



REPUBLIKA E KOSOVËS
Republika Kosova - Republic of Kosovo
Gjykata Kushtetuese / Ustavni sud / Constitutional Court
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Prishtina, date: 23 March 2010
Ref. No.: AGJ 08/10

Resolution on Inadmissibility

In

Case No. KI 73/09,

Mimoza Kusari-Lila

vs.

The Central Election Commission

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

The Constitutional Court composed of

Enver Hasani, President
Snezhana Botusharova, Judge
Robert Carolan, Judge
Ivan Čukalović, Judge
Iliriana Islami, Judge
Kadri Kryeziu, Judge
Gjylieta Mushkolaj, Judge
Almiro Rodrigues, Judge and
Altay Suroy, Judge

Having issued a **Decision**, dated 26 February 2010, rejecting the request for interim measures of Ms Mimoza Kusari-Lila the Court unanimously adopts the following Resolution on Inadmissibility in relation to her Referral:

The Applicant.

1. The Applicant is Ms Mimoza Kusari-Lila, who was a candidate for Mayor of Gjakovë/Đakovica in the Local Government elections held in Kosovo on 15 November 2009 representing a political party, the New Kosovo Alliance (NKA).

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Overena kopija
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The Responding Party

2. The Responding Party is the Central Election Commission (CEC) as established by Article 139 of the Constitution of Kosovo.

Subject Matter of the Referral

3. On 10 December 2009 the Applicant, lodged a referral to the Constitutional Court of the Republic of Kosovo requesting:
 - a) An assessment of the constitutionality and legality of the decision of the CEC to certify the results of local elections held on 15 November 2009, without having considered the results of all the complaints and appeals lodged.
 - b) The granting of interim measures annulling the election results in the Municipality of Gjakovë/Đakovica, at polling stations where election process had been violated and ordering new elections under the supervision of the CEC.

The Facts

4. Following the local elections held in Kosovo on 15 November 2009 the NKA, not Ms Mimoza Kusari-Lila, lodged a number of appeals to the Election Complaints and Appeals Committee (ECAC) concerning alleged irregularities observed during the election. However, following consideration of the matter the ECAC rejected these appeals. The NKA appealed two of these decisions of the ECAC to the Supreme Court of Kosovo. The Supreme Court of Kosovo rejected these appeals by Decisions given on 4 December 2009, A.nr. 929/2009 and A.nr.931/2009.
5. The NKA, again, not Ms Mimoza Kusari-Lila, addressed a further appeal to the Supreme Court of Kosovo on the basis that the CEC certified the local elections results without all prior procedures being properly concluded, which they allege amounted to a violation of Article 106.1 of the Law on General Elections in the Republic of Kosovo, Law No. 03/L-073,. The Supreme Court of Kosovo also rejected this appeal on 4 December 2009, A.nr.930/2009.

Legal Basis for the Application

6. Article 113.7 of the Constitution of the Republic of Kosovo, and Article 47 of the Law of the Constitutional Court. Law No. 03/L-121.

Summary of the proceedings before the Court

7. On 10 December 2009, the Applicant lodged with the Constitutional Court a referral in her own name and on her own behalf.

8. The President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur. A Review Panel consisting of Judges Snezhana Botusharova, Chair, Enver Hasani and Iliriana Islami was established.
9. Based on the preliminary report of Judge Ivan Cukalovic the Review Panel recommended and the full Court accepted a public hearing to be hold for the purposes of establishing facts in relation to the matter, to enable the parties to be heard and to determine if there were elements justifying granting the interim measures as requested by the Applicant.
10. On 9 February 2010 a public hearing was held at the Faculty of Law, Pristina. The Applicant appeared on her own behalf and Ms Nesrin Lushta appeared as Chairperson of the Central Election Commission.
11. On 26 February 2010, the Court deliberated on the matter and decided to reject the Applicant's referral as inadmissible.

