



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 12 April 2019
Ref. no.: RK 1346/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 59/18

Applicant

Strahinja Spasić

**Constitutional review of Decision AA–UŽ. No. 58/2017 of the Supreme
Court of 1 December 2017**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Strahinja Spasić from Kllokot (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Decision AA-UŽ. No. 58/2017 of the Supreme Court of 1 December 2017 and in connection with Decision ZL. ANo. 1127/2017 of the Election Complaints and Appeals Panel (hereinafter: the ECAP) of 8 December 2017, and Decision No. 2585-2017 of the Central Election Commission (hereinafter: the CEC) of 14 December 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Article 21 [General Principles], Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation], and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Articles 113.1 and 7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Court

6. On 12 April 2018, the Applicant submitted the Referral through mail service to the Court.
7. On 18 April 2018, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.
8. On 30 April 2018, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the ECAP, the Supreme Court and the CEC, giving them the opportunity to submit their comments regarding the claims raised in the Referral KI59/18.
9. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues was terminated. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović was terminated.

10. On 18 June 2018, the Applicant submitted to the Court additional documents in which he specified his Referral in more detail.
11. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
12. On 22 August 2018, the President rendered decision on the appointment of Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur instead of Judge Snezhana Botusharova.
13. On 1 February 2019, the Court notified the Political Entity Srpska Lista (hereinafter: Serbian List) about the registration of the Referral. The Court sent them the copies of the Referral and requested them to submit their comments regarding the referral within seven (7) days from the date of receipt of this notice. The Serbian List did not submit comments regarding the Referral.
14. On 5 February 2019, the President of the Court appointed new Review Panel composed of Judges: Bekim Sejdiu (Presiding), Radomir Laban and Remzie Istrefi -Peci.
15. On 19 February 2019, Judge Bajram Ljatifi requested the President of the Court to be excluded from the review of Referral No. KI59/18, because he participated before in the decision on the same referral related to the proceedings conducted before the Central Election Commission (hereinafter: the CEC).
16. On 25 February 2019, in accordance with Article 18.1 (1.3) of the Law and Rule (9) of the Rules of Procedure, the President rendered the decision approving the request for exclusion from the review proceeding and decision-making in connection with the case KI59/18.
17. On 27 March 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

18. On 22 October 2017, the elections were held in the Republic of Kosovo for local self-government bodies. The Applicant was the candidate of the Serbian List for the Mayor of the Klllokot Municipality.
19. In the first round of elections for local self-government bodies, none of the candidates for the president of the municipality of Klllokot won more than 50% plus 1 (one) vote out of the total number of valid votes given in that municipality, as provided for by Article 9.9 of the Law on Local Elections in the Republic of Kosovo (No. 03/L-072).
20. On 19 November 2017, a second round of elections for the president of the municipality of Klllokot was held, in which the candidates were the Applicant, the candidate of the Serbian List and Božidar Dejanović, the candidate of the civic initiative Klllokot-Vrbovc.

