



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

Prishtina, on 24 May 2021
Ref.No:RK1792/21

This translation is unofficial and serves for informational purposes only.

DECISION TO REJECT THE REFERRAL

in

Case No. KI22/21

Applicant

Hasime Daka

**Constitutional review of Decision AA.no.5/2021 of the Supreme Court of
Kosovo, of 29 January 2021**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy 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 Hasime Daka from Suhareka (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Decision AA. no.5/2021 of the Supreme Court of the Republic of Kosovo, of 29 January 2021.

Subject matter

3. The subject matter of the Referral is the constitutional review of the above-mentioned Decision, which allegedly has violated the Applicant's rights guaranteed by Article 24 [Equality before the Law] and 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 1 February 2021, the Applicant submitted the Referral to the Court.
6. On 2 February 2021, the President of the Court appointed Judge Remzije Istrefi Peci as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban (members).
7. On 3 February 2021, the Court notified the Applicant about the registration of the Referral and requested from her, within 3 (three) days from the day of receipt of the submission, to clarify whether she has submitted the Referral as an individual Referral, or she also represents the Political Entity NISMA Socialdemokrate [Eng. Social Democratic Initiative] (hereinafter referred to as: NISMA).
8. On 9 February 2021, the Applicant submitted to the Court the power of attorney which did not provide the additional clarifications sought by the Court.
9. On 11 February 2021, the Court repeated its request for clarification, seeking from the Applicant to clarify/supplement the following points in respect of the issue of the power of attorney: (i) who is the authority or person in the Political Entity NISMA who is authorizing her to submit the Referral to the Constitutional Court on behalf of the Political Entity NISMA; (ii) what is the scope of the power of attorney, respectively are you authorized to represent the Political Entity NISMA, or not; (iii) the power of attorney must also contain the signature of the authority within the Political Entity NISMA.

10. Acting within the set deadline, the Applicant failed to submit the requested clarifications to the Court.
11. On 2 March 2021, the Court notified the Supreme Court about the registration of the Referral and sent a copy thereof to it.
12. On 5 May 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. On the basis of the case file it results that the Applicant on 20 February 2018, through Judgment [P.nr.2080/16] of the Basic Court in Prizren (hereinafter: the Basic Court) was found guilty of having committed the criminal offence of endangerment of public traffic from paragraph 8 in conjunction with paragraph 6 of Article 378 (Endangering public traffic) of the Criminal Code No.04/L-082 (hereinafter: the Criminal Code). It is also worth mentioning that the Applicant had reached a guilty plea agreement with the Basic Prosecution in Prizren, on which occasion she was sentenced with a suspended sentence, so that her sentence of imprisonment in length of one (1) year and six (6) years months was confirmed, but the said sentence would not be executed provided that the Applicant, within the time period of two (2) years from the day of the Judgment becoming final, does not commit any new criminal offence.
14. Based on the case file, it results that within the framework of the preparations for the early elections held on 14 February 2021, concerning the certification process of political entities and its candidates, on 16 January 2021, NISMA submitted to the CEC the documentation for certification of the political entity and its candidates.
15. On 20 January 2021, the Office for Political Parties Registration and Certification (hereinafter: the Office) notified NISMA that 12 candidates (including the Applicant) did not comply with sub-paragraph q of Article 29 of the Law on General Elections; and requested the replacement of these candidates with candidates of the same gender by 21 January at 13:00hrs.
16. On 22 January 2021, while NISMA failed to provide the required supplementations, the CEC at its meeting by majority vote through Decision [242-2021] did not certify the Political Entity NISMA nor the list of its candidates.
17. On 22 January 2021, the Basic Court, by Decision [Pk.no.53 / 21] approved the Applicant's request in the capacity of a convict, for expungement of the suspended sentence from the convicts' records (see, the above Judgment [P.no.2080/ 2016] of 20 February 2018, of the Basic Court which became final on 12 June 2018).
18. On 23 January 2021, NISMA, in its capacity as a Political Entity and consequently as a legal entity, filed a complaint with the Election Complaints and Appeals Panel (hereinafter: the ECAP), against the decision of the CEC

[242-2021] of 22 January 2021. In the complaint, NISMA stated that the CEC has not certified the list of 110 candidates of NISMA, as well as the political entity, for the early elections for the Kosovo Assembly, on which occasion it has violated the legal provisions of the Law on General Elections, and erroneously determined the factual situation. Finally, NISMA proposed to the ECAP to annul the Decision of the CEC, and approve their complaint by certifying the Political Entity NISMA and the 110 candidates on its list.