Summary of the Hearing on 9 February 2010

12. The Applicant indicated that, following a total of 15 complaints by her party NKA, the ECAC annulled results from 15 polling stations including 8 in the Municipality of Gjakovë/Đakovica. She pointed out that by the 4 December 2009, the date of the final certification by the CEC, the Supreme Court had not issued decisions lodged by her party.
13. Ms Nesrine Lushta for the CEC emphasised that at all times the CEC acted within the law in ensuring that all claims against the election counting and results process had been finalised prior to the final certification of the results of the elections. She stated that the CEC relied specifically on Article 106 of the Law on General Elections (which applies, where appropriate, to Local Elections also) which provides that "The CEC shall certify election results after completion of all polling station and counting procedures and when all outstanding complaints concerning polling and counting have been adjudicated by the ECAC and the Constitutional Court."
14. When asked during the hearing whether she had submitted and signed any complaint or appeal to ECAC or Supreme Court, she replied that the person who had signed the appeals to the ECAC had acted on her behalf, and that she was the coordinator for the election office/team for the candidate for Mayor for the Municipality of Gjakova.
15. She was asked why this person, acting on her behalf in the proceedings before the ECAC and the Supreme Court, had not signed the referral to the Constitutional Court on her behalf. She replied that that person, on her behalf and with her consent, had signed and submitted the documents to ECAC, as the head of the election group residing in Gjakova. With regard to the Appeal to Supreme Court, they had prepared it together and signed it. With regard to the referral to the Constitutional Court she stated that she was in charge of the entire appeals process, therefore she has signed it for the Constitutional Court.

16. In sum, the Applicant, admitted that it was correct that she had not signed any complaint or appeal to ECAC or Supreme Court. However, she also restated that everything was done with her consent, as she was personally involved in discussions and meetings with the witnesses and people who were bringing in documents and providing information about misconduct on the day of the election.
17. In response to what were the precise legal provisions of the Constitution on which she supports her allegation, she stated that she relied on Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of Rights].
18. In addition, when asked how her constitutional right to be elected has been violated, she considered that the freedom of election and participation was violated. According to Article 45 her right to be elected has been denied because of the manner of rendering decisions by the ECAC.
19. The minutes of the meeting of the CEC of 4 December 2009, provided by Ms Lushta in the hearing, indicated that the Commission was aware of Appeals that were pending. Indeed the CEC had postponed their decisions for some hours pending the receipt of information from the Supreme Court in relation to those Appeals. Previously, on 1 December 2009, the CEC had written to the Constitutional Court asking if any cases in relation to the elections were pending before it and, by letter of the same date, the Court had replied that there were no such cases. Ms Lushta did not address Article 118.4 of the Law on General Elections which provides that an appeal shall lie to the Supreme Court from decisions of the ECAC in certain circumstances.

Elections

20. Article 45 of the Constitution of Kosovo provides:

Article 45 [Freedom of Election and Participation]

1. *Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.*
 2. *The vote is personal, equal, free and secret.*
 3. *State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.*
21. According to Article 22 of the Constitution of Kosovo the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols are directly applicable in the Republic of Kosovo. They form part of its domestic law. Article 3 of the First Protocol provides for the right to free elections. It provides that free elections shall be held "...at reasonable

intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people..."

22. Article 123.2 of the Constitution of the Republic of Kosovo provides that "Local self-government is exercised by representative bodies elected through general, equal, free, direct and secret ballot elections." The Assembly of Kosovo has provided a mechanism for the holding of General and Local Elections by the enactment of the Law on General Elections, Law No. 03/L-073, in the Republic of Kosovo and the Law on Local Elections in the Republic of Kosovo, Law No. 03/L-040.
23. The natures of the rights to vote in elections and to stand for elections are differentiated by the case law of the European Court of Human Rights (ECtHR). The Court has pointed out that the right to vote is an active right and the right to stand for election is a passive right. The Applicant maintains that her right to be elected has been violated. There is a difference, however, between the right to be elected and the right to stand for election. The jurisprudence of the ECtHR points to the considerable leeway that States have in devising electoral systems and they allow a wide margin of appreciation as to how elections are conducted and how results are certified. In the case of *United Communist Party of Turkey v Turkey* the Court stated that "...[States] have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Sadak and Others (no. 2) v. Turkey*, nos. 25144/94 et al., § 31, ECHR 2002-IV).
24. The ECtHR has consistently expressed the importance of free elections and of democracy in its Judgments. In the same Judgment the Court expressed its view in the following terms "Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it." The ECtHR in the same Judgment quoted, with approval, The Code of Good Practice was adopted by the European Commission for Democracy through Law (Venice Commission) at its 51st (Guidelines) and 52nd (Report) sessions on 5-6 July and 18-19 October 2002 (Opinion no. 190/2002, CDL-AD (2002) 23 rev.). There the Venice Commission stated:
- The five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage. Furthermore, elections must be held at regular intervals.*
25. The Venice Commission points out that the organisation of elections should be overseen by an impartial body in charge of applying electoral law and that there be an effective system of appeal. Under the law in Kosovo these two functions are performed by the CEC and the ECAC, respectively, subject to such court appeals as may be permitted by law. These are the bodies that decide on all matters relating to the running of elections, certification of results

and who adjudicate on complaints and permitted appeals concerning the electoral process, as established by law and the electoral rules. They are permanent independent bodies.