21. On 24 November 2017, the Applicant filed a complaint [no. 1112] to the ECAP requesting the annulment of the second round of local elections for the President of the Municipality of Klokot, held on 19 November 2017, claiming that the irregularities occurred in counting votes received by mail.
22. On 26 November 2017, the Serb List notified the ECAP that it withdraws from the appeal proceedings, while the Applicant remained in his appeal.
23. On 27 November 2017, the ECAP by [Decision ZL. A. No. 1112/2017] rejected as ungrounded the complaint of the Applicant. The ECAP assessed that the Applicant failed to substantiate in a secure and convincing manner the allegations in the complaint regarding irregularities in the counting of votes sent by mail.
24. The relevant part of the abovementioned decision of the ECAP establishes: *"From the investigation conducted by the investigative team of the ECAP, in the ballot box BM137/001, it was determined that there were 19 open envelopes in the box. These envelopes were in three different types, of which 11 are of the same type, 5 of the same type and 3 of the same type. There were 19 ballot papers in the box and all the ballot papers were marked with a ball pen and a sign (✓), and they were not copied, marked for Bozidar Dejanovic, candidate of the political entity GI Klokot - Vrbovac, while the candidate Strahinja Spasić from the political subject Srsпка Lista had no votes".*
25. The Applicant filed an appeal with the Supreme Court against the abovementioned decision of the ECAP, on the grounds of the Violation the provisions of the Law on General Elections, erroneous and incomplete determination of factual situation, with a proposal that the appeal be approved and the decision of the ECAP be annulled.
26. On 1 December 2017, the Supreme Court by Decision AA-UŽ. No. 58/2017 rejected as ungrounded the Applicant's appeal, the Supreme Court found that the factual situation was correctly determined and that the law was not violated to the detriment of the Applicant.
27. The relevant part of the reasoning of the decision of the Supreme Court states, *"when deciding the ECAP considered in correct way the relevant facts and applied the provisions of the law on the basis of this, given the fact that in this particular case the Applicant failed to substantiate his claims with relevant and convincing evidence. Statements of witnesses attached to the appeal, this Court considers irrelevant and cannot have impact on different decision making, taking into consideration that such statements may be contrary to the will of the voters, as confirmed from the checked ballot papers by the ECAP."*
28. On 7 December 2017, the CEC by Decision No. 2470-2017 announced final election results for the second round of voting in the local elections for the President of the municipality of Klokot.

29. The Applicant against CEC Decision [no. 2470-2017] filed an appeal [no. 1127] with the ECAP, claiming that there have been irregularities in counting the votes received by mail.
30. On 8 December 2017, the ECAP by Decision ZL. A. No. 1127/2017 dismissed the Applicant's appeal on the grounds that the ECAP has responded to these allegations of the Applicant by Decision [ZL. A. No. 1112/2017] of 27 November 2017, and the ECAP accordingly concludes that the issue has already been decided (*res judicata*) and that this appeal be dismissed as inadmissible.
31. On 14 December 2017, the CEC by Decision No. 2585-2017 confirmed the final election results for the second round of voting in the local elections for the President of the Municipality of Klokot.

Applicant's allegations

32. The Applicant alleges that the challenged decision violates his rights guaranteed by Article 21 [General Principles], Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of the Rights] of the Constitution.
33. With regard to the alleged violation of Article 21 of the Constitution, the Applicant alleges, *"the failure to comply with the positive legal rules by the ECAP, and the pressures I have been exposed by the Office for Kosovo and Metohija that I have to give up the candidacy, as well as the pressure by the media, I consider that in this way my constitutional right under Article 21 (Human Rights and Fundamental Freedoms) was violated"*.
34. With regard to the alleged violation of Article 32 of the Constitution, the Applicant states, *"The ECAP not only failed to accept the appellant's appealing allegations, as a first instance body, but declared the appeal inadmissible, and also the appeal to the second instance body is not allowed, thus violating Article 32 of the Constitution of Kosovo "Right to Legal Remedies"*.
35. As regards the alleged violation of Article 45 of the Constitution, the Applicant states, *"by rigging and abusing the 19 votes received through mail from the special voter list for voting outside Kosovo by the Office for Kosovo and Metohija in Belgrade, I am deprived the election victory and by the rigged votes wins the candidate according to the will of the Office in Belgrade"*.
36. As regards the alleged violation of Article 54 of the Constitution, the Applicant states *"the ECAP did not comply with the Law on local and general elections, nor the electoral rules clearly regulating the manner of registering and voting of the voters from a special election register outside Kosovo, but on the same day when the Appellant's appeal was filed, it rendered an unintelligible decision no. ZL. Ano. 1127/2017 of 08.12.2017 on inadmissibility without the right to appeal to the Supreme Court of Kosovo as a second instance body"*.
37. Finally, the Applicants requests the Court:

"- To annul by mail ballot papers from the Special Voting List outside of Kosovo.