19. On 25 January 2021, the ECAP by Decision [Ano.16/2021]: (i) partially rejected the complaint of the Political Entity NISMA, whilst it upheld the Decision of the CEC [242-2021] of 22 January 2021, in the part where it rejected the recommendation of the Office for the certification of candidates for deputies of the Political Entity NISMA, specifically: V.K., B.B., F.B., V.A., Xh. B., A. Th., M.F., Hasime Daka, F.G., V.A., E. Sh., A.N.; (ii) partially accepted the complaint of the Political Entity NISMA; (iii) amended the CEC Decision [242-2021] of 22 January 2021, and decided to partially accept the recommendation of the IPRO, and certify the Political Entity NISMA and the list of candidates for deputies of this political entity, except for candidates mentioned under point I of the enacting clause of this decision; (iii) the candidates for deputies mentioned under point I of the enacting clause of this decision, cannot be replaced with other candidates.
20. On an unspecified date, NISMA, as a political entity and consequently as a legal entity, filed an appeal with the Supreme Court against the above-mentioned Decision of the ECAP. On that occasion, NISMA challenged the legality of the ECAP decision, by alleging erroneous and incorrect determination of the factual situation and opposing the punitive measures against NISMA reflected under point III of the enacting clause concerning the disallowance of supplementation of the list with other candidates. NISMA proposed to the Supreme Court to annul the Decision of the ECAP, to approve the certification of the Political Entity NISMA with its full list of 110 candidates for early elections for the Assembly of Kosovo, as well as to repeal point III of the ECAP decision.
21. On an unspecified date, the ECAP filed a response to NISMA's complaint, rejecting the allegations of the complaint and proposing that the complaint of the Political Entity NISMA be rejected as ungrounded.
22. On 29 January 2021, the Supreme Court by Decision [AA.no.5/2021] rejected the appeal of NISMA, filed against the decision of ECAP [A.nr.16 / 2021] of 25 January 2021, as being ungrounded.
23. The Supreme Court reasoned its Judgment as follows:

“Law No. 03/L-073 on General Elections in the Republic of Kosovo with the provisions of Article 29 has determined the Eligibility/Ability of the Candidate for certification, by stipulating under paragraph 1 that: “Any person whose name appears on the Voters List is eligible to be certified as a candidate, except if he or she is”, whilst point q) of the same article stipulates that: “found guilty of a criminal offence by a final court decision in the past three (3) years.” Based on the interpretation of the cited

provision it results that in this case, the LGE has provided for an obstacle to certification when a candidate has been found guilty of a criminal offence by a final court decision in the last three (3) years. The said provision has not made the classification of criminal offences which would be an obstacle to certification, or of offences that are not categorized as offences that prevent the candidate from being certified, nor of sentences by type.”

The Supreme Court of Kosovo in the present case has also considered the appeal claims of the Electoral Entity NISMA Socialdemokrate in particular in respect of the candidates Hasime Daka, [...] and at the appellate stage has presented the Decision on expungement from the convicts’ records, Pk.no.53/21, of 22 January 2021, which became final on 26 January 2021. [...] Having reviewed the appeal claims, the Supreme Court treated them as accepted evidence at the appeal procedure stage and in the sense of Article 180.1 of the LCP- where it is provided that the parties to the appeal may not present new facts and propose new evidence, except when the complainer provides evidence that he could not present evidence through no fault of his own, namely he could not propose them until the conclusion of the verification phase. So these pieces of evidence were not presented in the phase of review and verification of the suitability of the candidates at the relevant office, the CEC or the ECAP for the reason that these decisions on the expungement of sentences have become final on 26 January 2021, respectively on 28 January 2021. The Supreme Court finds that this evidence is irrelevant because the evidence of rehabilitation has been submitted after the assessment of the suitability. It has also been established that these two candidates as well as the others who are included in the list of those who are denied certification, according to Article 29 para.1 point 4) of the LEG, have not exceeded the three-year deadline based on the judgment of the Constitutional Court of the Republic of Kosovo K095/2020, of 06.01.2021, which does not refer to the provisions of the Criminal Code of Kosovo but only to the relevant provision of the LEG, cannot be on the list.”

Applicant’s allegations

24. The Applicant alleges that the challenged Decision has violated her rights guaranteed by Article 24 [Equality before the Law] and Article 45 [Freedom of Election and Participation].
25. The Applicant alleges that she has been denied a basic and fundamental right guaranteed by the Constitution, namely by Article 45 thereof. The Applicant states that such a right to be elected was not restricted by a Judgment as an accessory measure but her Judgment was rendered as generalized, and now it is worth mentioning that she did not commit any crime or criminal offence against the state, legal security, or corruption offence, she only had an unintentional accident which was committed without her will and she has deeply regretted about it and it is exactly for this reason that the Basic Court in its Judgment had pronounced a suspended sentence on her. The Applicant further states that in relation to this sentence the Court that had imposed the sentence, namely the Basic Court had taken a Decision on the expungement of persons convicted for this criminal offence from the convicts’ records, therefore

pursuant to the Criminal Code of the Republic of Kosovo 04/ L-082, and according to Article 104 (Judicial rehabilitation) such person is not considered a convict.

