

Judicial Independence and Accountability in Bulgaria

The Case of Judge Miroslava Todorova

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1 INTRODUCTION

On 12 July 2012, the Supreme Judicial Council of Bulgaria dismissed Judge Miroslava Todorova, at that time a judge of the Sofia City Court and Chairperson of the Bulgarian Judges Association, on the grounds that she was responsible for delays in a number of cases.

Subsequently, Judges for Judges and the International Commission of Jurists (ICJ) followed the disciplinary proceedings against Todorova and sent trial observers to Sofia on two occasions, in May 2013 and November 2014.

This brief report details the salient points in the different disciplinary proceedings against Todorova, the legal framework on judicial independence and accountability as applicable at the time of those proceedings, and provides findings on the proceedings by the trial observers.

2 TODOROVA DISCIPLINARY PROCEEDINGS

2.1 Activities as BJA President

Between 30 October 2009 and 23 November 2012, Todorova served as chairperson of the Bulgarian Judges Association (BJA). This is an independent, voluntary professional organization of Bulgarian judges, which aims to promote their professional, intellectual, social and material interests and the prestige of the courts in Bulgaria.¹ In 2016, the BJA counted 913 members, out of circa 2300 judges in the country.

In that same period, the BJA and other non-governmental organizations including the Bulgarian Institute for Legal Initiatives and the Bulgarian Helsinki Committee,² criticized the arbitrary appointments of court presidents and the human resources policy of the Supreme Judicial Council (SJC). Todorova, as the BJA's chairperson, also levied criticism on statements made by then Prime Minister Boyko Borisov and the Minister of Internal Affairs and Deputy Prime Minister Tzvetan Tzvetanov, which she deemed undermined judicial independence. Todorova repeatedly noted that Tzvetanov continually insinuated ties between individual representatives of the judiciary and organized crime, and she criticized members of the Executive who had commented on pending trials.

Tzvetanov proceeded to make a series of statements in the media, discussing Todorova's work and commenting on trials she had conducted, alleging she defended the interests of organized crime. On 6 February 2012, Todorova in response filed a complaint with the Sofia Regional Court against Tzvetanov, requesting he be prosecuted for libel, which under Bulgarian law is a criminal case of a private character that requires no action by the public prosecutor.³ On 21 May 2013, after referral of the case twice to different courts by the Supreme Court of Cassation, the Sofia District Court suspended the case given that Tzvetanov had been elected as a Member of Parliament⁴ on 12 May 2013 and hence enjoyed immunity from prosecution. Under Bulgarian law, the statute of limitations on defamation suits is three years.⁵ On 24 December 2013, Todorova lodged a complaint with the European Court of Human Rights on the ground, among others, that the procedural delays resulted in a violation of Article 6 of the European Convention on Human Rights.⁶

Also within the SJC, the criticism levied by the BJA and Todorova's activities in this regard gave rise to resentment, with some of the SJC's members questioning the BJA's motives, its collaborators and funders, alluding to "the vague smell of money, a lot of money, that must be divided between a group of people bent on, as the saying goes, saddling the judicial system for their own benefit".⁷

¹ See www.judgesbg.org (last accessed on 17 February 2017).

² See e.g., various statements on the website of the Bulgarian Judges Association, www.judgesbg.org (last accessed on 17 February 2017); Klasa.bg, 'EC: We are monitoring the current judicial appointments', 19 December 2011, <https://gramophon.com/новини/2011/12/19/ec-we-are-monitoring-the-current-judicial-appointments.html> (last accessed on 17 February 2017); Stefanie Ricarda Roos, 'EU expansion: watchdog and cooperation partner', 24 February 2010, www.dandc.eu/en/article/romania-and-bulgaria-civil-society-organisations-are-demanding-rule-law (last accessed on 17 February 2017).

³ As per Art. 161 (1) in line with Art. 147 of the Criminal Code of the Republic of Bulgaria (hereinafter: the Criminal Code).

⁴ As per Art. 70 (1) of the Constitution of the Republic of Bulgaria (hereinafter: Constitution).

⁵ As per Art. 81 (3) in line with Art. 80 (1.5) of the Criminal Code.

⁶ Case No. 40072/2013, Todorova v. Bulgaria.

⁷ SJC session of 26 July 2012, cited at SAC Ruling No. 9190 of 1 July 2014 (hereinafter: SAC Ruling 1 July 2014), S. III.4.

In sum, the mutual criticism led to strained relationships between Todorova and the SJC as well as between her and members of the Executive.

2.2 Disciplinary proceedings against Todorova, 2011-2012

In September 2010, the Inspector General of the Inspectorate of the Supreme Judicial Council (ISJC) ordered that a check be carried out at the criminal division of the Sofia City Court regarding the court rulings issued beyond the three-month time limit.⁸ The court logs were checked for 2008, 2009 and the first half of 2010. For Todorova, the inspection concluded that eight first instance general criminal cases and nine appeals criminal cases had been delayed, recommending that the President of the Sofia City Court reprimand Todorova for transgression, namely an offence of the statutory deadlines.⁹

In June 2011, the Inspector General of the ISJC ordered another inspection, covering 2010 and the first half of 2011.¹⁰ The inspection found that within the criminal division, 14 judges were not in breach of the procedural time limits for reviewing and disposing of cases and for writing up and completing rulings, whereas 10 judges had a minimal number of delayed cases and 11 judges incurred delays in a significant number of cases. For Todorova, it was found that in the period under review in 55 cases the verdict was written up between 2 and 16 months past the time limits in the Criminal Procedure Code (in addition to two more cases which were closed prior to 2010, but for which the final ruling was not completed until June 2011).¹¹

Based on the data collected during the 2011 check, the Inspector General proposed the SJC impose disciplinary penalties. Subsequently, the SJC unanimously voted to open disciplinary proceedings and appointed a panel in relation to four judges, including Todorova.¹² In January 2012, the SJC imposed a disciplinary penalty of a 15% reduction in salary upon Todorova for a systemic failure to abide by procedural time limits.¹³

Todorova challenged the imposition of this disciplinary sanction before the Supreme Administrative Court (SAC), but eventually in December 2012 a five-judge bench upheld the lawfulness of the SJC's decision.¹⁴ In 2013, Todorova lodged an application with the European Court of Human Rights, claiming a violation of her rights under Articles 6, 8, 10, 13 and 18 of the European Convention of Human Rights (ECHR), where the case remains pending.¹⁵

By that time, the SJC had initiated three new disciplinary proceedings against Todorova in March and at the end of April 2012.

