



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

Prishtina, 4 June 2014
Ref. No.:RK640/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI79/14

Applicant

Adnan Rustemi

Constitutional Review
of the Judgment, AA. no. 3/2014 of the Supreme Court of Kosovo
of 21 February 2014

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Adnan Rustemi (hereinafter: the Applicant), represented by Mr. Armend Shkoza.

Challenged Decision

2. The challenged Decision is the Judgment, AA. No. 3/2014 of the Supreme Court of Kosovo dated 21 February 2014, which the Applicant declares to have received on 24 February 2014.

Subject Matter

3. The subject matter is the constitutional review of the Judgment, AA. No. 3/2014 of the Supreme Court of Kosovo dated 21 February 2014, which rejected the Applicant's appeal filed against the Decision of the Election Complaints and Appeals Commission (hereinafter: the ECAC) of 18 February 2014. The Applicant, as a member of the Central Election Commission (hereinafter: the CEC), had filed a complaint against the Decision No. 332/2014 of the CEC of 13 February 2014, which certified the final voters list for the extraordinary elections for the mayor of the Municipality of Northern Mitrovica.
4. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely to suspend the 6,684 individuals from the final voters list, certified based on the aforementioned Decision of the CEC.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 54, 55 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 7 May 2014 the Applicant submitted the Referral to the Court.
7. On 8 May 2014, the President by Decision GJR. KI79/14 appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President by Decision KSH. KI79/14 appointed the Review Panel composed of Judges Robert Carolan (presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
8. On 8 May 2014 the Court informed the Applicant on the registration of the Referral and sent a copy of the Referral to the Supreme Court and the CEC.
9. On 19 May 2014 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court to declare the Referral as inadmissible and to reject the request for interim measures.

Summary of facts

10. On 13 February 2014, the CEC rendered Decision No. 332/2014, which certified the final voters list for the extraordinary elections for the Mayor of the Municipality of Northern Mitrovica, which were held on 23 February 2014.

11. On 14 February 2014, the Applicant, as a member of the CEC filed an appeal against the aforementioned Decision of the CEC. In his appeal, the Applicant argued that the additional list with 6684 individuals attached to the final voters list, received from the Agency for Civil Registration and certified by the CEC, is unlawful and unconstitutional, as it was not included in the preliminary voters list and these 6684 individuals were not citizens of the Republic of Kosovo. Thus, according to the Applicant, the aforementioned Decision was rendered in violation of Article 45 [Freedom of Election and Participation] of the Constitution, Article 29 of the Law on Citizenship and Article 5, paragraph 1, of the Law on General Elections.
12. On 18 February 2014, the ECAC with its Decision, A. No. 14/2014 rejected the Applicant's appeal as ungrounded. The ECAC held that the Applicant's allegations were ungrounded since the Decision of the CEC to certify the final voters list, including the additional list of 6,684 individuals, was based on the final extract received from the Agency for Civil Registration, which according to the ECAC is the competent body for the maintenance of the Central Civil Registry, whose data are supposed to be correct.
13. On 20 February 2014, the Applicant filed an appeal against the Decision of the ECAC (No. 14/2014 of 18 February 2014) with the Supreme Court alleging wrongful determination of factual situation. In his Appeal, the Applicant further argued "[...] that the additional list, certified by the CEC, containing the names of 6684 individuals, who were not citizens of the Republic of Kosovo was in contradiction with Article 45 [Freedom of Election and Participation], paragraph 1 in conjunction with Article 15 [Citizens Living Abroad] of the Constitution, Article 29 of the Law on Citizenship and Article 5.1 of the Law on General Elections No. 03/l-073 [...]".
14. On 21 February 2014 the Supreme Court with Judgment, AA. No. 3/2014 rejected the Applicant's appeal as ungrounded. The Supreme Court held the following:

"From the case file it results that Central Election Commission certified the Final Voters List for early elections for the Mayor of North Mitrovica municipality 2014, by decision no. 332/2014 of 13.02.2014, which is based on extract of civil register drafted by Civil Registration Agency, respectively Document Production Department within the Ministry of Internal Affairs.

Supreme Court of Kosovo finds that as per Article 11 para. 1 sub para. 1 item 1 of Law no.04/L-160 on Civil Registration Agency, duties and responsibilities of Agency are all processes in relation to application, personalization and issuance of documents for citizens of the Republic of Kosovo and foreign citizens, whereas according to the same Article sub-para 1 item 3 Agency administers and maintains the database of central civil status register. Due to the fact as per Article 7.1 item (a) of Law on General Elections no.03/L-073, in which it is stated that CEC keeps the voters list and assures that the voters list is accurate and updated, and the same contains the most recent extract available from Central Civil Register all eligible voters who are registered as citizens of Kosovo according to the

Law on Citizenship, the Supreme Court of Kosovo evaluated that the decision of Central Election Commission is based on law, since it based its decision on the most recent extract of Civil Registration Agency, as competent body to maintain central civil register, for which reasons it was evaluated that the appeal is ungrounded.