26. The Applicant also alleges that her right to gender equality for participation in the Assembly has been violated, because the gender quota of 30% of the under-represented gender is not being respected and this will be dangerous for democracy and the parliamentary state.
27. Further, the Applicant considers that injustice has been done to her for the fact that the Law on General Elections provides that a person convicted in the last three years can not apply for a Member of Parliament, a law which according to her claims is in contradiction with the Constitution and the Criminal Code mentioned above by which the person expunged from the convicts' records is not considered convict, therefore she considers that the Law on General Elections is discriminatory and as such should have not be applied in the present case.
28. The Applicant further states that the fact that the list of the Political Entity NISMA has not been reviewed for each candidate individually but has been reviewed as a whole, whilst in the case of other parties such as Lëvizja VETËVENDOSJE!(Self-Determination Movement) and Aleanca për Ardhmërinë e Kosovës (Alliance for the Future of Kosovo) it has treated all candidates one by one and in a case which is the same as the case of the complainant (applicant) a convict sentenced for the criminal offence of traffic was granted the right to participate in the election for MP, even though the Applicant is female and by eliminating her right to run as a candidate, the gender quota guaranteed by the Constitution would be impacted.
29. Finally, the Applicant proposes that her Referral be approved as grounded.

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 24 [Equality before the Law]

- 1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
- 2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.*
- 3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.*

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.

Criminal Code of Kosovo Nr. 04/L-082

Article 378
Endangering public traffic

1. Whoever violates any law related to road traffic or road transportation and endangers public traffic, human life, physical safety and thereby causes light bodily injury or material damage to property shall be punished by a fine or by imprisonment of up to three (3) years.

2. Whoever violates any law related to road traffic or road transportation and thereby endangers railway, tram, trolleybus, bus, lift or water traffic and in this way endangers human life, physical safety or property shall be punished by imprisonment of up to five (5) years.

3. When the offense in paragraph 2 of this Article results in light bodily harm to a person or damage of fifteen thousand (15,000) EUR or more to property, the perpetrator shall be punished by a fine or by imprisonment of six (6) months to five (5) years.

[...]

6. When the offense provided for in paragraph 1 or 2 of this Article is committed by negligence, the perpetrator shall be punished by a fine or by imprisonment of up to one (1) year.

7. When the offense in paragraph 6 of this Article results in light bodily harm to a person or damage of fifteen thousand (15,000) EUR or more to property, the perpetrator shall be punished by a fine or by imprisonment of up to three (3) years.

8. When the offense provided for in paragraph 6 of this Article results in grievous bodily injury or damage of twenty thousand (20,000) EUR or more to property, the perpetrator shall be punished by imprisonment of six (6) months to five (5) years.

[...]

Criminal Code of Kosovo No. 06/L-074

Article 97 Judicial rehabilitation

The court may, upon the request of the convicted person, decide to expunge a punishment from its records and consider the person not convicted if one-half of the relevant period of time provided for in paragraph 2. of Article 96 of this Code has elapsed and if the convicted person has not committed a new criminal offense during that time. When deciding to expunge a punishment, prescribed by statutory limitation or terminated by pardon or a change in the Criminal Code, the court shall consider the conduct of the convicted person after serving the punishment, the nature of the criminal offense and other circumstances that may be important for evaluating the appropriateness of expunging the punishment.

Law No.03/L-073 on General Elections in the Republic of Kosovo amended according to the Law No.03/L-256 on Amending and Supplementing the Law No.03/L-073 on General Elections in the Republic of Kosovo

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. [...]

118.4 An appeal may be made from a decision of the ECAP, as ECAP may reconsider any of its decisions upon the presentation by an interested party. An appeal to the Supreme Court of Kosovo may be made within twenty four (24) hours of the decision by ECAP, if the fine involved is higher than five thousand Euro (€ 5,000) or if the matter affects a fundamental right. The Supreme Court shall decide within seventy two (72) hours after the appeal is filed.

Article 119 [Complaints]

119.1 A person who has a legal interest in a matter within the jurisdiction of ECAP, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAP within twenty four (24) hours after the close of the polling stations and the ECAP shall decide the complaint within seventy two (72) hours after the complaint is received [...].