⁸ Order No. 108 (20 September 2010).

⁹ Act regarding the findings of an inspection at the criminal division of the Sofia City Court, cited at SAC Ruling 1 July 2014, S. I.2.

¹⁰ Order No. CC-01-3 (14 June 2011).

¹¹ SAC Ruling 1 July 2014, S. I.5.

¹² Protocol No. 27 of the session of 28 July 2011, cited at SAC Ruling 1 July 2014, S. I.6.

¹³ Decision as per item 21 from Protocol No. 3 of the session of 19 January 2012, cited at SAC Ruling 1 July 2014, S. I.7. (Note: the ruling contains two paragraphs numbered I.7; this citation concerns the first of these paragraphs.)

¹⁴ SAC Ruling No. 16249 (18 December 2012).

¹⁵ Case 40072/13. Todorova requested the application be merged with the complaint she filed with regard to the defamation suit, and that the matter be treated as an urgency. As of the date of publication of this report, the Court has yet to rule even on admissibility.

2.3 Disciplinary proceedings against Todorova, 2012-2015

Initiation of proceedings

On 20 February 2012, the SJC's Commission on the Implementation of the Organizational Measures Related to the Handling of High Profile Cases (CIOMHHPC) received a letter from the President of the Sofia Appellate Court, who informed the Commission that a panel of his court overturned a verdict and terminated criminal proceedings in a case over which Todorova presided¹⁶ due to the fact that the 15-year statute of limitations had run out, allegedly involving "flagrant delays of the procedural actions".¹⁷ The CIOMHHPC set up a working group¹⁸ comprising two SJC members to carry out an inspection of the handling of the case. They found that in the case, the statute of limitations had expired several days before the case file was sent to the Sofia Appellate Court for review of the defendant's appeal. Subsequently, five members of the SJC proposed to initiate disciplinary proceedings against Todorova for the offence of committing an action of inaction that caused unwarranted procedural delay and undermined the prestige of the judiciary.¹⁹ Per a decision on 1 March 2012, the SJC decided to initiate disciplinary proceedings (No. 3 of 2012).²⁰

The President of the Sofia City Court, by a further letter,²¹ informed the SJC about irregularities concerning the entering of results in the court log in five appeals general and administrative cases over which Todorova presided. Checking up on this notification revealed a further delayed case,²² in which a verdict was passed on 13 May 2005 but the reasoning had not been written up until 20 May 2009. At the proposal of the same five of its members, the SJC initiated a disciplinary case (No. 4 of 2012)²³ that was subsequently combined with case No. 3 of 2012.

At the proposal of the chairperson of the CIOMHHPC, the SJC ordered the ISJC to carry out an inspection in another criminal case²⁴ that was assigned to Todorova. The inspection revealed that the verdict was announced on 17 July 2009, but the reasoning was provided and entered into the court log only on 17 January 2012. The Inspectorate proposed to initiate disciplinary proceedings, which were subsequently launched by the SJC²⁵ (No. 6 of 2012) and combined with case No. 3 of 2012.

First SJC decision and appeals

On 5 July 2012, the disciplinary panel that investigated joined cases No. 3, 4 and 6 of 2012 recommended the SJC dismiss Todorova from office.²⁶ At its session on

¹⁶ General criminal case No. 3109/2003.

¹⁷ Letter No. 1250 (20 February 2012), cited at SAC Ruling 1 July 2014, S. I.7. (Note: the ruling contains two paragraphs numbered I.7; this citation concerns the second of these paragraphs.)

¹⁸ Protocol No. 9 (20 February 2012), cited at SAC Ruling 1 July 2014, S. I.7. (Note: the ruling contains two paragraphs numbered I.7; this citation concerns the first of these paragraphs.)

¹⁹ Judicial System Act 2007 (hereinafter: JSA), Art. 307, para. 4, S. 2 and 4.

²⁰ Item 8 of Protocol 9 (1 March 2012), initiating disciplinary proceedings No. 3 of 2012.

²¹ Letter No. 223 (2 March 2012).

²² General Criminal Case No 490/2004.

²³ Protocol No. 12 (22 March 2012), initiating disciplinary case No. 4 of 2012.

²⁴ General Criminal Case No. C-328/2008.

²⁵ Item No. 7 (supplemented) of Protocol No. 18 (26 April 2012), initiating disciplinary case No. 6 of 2012.

²⁶ As per JSA, Art. 308, para. 1, s. 6. Decision No. 10-00-13 (5 July 2012).

12 July, the SJC reviewed that proposal. After the presentation of the SJC member who presided over the disciplinary panel, another SJC member made a proposal for an alternative penalty, involving demotion in rank for a period of three years. By secret vote with 19 in favour, 3 against and 2 abstentions, the SJC found that Todorova had indeed committed disciplinary offences²⁷ and imposed the penalty of dismissal,²⁸ as had been proposed by the disciplinary panel.²⁹ The proposal for an alternative sanction was not put to a vote.

Todorova appealed the dismissal imposed by the SJC to the SAC.³⁰ In her appeal, Todorova argued that the SJC's composition and functioning did not provide the necessary safeguards to guarantee its independence and impartiality and that her rights under Article 6 ECHR had been violated, alleging bias on the part of individual members of the disciplinary board. She also claimed that any liability should have been extinguished with the expiry of the statute of limitations. On 4 January 2013, a three-judge panel of the Sixth Chamber of the SAC upheld the SJC's decision.³¹ The court found the statute of limitations³² had expired completely only with regard to general criminal case No. 490/2004 (to which disciplinary proceedings No. 4 of 2012 pertain) and partially with regard to general criminal case No. 3109/2003 (to which disciplinary proceedings No. 3 of 2012 pertain) for the period between 16 July 2006 and 1 April 2009. It withheld liability for a delay of one year and 11 months in disciplinary case No. 3 of 2012. With regard to the reasoning in the general criminal case to which disciplinary proceedings No. 6 of 2012 pertain, the panel found it had been postponed by 2 years and 11 months.