Therefore, the Supreme Court of Kosovo, concluded that the Election Complaints and Appeals Panel determined correctly and completely the factual situation and applied correctly the legal provisions when it found that the appeal is ungrounded, which reasons also this Court [Supreme Court] bases on law as correct and ungrounded.”

Applicant’s allegations

15. The Applicant argues that *“in the appeal procedure before the ECAC and in the appeal procedure before the Supreme Court against the Decision, No. 14/2014 of the ECAC, the factual and legal situation of 6,684 individuals has not correctly been determined”*. Hence, the Applicant alleges that the aforementioned Judgment of the Supreme Court was rendered in violation of Articles 14 [Citizenship], 24 [Equality before the Law] and 45 [Freedom of Election and Participation] of the Constitution, provisions of the Law No. 03/L-073 on General Elections, Law No. 04/L-215 on Citizenship and Law No. 04/L-160 on the Agency for Civil Registry.

16. Referring to the Applicant’s allegation of violation of Article 45, paragraph 1, of the Constitution, the Applicant argues as following: *“[...] based on this, the essential criteria for the right to elect and to be elected, is the element of citizenship, which is acquired, based on the legal criteria foreseen in the legislation of the Republic of Kosovo.”*

17. Referring to the allegation of violation of Article 24 [Equality Before Law] of the Constitution, the Applicant further argues that:

“Because, this represents a mutual relationship and in itself contains legal obligations which are only acquired with the right to citizenship, and by recognizing the right of individuals to vote without fulfilling the criteria on which basis these individuals would acquire obligations toward the state, we consider that the citizens of the Republic of Kosovo are discriminated in relation to their treatment within the legal and constitutional order of the Republic of Kosovo.”

18. The Applicant concludes, requesting the Court:

“In this context, pursuant to the constitutional provisions, namely Article 45, paragraph 1 in conjunction with Article 14 of the Constitution of the Republic of Kosovo and Article 29 of the Law No. 04/L-215 on Citizenship, based on this, we request the Constitutional Court of the Republic of Kosovo to uphold the unconstitutionality of the Decision of CEC, and therefore to uphold the incomplete review by the Supreme Court in its Judgment AA. No. 3/2014, with regard to the complete determination of the factual situation.”

Relevant provisions of the Law on General Elections No. 03/L-073, Law on Citizenship No. 04/L-125 and Law on Civil Registry Agency No. 04/L-160 related to the Applicant's complaint

Law on General Elections No. 03/L-073

1. Article 5 [Voter Eligibility]

“1. A person is eligible to vote in an election in accordance with the present Law if he or she is at least eighteen (18) years of age on the day of the election and satisfies at least one of the following criteria:

a) he or she is registered as a citizen of Kosovo in the Central Civil Registry; b) he or she is residing outside Kosovo and left Kosovo on or after 1 January 1998,

provided that he or she meets the criteria in applicable legislation for being a citizen of Kosovo; or

c) he or she obtained the status of a refugee, as defined in the Convention Relating to the Status of Refugees of 28 July 1951 and its Protocol of 16 December 1966, on or after 1 January 1995, and is eligible to be registered in the Central Civil Registry as a habitual resident of Kosovo.

2. No person may vote if he or she:

a) is serving a sentence imposed by the International Criminal Tribunal for the former Yugoslavia (“the Tribunal”);

b) is under indictment by the Tribunal and has failed to comply with an order to appear before the Tribunal; or

c) has been declared mentally incompetent by a final court decision.”

2. Article 7 [Voters List]

“1. The CEC shall maintain a Voters List and it shall ensure that the Voters List is accurate and up to date, which represents:

a) the most recent available extract from the Central Civil Registry of all eligible voters who are registered as citizens of Kosovo pursuant to the law on Citizenship; and

b) eligible voters who have successfully applied to vote outside of Kosovo.

2. All eligible voters listed in the manner required by the CEC. The personal information provided for each voter shall be: name, surname, date of birth, address, and the Polling Center where he/she is assigned to vote.

3. For confirmation of eligibility, the CEC shall have access to registers, records of residence, and other official records.

4. The Voters List shall be accessible as set out by CEC rules.

5. All activities and documents of the state bodies, and all submissions and evidence related to registering citizens in the Voters List shall be exempted from payment of fees and taxes.

