlawful procedure of invitation for applications would not hinder the implementation of the present decision. This decision (Item 2 of the holding hereof) was made by the Constitutional Court on the basis of the authorization granted to it in Paragraph 2 of Article 40 of the Constitutional Court Act (Official Gazette of the RS, No. 15/94, hereinafter: ZUstS), that is, of an authorization that it may, if necessary, determine the manner of implementation of its decision.

C.

28. This decision was made on the basis of Paragraphs 1 and 2 of Article 59, Article 30 and Paragraph 2 of Article 40 of the ZUstS by the Constitutional Court in the following composition: Dr. Tone Jerovšek, President, and Dr. Peter Jambrek, Matevž Krivic, M.L., Janez Snoj, M.L., Dr. Janez Šinkovec, Dr. Lovro Šturm, Franc Testen, Dr. Lojze Ude and Dr. Boštjan M. Zupančič, the Judges.

The decision was reached with six votes in its favour and three against it. Votes against were cast by Judges Šinkovec, Ude and Zupančič. The concurring opinions were given by Judges Krivic and Testen. The dissenting opinion was given by Judge Ude.

President of the Constitutional Court:
Dr. Tone Jerovšek