Subsequently, Todorova filed a cassation appeal with a five-judge panel of the SAC. In its July 2013 decision,³³ the court held that the disciplinary offence in question involved non-performance of official duties³⁴ in writing up the reasoning in two cases: a delay of one year and 11 months in disciplinary case No. 3 of 2012 (as the statute of limitations covered the period prior to 1 April 2009) and a delay of 2 years and 11 months in disciplinary case No. 6 of 2012. These delays, the Court held, constituted a particular disciplinary offence: non-performance of a duty in office, which resulted in an unwarranted delay in court proceedings (Judicial System Act, Art. 307, para. 4, s. 2). Accordingly, the Cassation Court – in line with the view of the Prosecutor-General, who has an advisory role in the proceedings – overturned the decision of the three-judge panel concerning the part where it rejected Todorova's appeal against her dismissal for disciplinary offences as per Art. 307, para. 4, s. 1, 3 and 4, and it revoked the SJC's decision with regard to these sections of the provision. It upheld the SJC's decision only with regard to s. 2 of that provision (the above-named particular offence) and sent the case back to the SJC³⁵ for a new decision concerning the type of disciplinary penalty. On 18 July 2013, Todorova was reinstated as a judge with the Sofia City Court.

Second SJC decision

²⁷ As per JSA, Art. 307, para. 1, s. 1-4.

²⁸ As per JSA, Art. 308, para. 1, s. 6.

²⁹ Item 54 of Protocol 29 (12 July 2012).

³⁰ Administrative Case No. 9061/2012.

³¹ Decision No. 78 of 4 January 2013 under Administrative Case No. 9061/2012.

³² JSA, Art. 310, para. 1.

³³ Ruling No. 10813 of 16 July 2013 under Administrative Case No. 1749/2013.

³⁴ JSA, Art. 210, s. 1.

³⁵ As per Art. 208 and following of the Administrative Procedural Code in line with Art. 323 (4) of the JSA.

In March 2014, following the SAC's referral of the case to the SJC for a new decision on the penalty, a disciplinary panel recommended³⁶ the Council impose a reduction in salary at the maximum rate of 25% for a period of two years.³⁷

On 27 March 2014, after the panel's report was presented, one of the SJC's members (Rumen Boev) suggested that a harsher sanction would be appropriate, taking into account the need for consistency in the case law in light of the penalties that had been imposed on another judge (Markov)³⁸ and a prosecutor³⁹ in cases involving delays. Boev proposed demotion in rank within the same body of the judiciary.⁴⁰ SJC member Svetla Petkova supported the proposal, arguing that a demotion for a period of three year would be commensurate.⁴¹ Two of the SJC's members⁴² argued against Boev's proposal, noting the differences between the facts in the case law and the one at hand: judge Markov had incurred significantly larger delays and had also committed other infractions. Moreover, he had previously already received two other penalties and a reprimand for similar offences. In comparison, these SJC's members argued, the disciplinary offences in the case against Todorova were significantly less serious in intensity. Further, Todorova had already been penalized for these delays in the 2011-2012 disciplinary proceedings, and as a result of the immediate enforcement of the SJC's first decision in the current proceedings she had been dismissed from office for two years already prior to the cassation court's ruling, which should be taken into account when determining the new penalty.⁴³ The SJC first voted on the disciplinary panel's proposal of a reduction in salary, which was rejected by 4 votes in favour, 7 against and 10 abstentions.⁴⁴ The proposal to demote Todorova to a judge in the Sofia Regional Court for a period of two years was voted next and adopted with 14 votes in favour, 7 against and no abstentions.⁴⁵

Appeal against the second SJC decision

Todorova appealed the SJC's second decision to the SAC, which by a decision of a three-judge panel of Division Six amended the penalty, reducing the term of the demotion from two years to one.⁴⁶

In its decision, the SAC panel considered the important question at the current stage of the proceedings to be:

"[I]f the Supreme Judicial Council does not sustain the decision of the disciplinary panel and imposes a harsher disciplinary penalty, does it follow from there that the proposal made by a member of the SJC for the imposition of such harsher penalty should be supported with a consideration of the circumstances as per JSA [Judicial System Act] Art. 309, to wit, the seriousness of the infringement, the form of guilt, the circumstances in which the infringement was committed and the conduct

³⁶ Decision No. 10-00-003 of 12 March 2014.

³⁷ As per JSA, Art. 308, para. 1, s. 3.

³⁸ Penalty of 10% reduction in salary for half a year for delaying 19 cases between one and two months.

³⁹ Penalty of demotion in rank for delays of over a year in 1 case out of 4 pending cases with more than one month delay.

⁴⁰ Quoted in SAC Ruling 1 July 2014, S. I.14.

⁴¹ Quoted in SAC Ruling 1 July 2014, S. I.14.

⁴² N. Stoeva and G. Karagyozeva.

⁴³ Quoted in SAC Ruling 1 July 2014, S. I.14.

⁴⁴ One SJC member recused himself and did not vote, two members were absent.

⁴⁵ Decision under item 69 of Protocol No. 14 from the SJC's session on 27 March 2014.

⁴⁶ SAC Ruling 1 July 2014.