6. *The personal data of the citizens on the Voters List shall be written in the languages and alphabets in which the original records are kept and in accordance with the Law on the Use of Languages in Kosovo.*

7. *The competent court shall submit data to the CEC on persons who have been deprived of their legal capacity with a final court decision. Such data shall be delivered as required by the CEC.*

8. *The Central Civil Registry shall supply the CEC with all relevant information that the CEC requires to maintain the Voters List in accordance with deadlines established by the CEC.*

9. *The CEC shall provide the Municipal Election Commissions (hereinafter: MECs) with an electronic copy of the entire VL and one printed copy of the VL for their municipality.”*

3. Article 8 [Review of Voters List and Challenge Period]

“1. Eligible voters may challenge, as specified under article 9, inaccuracies or omissions in the Voters List during a period established for that purpose by the CEC.

2. Prior to the start of the Challenge and Confirmation Period, following the declaration of the election date by the President of Kosovo, the CEC Secretariat shall make the VL available at MEC Office in each municipality as set out by CEC rules and in conformity with data protection law. In addition, the MEC may designate additional locations to view the VL when necessary to allow for access to it within its municipality.

3. Decisions regarding changes in the VL shall be made by the court of first instance.

4. Prior to the commencement of the challenge period the CEC shall provide the designated Contact Person of each certified Political Entity with the VL. Any use of the VL by certified political entities that contravenes Chapter V on the Code of Conduct for Political Entities and their Supporters and Candidates, shall be a violation of this Law. Changes to the VL may be done in accordance with CEC rules.

5. The CEC shall provide accredited electoral observers with the VL during the election period upon individual request. Accredited electoral observers may observe the Challenge and Confirmation Period in all locations where the VL is available for viewing.

6. The CEC shall, after the public has had the opportunity to challenge inaccuracies and omissions in the Voters List, but before the day of the election, certify that the Voters List has been established in accordance with applicable law.”

4. Article 9 [The Challenge Procedure]

“1. Any eligible voter as set out in Article 5 may review the VL provided that he/she:

a) properly identifies him/herself to the MEC as an eligible in Kosovo voter appearing on the VL and provides one of the following identification documents:

(i) a valid ID card;

(ii) a valid travel document;

(iii) a valid passport;

(iv) a valid driving license; or

b) properly identifies him/herself to the MEC as a successful out of Kosovo voter applicant with a valid picture identification and out of Kosovo registration receipt.

2. A person who wishes to challenge a name that he/she considers should not be on the VL shall submit a request to the court of first instance clearly stating the facts supporting his/her challenge and including any relevant evidence.

3. A person may submit a request to the court of first instance if he/she discovers that his/her name does not appear on the VL. Such request shall include any relevant evidence. “

Law on Citizenship No. 04/L-125

Article 29 [Proof of Citizenship]

“A valid birth certificate, birth extract, a citizenship certificate, an identity card or passport of the Republic of Kosovo shall serve as proof of citizenship of the Republic of Kosovo.”

Law on Civil Registry Agency No. 04/L-160

Article 11 [Duties and Responsibilities], paragraph 1, point 1 and 3

“1. Duties and responsibilities of the Agency are as following:

1.1. responds to all processes connected to the application, personalization and issuance of documents for citizens of the Republic of Kosovo and foreign citizens;

[...]

1.3. administers and maintains the data base of the civil status central registry;”

Admissibility of the Referral

19. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.
20. In this respect, the Court refers to Article 113, paragraph 7 of the Constitution, which establishes that:

“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.”
21. In addition, Article 49 of the Law provides that *“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.”*
22. In the present case, the Court notes that the Applicant has made use of all legal remedies available under the law. The Court also notes that the challenged Decision was rendered on 21 February 2014, and the Applicant filed his Referral with the Court on 7 May 2014.
23. However, the Court refers to Rule 36 of the Rules of Procedure, which provides:
 - (1) *“The Court may only deal with Referrals if: (c) the Referral is not manifestly ill-founded.”*
 - (2) *“The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:*

[...], or

(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights.

[...], or

(d) when the Applicant does not sufficiently substantiate his claim”.
24. As mentioned above, the Applicant, as a member of the CEC, had filed a complaint with ECAC against the Decision of the CEC (No. 332/2014 of 13 February 2014), which certified the final voters list for the extraordinary elections for the mayor of the Municipality of Northern Mitrovica. The ECAC and the Supreme Court in their Decisions did not raise the issue of the Applicant's right to file an appeal against Decisions of the CEC in his capacity as a member of the CEC. The ECAC and the Supreme Court referred only to the legal provisions of the Law No. 04/L-160 on Agency of Civil Registry and Law No. 03/L-073 on General Elections regarding the voters list.
25. In his Referral, the Applicant alleges that the Judgment of the Supreme Court was rendered in violation of Articles 14 [Citizenship], 24 [Equality before the Law] and 45 [Freedom of Election and Participation] of the Constitution,

provisions of the Law No. 03/L-073 on General Elections, Law No. 04/L-215 on Citizenship and Law No. 04/L-160 on the Agency for Civil Registry.