Assessment of the admissibility of Referral

30. The Court first examines whether there have been fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

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

"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."

32. In the circumstances of this case, the Court specifically refers to Article 22, paragraph (4) of the Law, which stipulates:

"If the referral ... is ... incomplete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline of not more than fifteen (15) days for ... supplementing the respective referral (...)".

33. In addition, the Court takes into consideration Rule 32[Filing of Referrals and Replies], sub-Rule (2) item (h) and Rule 35 [Withdrawal, Dismissal and Rejection of Referrals], sub-Rule (5) of the Rules of Procedure, that establish:

32 (2) "The referral shall also include:

[...]

(h) the supporting documentation and information.

Rule 35

(Withdrawal, Dismissal and Rejection of Referrals)

[...]

(5) The Court may decide to summarily reject a referral if the referral is incomplete or not clearly stated despite requests by the Court to the party to supplement or clarify the referral, if the referral is repetitive of a previous referral decided by the Court, or if the referral is frivolous.

[...]

34. The Court notes that the above Rule of Rules of Procedure enables the Court to summarily reject a referral if, among other things, the Applicant's referral is incomplete and not clearly stated, despite requests by the Court to the party to supplement and clarify the respective referral.
35. The Court recalls that the Applicant alleges that the regular courts violated her rights guaranteed by Articles 24 and 45 of the Constitution.
36. In the concrete case, the Court recalls that the Referral was submitted by the Applicant, who requested a constitutional review of Judgment [A.A. no. 5/2021] of the Supreme Court, of 29 January 2021. The latter was issued by the Supreme Court following the appeal that NISMA, in the capacity of a political

entity and consequently in the capacity of a legal entity, submitted against Decision [A.no.16/2021] of the ECAP, of 25 January 2021.

37. The Court also recalls that after the registration of the Referral, on 3 February 2021, it requested from the Applicant to submit clarifications regarding the fact whether she has submitted the Referral in an individual capacity, only, or as a representative of the Political Entity NISMA.
38. Following the Court's first request for clarification, the Applicant had brought a general power of attorney for representation of the Political Entity NISMA, which in the Court's assessment was not clear, it lacked the name of the authority that issued the power of attorney and did not define the scope of the power of attorney. The Applicant failed to submit the requested clarifications even after the second request of the Court, of 11 February 2021, wherein was specifically requested that: (i) the power of attorney must contain the data of the authority in the political entity NISMA which is giving the authorization for representation in the Constitutional Court; (ii) the power of attorney must determine its scope, respectively whether the Applicant is authorized to represent the Political Entity NISMA; (iii) signature of the authority within the Political Entity NISMA.
39. So, the Court has addressed the Applicant twice with such requests, but even though on 9 February 2021, the Applicant had submitted a power of attorney which did not provide the additional clarifications sought by the Court, whilst in the second request of the Court sent to the Applicant seeking clarification about the scope of the submitted power of attorney, she did not respond at all to this specific request of the Court.
40. The Court recalls that the burden of building, clarifying and supplementing the Referral falls on the applicants, who have a direct interest to have their claims and allegations effectively addressed by the Court. In cases when the applicants do not respond to the requests of the Court for clarification and supplementation of the Referral, the Court summarily rejects these referrals. (See, *inter alia*, the cases of Court KI60/20, Applicant: The Council of the Islamic Community, Decision to Reject the Referral, of 18 February 2021, paragraph 36; KI90/20, Applicant *Arben Boletini*, Decision to Reject the Referral, of 9 December 2020, paragraph 25; and cases No.KI78/20, KI79/20 and KI80/20, Applicant *Hilmi Aliu and others*, Decision to Reject the Referral, of 7 December 2020, paragraph 33 and the references used therein).
41. In circumstances where a Referral before the Court is incomplete or not clearly stated despite its requests to the Applicant for supplementing or clarifying the Referral, the Court finds that the Applicant's Referral does not meet the procedural criteria for further consideration, because it is incomplete and not clearly stated, as defined in paragraph (5) of Rule 35 of the Rules of Procedure.
42. Therefore, the Court, pursuant to Article 22.4 of the Law, Rule 35 (5) of the Rules of Procedure, concludes that the Applicant's Referral must be summarily rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 and 113.7 of the Constitution, Articles 20, 22.4, 47 and 48 of the Law and Rules 39 (2) (h), 35 (5) and 59 (3) of the Rules of Procedure, on 5 May 2021, unanimously

DECIDES

- I. TO REJECT the Referral;
- 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;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Remzije Istrefi Peci

Arta Rama-Hajrizi



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