*of the perpetrator, which the SJC needs to take into account when determining the type and degree of disciplinary penalty to be imposed?*⁴⁷

The court considered that “the legal dispute regarding the lawfulness of the currently imposed disciplinary penalty [...] should be resolved solely through the prism of JSA [Judicial System Act] Art. 309.”⁴⁸ The court then considered the different elements contained in that provision.⁴⁹

With regard to the gravity of the offence, the court considered the delays incurred by Todorova that were retained in the cassation decision to be “significant”, holding that there was indeed a disciplinary offence, which had become more serious the longer the period of inaction lasted. Unlike the first three-judge panel, the court considered that “the administrative managers of courts at all levels are appointed with the main task of creating and maintaining the kind of workflow in the relevant courthouse as would objectively enable swift and efficient justice”. Accordingly, in order to determine the gravity of the offence, it remained to be settled whether the delays were the product of Todorova’s inability to organize her personal docket, or insufficient competence of her managers, or both. Furthermore, “[w]hat this panel [...] believes should be explicitly emphasized is that in the case under review, neither the ISJC, nor either of the two disciplinary panels [...] nor the SJC itself made any efforts to clarify the issue of whether or not there was proper organization of the workflow at the Sofia City Court.”⁵⁰

The court also considered the answer to this question relevant with regard to the determination of the circumstances in which the offence was committed. In addition, it also highlighted the following:

- Todorova was a tenured lecturer at the National Institute of Justice between 1 January 2006 and 31 December 2007. For the second year of that period, she had been seconded by the SJC, and she received a commendation and a diploma of merit for this work;
- During her secondment, Todorova wrote up the reasoning for 14 out of 15 open general criminal cases, including the case at issue in disciplinary proceedings No. 3 of 2012 (although 17 administrative criminal cases presumably remained open);
- Upon her return from secondment, Todorova had not yet been provided with an office which, in conjunction with the shortage of courtrooms at the Sofia City Court, “apparently rendered her work onerous”;
- There is no dispute between the parties that “judge Todorova was greatly overloaded with cases of legal and factual complexity”;
- Todorova took part, subject to decisions of the SJC, in a number of international events and workshops in July and November 2008 and in January 2011.

Furthermore, the court noted that Todorova served as Chair of the Board of the Bulgarian Judges Association. After considering the role of civil society, the “resentment on the part of the majority of J[udicial] C[ouncil] members” and the impact of Todorova’s chairmanship in the media, the court concluded that “the developments of 2010-2012 that directly concern Judge Miroslava Todorova show

⁴⁷ SAC Ruling 1 July 2014, S. II.3. JSA, Art. 320(4) prescribes: “The resolution of the Supreme Judicial Council shall be adopted by a majority of more than half its members and it shall be reasoned. The reasoning for the decision of the disciplinary panel, as well as any considerations shared by Supreme Judicial Council members, shall count as reasoning for the resolution.”

⁴⁸ SAC Ruling 1 July 2014, S. III.

⁴⁹ JSA, Art. 309 prescribes: “When setting the disciplinary sanction, the gravity of the offence, the form of guilt, the surrounding circumstances and the conduct of the offender shall be taken into consideration.”

⁵⁰ SAC Ruling 1 July 2014, S. III.1-2.

that pressure on a government body as a form of civil control can only be exerted by individuals who are themselves impeccable in their professional activity."⁵¹

As to the form of guilt (or, conduct of the offender), the SAC held that it is "undoubtedly, conscious negligence ... Judge Miroslava Todorova was wrong in believing that she would be able to handle all of her engagements: as a judge with the Sofia City Court, Criminal Division, as a lecturer with the National Institute of Justice, as the Chair of the Board of the Union of Judges in Bulgaria (and public appearances inevitably entail various 'housekeeping' issues)."⁵²

Given the above considerations, the court concluded that "the disciplinary penalty imposed ... corresponds by type to the gravity of her offence ... but is too harsh ... given the high individual workload of Judge Todorova ... and the rest of the circumstances."⁵³ The court also noted the differences between Todorova's case and that of Judge Markov. First, in respect of the Markov case the SJC imposed a penalty that was more lenient than the one proposed by the disciplinary panel in the current case; and secondly, no reasons were provided as to why Markov's systematic pattern of misconduct should be considered to be of equal weight to Todorova's two non-systematic infringements.

At the end of its decision, the court recognized that "only another five-member panel of the Supreme Administrative Court (as the court of equal standing) would possibly agree to comment" on the July 2013 decision in Todorova's first cassation appeal. At the same time the court suggested that it may be appropriate to again place under discussion whether a disciplinary offence had indeed been committed or whether Todorova's excessive individual caseload was an exonerating circumstance; and, if a disciplinary offence was committed, whether or not her liability was extinguished with the expiry of the time limits.⁵⁴ In this context, the court noted, "it would be interesting to know how the following would have been discussed":

- A November 2013 SAC cassation ruling⁵⁵ noting that "the excessive caseload naturally makes it objectively impossible for the legal reasoning for all acts of court to be written up within the statutory time limits [but] SJC has not yet developed a methodology or a set of rules ... in the absence of such rules, it would be impossible to judge objectively the performance by a magistrate of his/her duties of office in the light of his/her individual caseload [and] that 'gap' in the SJC disciplinary practice causes the principles of consistency and predictability ... to be breached";
- A January 2011 SAC cassation ruling,⁵⁶ which clarified that the specific factual and legal complexity of the cases where the acts of court have not been completed within the relevant procedural time limits is the factor that determines the form of guilt and how it should be sanctioned;
- A December 2010 SAC cassation ruling,⁵⁷ where the court ruled that in the case "the magistrate's conduct, while technically meeting the criteria of a disciplinary offence, essentially does not constitute one in the light of the work done by him in the course of 2008 compared with the number of delayed cases."

Both the SJC and Todorova lodged an appeal in cassation against the panel's decision.

⁵¹ SAC Ruling 1 July 2014, S. III.3-5.

⁵² SAC Ruling 1 July 2014, S. III.6.

⁵³ Ibid.

⁵⁴ JSA, Art. 310(1).

⁵⁵ Ruling No. 14780 (11 November 2013) in Administrative Case No. 11940/2013.

⁵⁶ Ruling No. 623 (13 January 2011) in Administrative Case No. 9430/2010.

⁵⁷ Ruling No. 15921 (23 December 2010) in Administrative Case No. 12157/2010.