26. The Court notes that in the appeal procedure, the ECAC and the Supreme Court regarding the voters list reasoned their Decisions referring to the provisions of the Law in force. In this regard, the Court finds that what the Applicant raises is a question of legality and not of constitutionality.
27. In this regard, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as it may have infringed rights and freedoms protected by the Constitution (constitutionality).
28. The Constitutional Court cannot substitute the role of the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See case *Garcia Ruiz vs. Spain*, No. 30544/96, ECHR, Judgment of 21 January 1999; see also case KI70/11 of the Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Constitutional Court, Resolution on Inadmissibility of 16 December 2011). The mere fact that the Applicant is not satisfied with the outcome of the proceedings in his case do not give rise to an arguable claim of a violation of his rights as protected by the Constitution. The Court notes that the Applicant had ample opportunity to present his case before the regular courts.
29. Furthermore, as mentioned above, the Court notes that the reasoning referring to the voters list given in the Judgment of the Supreme Court is clear and, after having reviewed all the proceedings, the Court has also found that the proceedings before the ECAC have not been unfair or arbitrary (See case *Shub vs. Lithuania*, no. 17064/06, ECHR, Decision of 30 June 2009).
30. In this regard, the Supreme Court held that: [...] “*Due to the fact as per Article 7.1 item (a) of Law on General Elections no.03/L-073, in which it is stated that CEC keeps the voters list and assures that the voters list is accurate and updated, and the same contains the most recent extract available from Central Civil Register all eligible voters who are registered as citizens of Kosovo according to the Law on Citizenship, the Supreme Court of Kosovo evaluated that the decision of Central Election Commission is based on law, since it based its decision on the most recent extract of Civil Registration Agency[...]*”
31. For the foregoing reasons, the Court considers that the facts presented by the Applicant do not in any way justify the alleged violation of the constitutional right invoked by the Applicant and the Applicant has not sufficiently substantiated his allegation.
32. Hence, the Court concludes that the Referral is manifestly ill-founded.

Assessment of the Request for Interim Measure

33. The Applicant also requests from the Court to impose an interim measure, namely to suspend the 6684 individuals from the final voters list, certified

based on the aforementioned Decision of the CEC of 13 February 2014 for the election process.

34. In this regard, the Applicant holds that:

“Although the elections held on 23 February 2014 for the Municipality of North Mitrovica have already produced irreparable damage in terms of rule of law, principles of constitutionality and legality, the submission of a request for imposing interim measures would prevent any possibility, until rendering a merit-based decision on the matter raised by the applicant before the Constitutional Court, of reproducing the damage caused in the repeated mayoral elections for the Municipality of North Mitrovica. The need for such a measure is of utmost relevance, especially when considering that general elections for the Assembly of Kosovo are expected to be held rather soon. The suspension of the list of 6684 persons, and the obligation of the Civil Registry Agency and the Central Election Commission to be diligent in arranging the lists and certifying such lists, and not allow the inclusion of any person in Voters Lists without proving clearly the citizenship of the Republic of Kosovo, until the rendering a merit-based decision by the Constitutional Court, would ensure an effective preventative measure against such an occurrence. “

35. In this connection, the Court notes that the final voter’s list challenged by the Applicant and certified by the CEC refers to the extraordinary elections for the Mayor of Municipality of Northern Mitrovica which were held on 23 February 2014. Therefore, the Court considers that the request for interim measure is not applicable since the elections already took place. The rest of the arguments quoted in paragraph 34 are irrelevant as they concern an event that has not yet happened.

36. In order for the Court to allow an interim measure, in accordance with Rule 55 (4) of the Rules of Procedure, it needs to determine that:

*“(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;
(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted.*

(...)

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application”.

37. As concluded above, the Referral is inadmissible and, therefore, there is no *prima facie* case for imposing an interim measure. For these reasons, the request for an interim measure is to be rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 27 of the Law, and Rules 36 (2), b) and d), 55 (4) and 56(2) of the Rules of Procedure, on 19 May 2014, unanimously:

DECIDES

- I. TO DECLARE the Referral as Inadmissible;
- II. TO REJECT the Request for Interim Measures;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- V. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Snezhana Botusharova



President of the Constitutional Court

Prof. Dr. Enver Hasani