26. The rationale for the CEC and the ECAC having such authority lies in the proposition that there must be certainty in the electoral process. The necessity of certainty in the electoral process requires the annulling of elections only for the most serious violations and a high burden of proof lies with whoever alleged such violations.
27. The role of the Constitutional Court in the electoral process is recognized by the Law on General Elections where it is provided in Article 106.1 that the CEC shall certify election results after complaints have been adjudicated upon by the ECAC and by the Constitutional Court. This Court has no other role in these electoral processes and it cannot revisit or overturn the decisions of the CEC or the ECAC, subject to the important provision that the Court will do so if there has been a violation of the individual rights and freedoms guaranteed by the Constitution.

Assessment of the Admissibility of the Referral

28. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this connection, the Court refers to Article 113.7 of the Constitution, which provides: "Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."
29. The Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution. (see, *mutatis mutandis*, ECHR, *Selmouni v. France*, no. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, *mutatis mutandis*, ECtHR, *Azinas v. Cyprus*, no. 56679/00, decision of 28 April 2004).
30. This Court applied this same reasoning when it issued a Decision on 27 January 2010 on inadmissibility on the grounds of non exhaustion of remedies in the case of AAB-RIINVEST University L.L.c., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41109.
31. Bearing Article 113.7 of the Constitution in mind the Court now looks carefully at the steps taken by NKA and the Applicant in relation to the appeals lodged and in particular by whom they were lodged. Having heard the Applicant at

the public hearing and having had the opportunity to examine the appeal papers tendered in evidence the following facts become clear.

32. As was clear from the evidence and from the hearing the political party NKA lodged the appeals to the ECAC and to the Supreme Court, not the Applicant. The first mention in any of the documentation before this Court of the name of the Applicant is in the Referral to the Constitutional Court which was received by the Court on 10 December 2009. The NKA has made no Referral to the Constitutional Court.
33. Political parties, as associations of citizens, have special recognition in the democratic process as an important component of a healthy civil society (see *mutatis mutandis Gorzelik v Poland*, 2004 ECtHR, Grand Chamber, para 93). That Court has said that freedom of expression of opinion in the choice of legislature is inconceivable without the participation of a plurality of political parties representing different shades of opinion to be found in a country's population. By relaying this range of opinion political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society (see *United Communist Party of Turkey v Turkey*, 1998, ECtHR, Grand Chamber, para 89).
34. The Fundamental Principles set out in the Law on General Elections also gives special consideration to the political parties in recognizing that they are entitled to campaign, and they are entitled to equality of opportunity of radio and television airtime, public funds and other support.
35. The Applicant was at all relevant times a member of the political party which enjoyed those rights and which made use of the appeals procedure available to it. The Applicant was also free to pursue such appeals in her own name, if she so wished. However, she did not do so.
36. Article 119 of the Law on General Elections allows any person who has a legal interest in a matter within the jurisdiction of ECAC to submit a complaint to the ECAC. In this case, the facts have established that the Applicant did not make such a complaint. Therefore, she did not exhaust all legal remedies provided by law. Having exhausted all remedies is a requirement for her to be able to challenge the constitutionality of the decisions that she wishes to refer to the Constitutional Court.

Conclusion

37. The Court after having heard the parties at a public hearing on 9 February 2010 and having considered all the facts and the evidence tendered, and having deliberated on the matter on 19 February 2010

DECIDES UNANIMOUSLY

- I. TO REJECT the Referral as inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

III. This Decision is effective immediately.

Done at Pristina this

day of March 2010

Judge Rapporteur

President of the Constitutional Court

Singed: Prof. Dr. Ivan Čukalović

Singed: Prof. Dr. Enver Hasani