-To annul CEC decision no. 2470/2017 of 07.12.2017 on the announcement of the final results, the decision of the ECAP ZL. Ano. 1127/2017 of 08.12.2017, and CEC decision no. 2585/2017 of 14.12.2017 on confirmation of the final results of the second round of local elections for the municipality of Klllokot.

- To order the ECAP and the CEC to modify the decision on confirmation of the final results in favor of the complainant."

Relevant legal provisions

Law no. 003 /L-073

on General Elections in the Republic of Kosovo

of 5 June, 2008

[...]

Chapter XX

Election Complaints and Appeals Commission

[...]

Article 118 ***Decisions***

118.1 The ECAC shall accept a complaint that is well-grounded and dismiss a complaint that does not meet this standard.

118.2 The ECAC shall provide the legal and factual basis for its decision in writing. The ECAC shall provide copies of its written decisions to the parties involved in the matter within two (2) days of the issuance of the decision if it affects the certification of the election results. For other decisions the ECAC shall provide copies of its written decisions to the parties involved in the matter within five (5) working days.

118.3 ECAC decisions shall be published in accordance with ECAC's rules of procedure.

118.4 An appeal may be made from a decision of the ECAC, as ECAC may reconsider any of its decisions upon the presentation by an interested party of new evidence or for good cause shown. An appeal to the Supreme Court of Kosovo will be accepted if the fine involved is greater than 5,000 Euro or if the matter affects a fundamental right. The Supreme Court shall give priority to any such appeal.

118.5 The ECAC decision is binding upon the CEC to implement, unless an appeal allowed by this law or by the constitution is timely filed and the higher court determines otherwise.

Rule No. 02/2015

**Rules and Procedures
The Election Complaint and Appeals Panel
of 04 December 2015
[...]**

**Article 6
Review of complaints**

6.1 Each complaint will be marked with the number of protocol after the submission in the ECAP and will be part of the case and permanent register of the ECAP.

6.2 Until the main decision on review of complaint is taken, the parties may withdraw the previously filed complaint.

6.3 A complaint that does not meet the criteria provided for in Article 5.7 of this Rule shall be returned to the complainant for the correction and supplementation within twenty-four (24) hours. The complaint will be deemed withdrawn if it is submitted again to the ECAP within the prescribed time limit, and if it is submitted uncorrected or incomplete, the complaint will be dismissed.

6.4 Complaints that are inadmissible and out of time, shall be rejected by the ECAP by its decision.

6.5 The ECAP by decision approves-rejects complaints in accordance with the legal provisions.

6.6 In cases where the ECAP considers the complaint to be correct, the party against whom the complaint is filed shall be notified and shall be advised that it has the right to respond to the complaint within twenty-four (24) hours from the moment of receiving the complaint together with the evidence.

6.7 A party notified by the ECAP that a complaint has been filed against it may take remedial measures within the time limit set by the ECAP of twenty-four (24) hours from receipt of the order for remedy.

Admissibility of Referral

38. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and in the Rules of Procedure.

39. In this respect, the Court refers to Article 113, paragraphs 1 and 7 [Jurisdiction and Authorized Parties] of the Constitution, which establish that:

Article 113

„(1) The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

„(7) 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.“

40. The Court also refers to Article 48 of the Law, which stipulates:

„In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.“

41. As regards the fulfillment of this requirement, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely decision ZL. A. No. 1127/2017 of the ECAP, the Applicant also specified the rights and freedoms which have allegedly been violated, in accordance with the requirements of Article 48 of the Law.

42. However, the Court also refers to Article 49 [Deadlines] of the Law, which provides:

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. [...].

43. The Court also takes into account Rule 39 (1) (c) of the Rules of Procedure, which foresees:

The Court may consider a referral as admissible if:

“[...]

(c) referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant [...].