Cassation in the second appeal

In its judgment of 11 February 2015, a new five-judge panel of the SAC deciding the Cassation appeal did not follow the suggestion of the three-judge panel to comment on the SAC's 2013 cassation judgment or to reopen the discussion on several legal issues: "By force of ... [the July 2014 judgment] ... the question has been answered by *res judicata* whether Miroslava Todorova has committed a disciplinary violation." The court deemed that the "only issue that should be discussed in the present court proceedings is whether the penalty imposed upon Miroslava Todorova is commensurate with the seriousness of her offence. Have all mitigating as well as all aggravating circumstances been considered in determining said penalty, and more specifically, the circumstances prescribed in JSA Art. 309?"⁵⁸

The court subsequently found that all relevant circumstances had indeed been taken into consideration. It considered that the fact that Todorova had not been given an opportunity to react to Boev's statement during the March 2014 meeting of the SJC did not constitute a violation of her right to a legal defence, since in his statement no new facts had been disclosed. The court also rejected Todorova's argument that the proposal for imposing a heavier penalty had been submitted by an SJC member elected from the prosecution quota on the ground that the law does not proscribe this possibility. It further held that the fact that Todorova had sustained a *de facto* unlawful penalty – the dismissal that was quashed in the first cassation proceedings – had no bearing on the type and extent of her new penalty. The SAC further considered that the three-member panel had taken over the prerogatives of the SJC and dealt with an issue within the latter body's discretion.

Accordingly, the Cassation Court abrogated the ruling of the three-judge panel and rejected Todorova's appeal against the March 2014 decision of the SJC. Thus, the disciplinary proceedings concluded with the imposition of a demotion to the level of judge at the Sofia Regional Court for a period of two years on Todorova.

Todorova subsequently lodged an additional application with the European Court of Human Rights, which was joined to the aforesaid application. To date, the ECtHR has not yet ruled on the admissibility of Todorova's complaint.

Dissenting opinion

Two members of the panel of five –including the judge-rapporteur – issued a dissenting opinion. In their view the three-judge panel should have overruled the SJC's decision. They deemed the SJC's decision to be unfounded and adopted in clear violation of Todorova's right to defence, the principle of proportionality, the principle of equality before the law and the principles of consistency and predictability. In their view, the imposed penalty was disproportionately harsh, as it was not commensurate with the seriousness of the offence and did not take into account all relevant circumstances under Article 309 JSA. The dissenting judges were of the opinion that the SAC should not send back a case file to the SJC in the event of an appeal filed by a magistrate against an administrative decision imposing a penalty under the JSA, whenever such a disproportionate penalty has been annulled.⁵⁹

⁵⁸ Ruling No. 1548 (11 February 2015) in Administrative Case No. 11728/214 (see annex II).

⁵⁹ See note 62 (p. 20-21)

3 JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN BULGARIA

3.1 Legal framework

Universal and regional international standards prescribe that complaints about judicial misconduct must be processed expeditiously and fairly under an appropriate procedure that is subject to independent review.⁶⁰ The judge in question has the right to a fair hearing before an independent and impartial body. The body responsible for discipline of judges should be independent of the executive,⁶¹ plural and composed mainly (if not solely) of judges and members of the legal profession.⁶² The judge's rights to a fair proceeding, including to notice of the accusations against him or her, to adequate time and facilities to prepare and present a defence including through counsel, to challenge the evidence against him or her and present witnesses must be respected. Decisions must be based on established standards of judicial conduct, and sanctions must be proportionate. Decisions to suspend or remove a judge must be limited to cases in which the incapacity or behaviour of a judge renders the individual unfit to discharge his or her judicial duties.⁶³ Decisions and sanctions in disciplinary proceedings should be subject to independent judicial review (although this may not apply to decisions of the highest court or the legislature in impeachment proceedings).⁶⁴

In Bulgaria, two bodies are responsible for judicial discipline: the Supreme Judicial Council (SJC) and the Inspectorate with the Supreme Judicial Council (ISJC). Judges "shall be disciplined where they have committed a disciplinary offence".⁶⁵ Such an offence is defined as "the guilty failure of a judge ... in fulfilling their official duties".⁶⁶ Exhaustively, the offences are: the systemic failure

⁶⁰ UN Basic Principles on the Independence of the Judiciary, Principle 17 and 20; Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Article 69; Consultative Council for European Judges, Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para. 77; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 28.

⁶¹ Human Rights Committee, Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Honduras, UN Doc. CCPR/C/HND/CO/1 (2006), para. 16; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20.

⁶² Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29. See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Article 27; European Charter on the Statute for Judges, para. 1.3, 5.1; Magna Carta of Judges, Consultative Council of European Judges CCJE (2010)3 Final, Article 13; Consultative Council of European Judges, Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, para. 60(b); Venice Commission, Report on the Independence of the Judicial System, Part I: the Independence of Judges, CDL-AD(2010)004, para. 32; Venice Commission, Judicial Appointments, CDL-AD(2007)028, para. 27-34, 48-51.

⁶³ UN Basic Principles on the Independence of the Judiciary, Principle 16; Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Article 50, 69; Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 20; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 10.

⁶⁴ UN Basic Principles on the Independence of the Judiciary, Principle 17-20; Consultative Council for European Judges, Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para. 77(v); Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 26-31; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 8 and 11.

⁶⁵ JSA, Article 307(1).

⁶⁶ JSA, Article 307(3).

to observe terms provided for in procedural laws; any act or omission slowing down proceedings without justification; any breach of the Code of Ethical Behaviour of Bulgarian Magistrates; any act or omission undermining the prestige of the judiciary; and, failure to discharge any other official duties.⁶⁷

Function and composition of the disciplinary bodies

The SJC is the permanent body “representing the judiciary and securing its independence”, which it must do “without interfering with the independence” of the judicial bodies.⁶⁸ Among other functions, the SJC imposes the disciplinary sanctions of demotion and removal from office on judges, prosecutors and investigating magistrates.⁶⁹ The SJC consists of 25 members, of whom three *ex officio*.⁷⁰ Non *ex officio* members are elected: the National Assembly elects eleven; judges, six; prosecutors, four; and magistrates, one.⁷¹ The Minister of Justice organizes and heads the sessions of the SJC,⁷² but does not vote. A number of criticisms and concerns have been raised with regard to the composition of the SJC:

- The Council of Europe’s Venice Commission has expressed concern over the parliamentary quota, who are elected by simple majority. The Commission noted that in the past, it has been the case that they were all elected by the governmental majority against the votes of the opposition, weakening the SJC’s legitimacy. The Venice Commission said in this regard that: “[t]he composition of the Council ... is not in itself objectionable. It could work perfectly well in an established democracy where the administration of justice is by and large above conflict of party politics and where the independence of the Judiciary is very pronounced and well established ... The Venice Commission considers that even though the Supreme Judicial Council may not in fact have been politicised it is undesirable that there should even be the appearance of politicisation.”⁷³
- In her report on a mission to Bulgaria, the UN Special Rapporteur on the independence of judges and lawyers expressed the view that “there remain a number of challenges that must be addressed in order for the SJC to perform its key role and fulfil its mandate as an independent body that oversees the performance of the judiciary while protecting its independence. These challenges start with its composition.”⁷⁴
- The European Commission in its 2016 report under the Co-operation and Verification Mechanism stated that “previous CVM reports have noted persistent concerns about the ability of the SJC to fulfil its role as guardian of judicial independence and integrity. Controversies have revolved around issues such as ... inconsistent practices in disciplinary proceedings ... To this has been added controversy about political influence in the SJC”.⁷⁵

⁶⁷ JSA, Article 307(4).

⁶⁸ JSA, Article 16(1).

⁶⁹ Constitution, Article 130(6)(2). Also see Article 129(1).

⁷⁰ Namely, the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court and the Prosecutor General. See Constitution, Article 130(1).

⁷¹ Constitution, Article 130(3); JSA, Article 17(2)-(3). Non *ex officio* membership is limited to “jurists of high professional standing and moral integrity who have practised law for at least 15 years”, see Constitution, Article 130(2), and also see JSA, Article 17(1), which however limits membership to “lawyers” instead of “jurists”.

⁷² JSA, Article 32(1).

⁷³ European Commission for Democracy through Law (Venice Commission), Opinion no. 444/2007 on the Constitution of Bulgaria, CDL-AD(2008)009 (March 2008), para. 23-28.

⁷⁴ UN Special Rapporteur on the independence of judges and lawyers, Report on a mission to Bulgaria, UN Doc. A/HRC/20/19/Add.2 (21 May 2012), para. 47.

⁷⁵ European Commission, Report to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism, COM(2016) 40 final (27 January 2016), p. 4. Previous CVM reports also explicitly noted the proceedings against Todorova.

The ISJC is established within the SJC.⁷⁶ Its functioning is based on the principles of legality, objectivity and publicity.⁷⁷ Among other things, the ISJC checks the organization of the courts, including adherence to established time limits.⁷⁸ In case of violations, it alerts the administrative head of the body concerned and the SJC, and it makes proposals for the imposition of disciplinary sanctions.⁷⁹

Sanctions

The law provides for six possible disciplinary sanctions for judges ranging from a reprimand to disciplinary relief from office.⁸⁰ The latter sanction can only be applied in case of “a grave breach or systematic dereliction of the official duties, as well as actions damaging the prestige of the judiciary”, as judges in principle become irremovable after having completed five years in office.⁸¹ The administrative head imposes the less serious sanctions of reprimand and censure, whereas the SJC imposes the others.⁸² It is explicitly stipulated that the *ne bis in idem* principle applies.⁸³ Further, “when setting the sanction, the gravity of the offence, the form of guilt, the surrounding circumstances and the conduct of the offender shall be taken into consideration”,⁸⁴ in order to ensure that the principle of proportionality is observed.

Procedure

A proposal for the imposition of a disciplinary penalty can be made by the administrative head or any higher administrative head; the ISJC; no less than one-fifth of SJC members; or, the Minister of Justice.⁸⁵

The disciplinary panel consists of three members, designated by a draw of lots. They elect the presiding member among themselves.⁸⁶ Decisions are adopted by majority.⁸⁷

Hearings of the disciplinary panel are held *in camera*. The panel aims to elucidate the facts and circumstances surrounding the offence. The defendant is entitled to have an attorney provide his or her defence. The disciplinary panel must hear the author of the proposal to impose a sanction (or a representative), the defendant and defence counsel if they attend the hearing.⁸⁸ The obligation for the panel to hear the magistrate was introduced at the end of 2012, when the SJC amended its Regulation on the Organization of the Activity of the SJC and its Administration.

The disciplinary panel sends its decision for a sanction to the SJC, which then examines it. At the time of the proceedings described in this report, the SJC adopted its decision by majority. The reasoning for the decision of the disciplinary

⁷⁶ Constitution, Article 132a.

⁷⁷ JSA, Article 40.

⁷⁸ JSA, Article 54(1)(1)-(2).

⁷⁹ JSA, Article 54(1)(5)-(6).

⁸⁰ JSA, Article 308(1). The other possible sanctions are: censure; reduction of remuneration by 10 to 25 per cent for a term of six months to two years; demotion in rank or position at the same judicial system body for a term of one to three years; and, relief from office as (deputy) administrative head.

⁸¹ Constitution, Article 129(3).

⁸² JSA, Article 311.

⁸³ JSA, Article 308(4).

⁸⁴ JSA, Article 309.

⁸⁵ JSA, Article 312(1).

⁸⁶ JSA, Article 316(3).

⁸⁷ JSA, Article 319(2).

⁸⁸ JSA, Article 318.

panel and any considerations shared by SJC members are deemed to constitute the reasoning.⁸⁹

Appeal to the SJC's decision lies with the SAC. A three-judge panel examines the appeal, which is subject to a further cassation appeal before a five-judge panel of the same court.⁹⁰

Since the 2016 amendment of the Judiciary System Act, the judge or prosecutor against whom a disciplinary proceeding has been initiated has the right to be heard by the body imposing the sanction (the college of judges or prosecutors respectively, see below).