44. Initially, the Court notes that on 1 December 2017, the Supreme Court of the Court submitted to the Court the final decision AA. UŽ. No. 58/2017 on the complaint [1112] filed by the Applicant before the ECAP.

45. The Court also notes that the Applicant subsequently filed complaints again [1127] with the ECAP with identical allegations and in relation to the CEC decision [no. 2470-2017] of 7 December 2017. The ECAP, after considering this complaint by the Applicant, rendered Decision ZL. A. No. 1127/2017 of 8 December 2017, in which it emphasized that these allegations of the Applicant were considered and reasoned in the previous decision, and that, accordingly,

it has already been decided matter, and therefore, the Applicant's complaint is inadmissible.

46. Subsequently, the CEC, by Decision no. 2585-2017 of 14 December 2017, confirmed the final results for local elections 2017 for the President of the Klllokot Municipality.
47. In addition, the Court recalls that the Applicant's appeal was dismissed by the ECAP as inadmissible because it was not filed in accordance with Article 118. 1 of the Law on General Elections in Kosovo, which stipulates: "*The ECAC shall accept a complaint that is well-grounded and dismiss a complaint that does not meet this standard.*"
48. In this respect, the Court considers that the Applicant attempted to use the legal remedies for which he knew, or should have known, however, this legal remedy was not provided for in this case by law, and therefore, was not admissible.
49. The Court reiterates that "*only those remedies which are effective, may be taken into account as the Applicant cannot extend the strict time-limit imposed under the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue*". See: *mutatis mutandis*, the European Court on Human Rights (hereinafter: the ECtHR), *Fernie v. the United Kingdom*, Application No. 14881/04, Decision as to Admissibility, of 5 January 2006.
50. The Court recalls that a period of four months runs from the date of service of that final decision. See: *mutatis mutandis*, the case of the ECtHR *Paul and Audrey Edwards v. U.K.*, application no. 46477/99, Judgment of 14. March 2002.
51. In addition, the Court considers that the 4 (four) month period starts to run from the date of service of the final decision resulting from the exhaustion of legal remedies which are adequate and effective to provide redress in the respect of the matter complained of. See: ECtHR case *Norkin v. Russia*, Application No. 20156/11, Decision as to Admissibility, of 5 February 2013; see also: the case of the Constitutional Court KI201/13, *Applicant Sofa Gjonbalaj*, Resolution on Inadmissibility of 2 April 2014, paragraph 32.
52. The Court recalls that "*if no legal remedies are available or if they are assessed to be ineffective*", the four month time-limit foreseen in Article 49 of the Law in principle runs from the date of service of the act complained of. See: ECtHR case *Bayram and Yildirim v. Turkey*, Application No. 38587/97, Decision of 29 January 2002.
53. The Court further recalls that the purpose of the four months legal deadline under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedures is to promote legal certainty by ensuring that cases raising issues under the Constitution are dealt within a reasonable time and that past decisions are not continually open to be challenged (See: ECHR case, *O'Loughlin and Others v.*

United Kingdom, Application No. 23274/04, Decision on admissibility of 25 August).

54. Based on the above, the Court considers that the final decision of the Applicant is Decision AA. UŽ. No. 58/2017 of the Supreme Court of 1 December 2017. Therefore, the time limit started to run from 1 December 2017, which is the date when the decision in question was served on the Applicant. The Applicant submitted his Referral on 12 April 2018. The deadline of four months for submitting the Referral expired on 1 April 2018.
55. Therefore, the Court concludes that the Referral was not filed within the legal time limit established in Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.
56. In sum, the Court finds that the Applicant's Referral is inadmissible as out of time.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 49 of the Law and Rules 39 (1) (c) of the Rules of Procedure, in the session held on 27 March 2019, unanimously

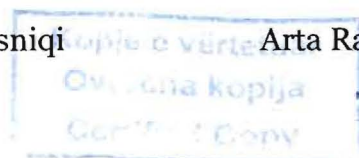
DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi



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