Code of ethics

A judicial code of conduct, drafted primarily by judges and members of the legal profession and consistent with international standards,⁹¹ can help to safeguard judicial integrity and protect against conflicts of interest.⁹² Pursuant to international standards, such a judicial code of conduct, which should be enshrined in the law, should serve as the basis for the determination of cases of alleged judicial misconduct within a fair disciplinary system.⁹³ The Council of Europe has recommended that this code of conduct should not only include duties that may be sanctioned by disciplinary measures, but should also offer guidance to judges on how to conduct themselves.⁹⁴

In 2009, the SJC adopted a Code of Ethics for the Behaviour of Bulgarian Magistrates, which applies to all judges, prosecutors and investigators, members of the SJC and inspectors at the ISJC.

3.2 Challenges

Excessive length of proceedings

In 2010, the Council of Europe's Committee of Ministers, noting "the numerous violations found by the [European] Court [of Human Rights] on account of the excessive length of civil and criminal proceedings", deemed this revealed "certain structural problems in the administration of justice".⁹⁵ In its Resolution 1787 (2011) on the implementation of the Court's judgments, the Parliamentary Assembly of the Council of Europe noted "with grave concern" the continuing existence of "major systemic deficiencies which cause large number of repetitive findings of violations of the Convention and which seriously undermine the rule of

⁸⁹ JSA, Article 320.

⁹⁰ JSA, Article 323.

⁹¹ See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Article 73; Consultative Council for European Judges, Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para. 49; Magna Carta of Judges, Consultative Council of European Judges CCJE (2010)3 Final, Article 18; Bangalore Principles of Judicial Conduct; International Bar Association Minimum Standards of Judicial Independence, para. 35-42.

⁹² See Bangalore Principles of Judicial Conduct, Preamble and 'Implementation'.

⁹³ UN Basic Principles on the Independence of the Judiciary, Principle 19; Magna Carta of Judges, Consultative Council of European Judges CCJE (2010)3 Final, Article 19.

⁹⁴ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Article 72. Also see Magna Carta of Judges, Consultative Council of European Judges CCJE (2010)3 Final, Article 18: "Deontological principles, distinguished from disciplinary rule, ...".

⁹⁵ Council of Europe Committee of Ministers, Interim Resolution CM/ResDH(2010)223: Execution of the judgments of the European Court of Human Rights concerning the excessive length of proceedings in 84 cases against Bulgaria (2 December 2010), 'II. General measures'.

law” in some Member States of the Council of Europe. One of those was the “excessive length of judicial proceedings”.⁹⁶ The Assembly, in particular, urged Bulgaria to “pursue its efforts to solve the problem of excessive length of court proceedings”.⁹⁷

On 10 May 2011, the ECtHR rendered two pilot judgments concerning Bulgaria,⁹⁸ finding violations of Article 6(1)⁹⁹ and Article 13¹⁰⁰ in both cases. These breaches concerned excessive length of court proceedings and a lack of effective remedies in criminal cases, and in a civil case respectively. The Court pointed out that “States have a duty to organise their judicial systems in such a way that their courts can meet each of the requirements of Article 6 § 1 of the Convention”,¹⁰¹ stressing that in that connection “it should be emphasised that a failure to deal with a particular case within a reasonable time is not necessarily the result of omissions on the part of individual judges, prosecutors or investigators”. It elaborated that “while in some cases delays may result from the lack of diligence on the part of the ... judge in charge of a particular case, in others the delays may stem from the State’s failure to place sufficient resources at the disposal of its judicial system”.¹⁰² The Court furthermore noted that “the unreasonable length of proceedings is a multifaceted problem which may be due to a large number of factors, of both a legal and logistical character”, some of which “may be internal to the judicial system”.¹⁰³ In application of Article 46 of the Convention, it required the country to introduce a remedy or remedies to deal with unreasonably long criminal proceedings and a compensatory remedy in respect of unreasonably long criminal, civil and administrative proceedings.¹⁰⁴

Workload

Reports of the European Commission’s Co-operation and Verification Mechanism systematically highlight the uneven workload between courts, as an issue in terms of the quality and efficiency of the judicial process, as well as possibly the independence of judges. High workload affects in particular the larger courts, especially those in Sofia.¹⁰⁵

3.3 Judicial reform

In April 2015, then Minister of Justice Hristo Ivanov, former president of the Bulgarian Institute for Legal Initiatives, presented a package of legislative proposals aiming to decrease political influence over the judiciary and to divide the SJC in two separate colleges – one for judges and the other for prosecutors.

⁹⁶ Council of Europe Parliamentary Assembly, Resolution 1787 (2011) on Implementation of judgments of the European Court of Human Rights (26 January 2011), para. 5.

⁹⁷ *Ibid.*, para. 7.1.

⁹⁸ ECtHR, *Dimitrov and Hamanov v. Bulgaria* (No. 48059/06 and 2708/09), Judgment of 10 May 2011, concerning delays in criminal proceedings; *Finger v. Bulgaria* (No. 37346/05), Judgment of 10 May 2011, concerning delays in civil proceedings.

⁹⁹ *Dimitrov and Hamanov*, para. 78 and 85; *Finger*, para. 103.

¹⁰⁰ *Dimitrov and Hamanov*, para. 99; *Finger*, para. 91.

¹⁰¹ *Dimitrov and Hamanov*, para. 72.

¹⁰² *Ibid.*, para. 73 (references to case law omitted in citation).

¹⁰³ *Dimitrov and Hamanov*, para. 115; *Finger*, para. 120.

¹⁰⁴ *Dimitrov and Hamanov*, para. 124-131; *Finger*, para. 129-133.

¹⁰⁵ See e.g., European Commission, Report to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism, COM(2016) 40 final (27 January 2016), p. 6.

The Minister did not receive enough support from the ruling political party (GERB) and to a large extent his proposals were rejected in Parliament.¹⁰⁶

In July 2015, a political compromise was reached on the division of the SJC into two chambers: the judges' college would have 13 members – the presidents of the Supreme Court of Cassation and the Supreme Administrative Court, 6 judges elected by their peers and 5 members elected by Parliament. The prosecutors' college would have 12 members – the Prosecutor General, 5 prosecutors elected by their peers and 6 members elected by the Parliament.¹⁰⁷

In October 2015 the Venice Commission noted, in its Opinion on the draft Act to amend and supplement the Constitution requested by the Bulgarian Parliament, that compared to its previous recommendations with regard to certain important aspects of the organization and operation of the SJC, the draft amendments did not go far enough. The main recommendations regarding the draft Act by the Commission were:

- Introduce a qualified majority requirement and anti-deadlock mechanisms for the election of SJC lay members by the National Assembly;
- Provide conditions, through specific election rules, for a proportional and fair representation in the SJC Chambers of all levels of courts and the prosecution service;
- Reconsider the division of competences between the SJC Plenum and the two Chambers with a view to ensuring full respect for the principle of independence of the different professions of the judiciary from each other;
- Provide for the adoption by open vote of decisions of the SJC Chambers and Plenum, including on disciplinary matters, while guaranteeing judges' right to a fair hearing;
- Reconsider the role of the Minister of Justice in relation to the SJC, in light of the risk of undue interference with the independence of judges, prosecutors and investigating magistrates. In particular, the role of the Minister as Chair of the Plenum and the Minister's powers in connection to individual career issues and the organization of the training of judges, prosecutors and investigating magistrates should be abolished;
- Provide broader access to the Constitutional Court, by giving judges at all levels the authority to raise questions of constitutionality when they are called to apply laws they deem unconstitutional, and by introducing direct individual complaints selected by filters of admissibility.¹⁰⁸

On 9 December 2015, the Parliament voted on the proposal of the Parliamentary group of ABV (Alternative for Bulgarian Revival) on the membership quota of the SJC's chambers. According to this proposal, accepted by the majority of the others parties, the number of members of the judges' college was increased to fourteen, with one more member to be elected by the Parliament in order to have symmetry with the parliamentary quota in the prosecutor's chamber, thus overall increasing the potential for political influence.

¹⁰⁶ Novinite.com, 'Bulgaria's GERB, DPS, Reformist Bloc fail to agree on constitutional amendments', 21 July 2015, <http://www.novinite.com/articles/169976/Bulgaria%E2%80%99s+%3Cb%3EGERB%3C/b%3E%2C+%3Cb%3EDPS%3C/b%3E%2C+Reformist+Bloc+Fail+to+Agree+on+Constitutional+Amendments> (last accessed on 17 February 2017).

¹⁰⁷ BNR, 'Historic compromise' on amendments to Constitution', 24 July 2015, <http://bnr.bg/en/post/100583825/historic-compromise-on-amendments-to-constitution> (last accessed on 17 February 2017).

¹⁰⁸ CDL-AD(2015)022-e Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015)

Judges from several courts in Sofia staged a protest in front of the Palace of Justice. Immediately after the vote, Ivanov announced his resignation, which was accepted by the Prime Minister Borisov. His deputies, one of them a former board member of the Bulgarian Judges Association (BJA), also resigned.¹⁰⁹

The BJA (advisory) role in the reform process. In an open letter to the people of Bulgaria, it framed the importance of the issue as follows: "it gets down to the most fundamental problem – which is whether we can have judicial courts that are independent of politicians and whether we can rely on a prosecutor's office which is independent of political interference".¹¹⁰

Subsequent to 2016 reforms, the two chambers of the SJC now deal with disciplinary matters related to judges and to prosecutors separately. The stated purpose of the reform was to avoid potential bias among the members of the disciplinary panel and the members of the chambers imposing the sanctions. Furthermore, the amended Judiciary System Act provides that members of the SJC can no longer propose the initiation of disciplinary proceedings. The latter now follows pursuant to a proposal made by the President of the respective court of prosecutors' office, the President of the superior judicial institution, the Inspectorate under the SJC, or the Minister of Justice.

4 FINDINGS

The ICJ and Judges for Judges make no determination as to whether, and which, disciplinary sanctions may have been appropriate in this case. We note, however, that the disciplinary proceedings concerned delays, constituting judicial misconduct, in a context where according to many internal and external observers the workload between the courts is divided unevenly and may be very high for some. We also note that, as the second three-judge panel has pointed out, the organization of the workflow was never properly considered in considering and reaching a determination in the disciplinary case. With the quashing of the second three-judge panel's decision, likewise other relevant circumstances were not taken into account.

Furthermore, disciplinary practice in Bulgaria is deficient in respect of its lack of predictability and consistency, and doubts expressed by many observers as to the independence of the Judicial Service Council muddy the waters further. The 2013 amendments to the legal framework only partially served to remedy the disciplinary practice's deficiencies. In particular, a full right of defence that includes the opportunity for the defendant to address all arguments and evidence remained wanting at the time of the Todorova proceedings.

The ICJ and Judges for Judges also note the animosity towards Todorova from certain quarters in the Executive and SJC for her activities as the chair of the BJA. Under the circumstances, there is an appearance that the disciplinary proceedings against Todorova were instituted and pursued selectively, and the system of the disciplinary proceedings in Bulgaria does not provide sufficient safeguards to dispel this appearance. The disciplinary proceedings against Todorova demonstrate why it is crucial that accountability mechanisms be independent not only in theory but in practice, and for such mechanisms to be in some way themselves publicly accountable.

¹⁰⁹ Bloomberg, 'Bulgarian Justice Minister Ivanov resigns over Constitution vote', 9 December 2015, www.bloomberg.com/news/articles/2015-12-09/bulgarian-justice-minister-ivanov-resigns-over-constitution-vote (last accessed on 17 February 2017).

¹¹⁰ Bulgarian Judges Association, 'Open letter in relation tot he vote by the National Assembly on 9.12.2015 for the Law for amendment and annexation of the Constitution of the Republic of Bulgaria', 10 December 2015, www.judgesbg.org/images/OpenLetter.pdf (last accessed 17 February 2017).

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