



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Pristina: 14 December 2010
Ref. No.: RK67/10

JUDGMENT

in

Case No. KI. 09/10

Applicant

Kimete Bikliqi

vs.

The Central Election Commission

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of :

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

Adopts the following Judgment:

Applicant

1. The Applicant is Ms. Kimete Bikliqi from Janjevo, Lipjan.

Opposing party

2. The Central Election Commission (CEC), established pursuant to Article 139 of the Constitution of the Republic of Kosovo.

Subject matter

3. On 27 January 2010, Ms. Kimete Bikliqi filed a Referral with the Constitutional Court of Kosovo, which was registered under No. KI-09/10. The Applicant challenged the decision of Central Election Commission (CAC), dated 14 December 2009, on the announcement of local election results that were held on 15 November 2009. In particular, the Applicant alleges that the following provisions were violated: Article 45, paragraph 2 of the Constitution of the Republic of Kosovo, Article 232, paragraph (c) and (g) of the Law on Contested Procedure of Kosovo, and Article 106 and 117 of the Law on General Elections in Kosovo.

Legal basis

4. Article 113 of the Constitution of the Republic of Kosovo (hereinafter: 'the Constitution'); Article. 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter 'the Law'), and Section 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter 'the Rules of Procedure').

Summary of proceedings before the Constitutional Court

5. The Referral was filed with the Constitutional Court on 27 January 2010. The President of the Court appointed Prof. Dr. Ivan Cukalović as Judge Rapporteur, and Review Panel composed of Judge Mr. Kadri Kryeziu, presiding, Prof. Dr. Enver Hasani and Dr. Iliriana Islami. The Court reviewed the admissibility of the applicant's referral.

Facts

6. The Applicant, who was a candidate for the Municipal Assembly in Lipjan during the local elections held on 15 November 2009, alleges that the CEC interfered unlawfully with the votes assigned to her in the Local Elections held on. According to the preliminary results announced by the CEC, the Applicant had won 132 votes, and in being listed as candidate number eighteen in the list of candidates from the Democratic Party of Kosovo she, according to that result, had secured the position of Municipal Assembly member in Lipjan.
7. Following the completion of the entire process and the publication of the final election results by the CEC on 14 December 2009, and pursuant to Article 106 paragraph 3 of the Law on General Elections, it appeared that the Applicant had a total of 131 votes and as a result the position of member in the Municipal Assembly was allocated to another person who had won the same number of votes, 131, but who was ranked higher in the list of candidates for the Democratic Party of Kosovo, the Applicant's party.

8. On 16 December 2009 the Applicant filed a complaint with the Election Commission on Appeals and Complaints (ECAC), expressing her concern over her exclusion from the final results list published by the CEC on 15 December 2009, and requesting the correction and confirmation of her votes. On 21 December 2009, the ECAC issued Decision A.no.477/200 through which it rejected the complaint as ungrounded.
9. On 11 January 2010, Ms. Bikliqi filed an appeal in writing to the ECAC together with new evidence and requested the review of the ECAC Decision A.nr.477/2009, dated 21 December 2009. On 21 January 2010, the ECAC issued Decision A.no.06/2010 through which it rejected the appeal as ungrounded.
10. On 21 December 2009, Ms. Bikliqi lodged an appeal with the Supreme Court of Kosovo against the ECAC Decision A.no.477/2009. The Supreme Court of Kosovo, in its Judgment A.no.995/2009, dated 29 December 2009, stated that: “upon assessing the appeal allegations and all case files related to this issue, found that the appeal is unfounded”. In the same decision the Supreme Court stipulated that: “the CEC, upon concluding all procedures in voting centres and counting centres, and after being informed that the ECAC has decided on all remarks pertaining to voting and counting, certified the final results of elections on 14 December 2009, at 18:45. Provisions of Article 119.3 of the Law on General Elections in Kosovo (LGEK) foresee that CEC decisions may only be appealed, if such decisions impact on legal rights, which are listed under that article. Incompliance of preliminary results with final results is not listed as one of the reasons for appealing against CEC decisions, therefore the appeal of the applicant was inadmissible, according to the Court’s assessment, the respondent has justly applied the Article 118 of the LGEK when deciding as in the ruling of its decision”.

Assessment of the Admissibility of the Referral

11. In order to be able to adjudicate the Applicants' Referral, the Court examined the documentation available and examined whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this respect, the Court refers to Article 113.7 of the Constitution:

“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.”

12. From the documentation filed the Court concludes that the Applicant has exhausted all legal remedies provided by law in that she had a final Appeal rejected by the Supreme Court.

13. Article 48 of the Law provides that:

“In his/her referral, the Applicant 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.”

14. The Applicant alleges that her rights provided by Article 45 of the Constitution, Articles 106 and 107 of the Law no.03/L-073 on General Elections and Article 232 (c, g) of the Law on Contested Procedure 03/L-006 have been violated.

15. 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force.”

16. The Applicant’s Referral was lodged with the Constitutional Court on 27 January 2010, whereas the latest Decision in relation to the present case is that issued by the Supreme Court of Kosovo, dated 29 December 2009. Thus the Court concludes that the Referral is filed in compliance with Article 49 of the Law.

17. Therefore, the Constitutional Court concludes that the legal criteria have been fulfilled and the Referral is admissible.

Elections

18. In a previous case of Ms. Mimoza Kusari, KI- 73/09, published on 18 March 2010, the Constitutional Court referred to the importance of elections in a democratic society. It is worth repeating and emphasising in this Judgment some important aspects that this Court pointed out in that case.

“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. Pursuant 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. These constitute a part of National Law. Article 3 of Protocol 1 provides the right to free elections. It provides that elections shall be held “at reasonable intervals by secret ballot, under conditions which will

ensure the free expression of the opinion of the people in the choice of the legislature”.

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 ensured the mechanism for holding General and Local Election through the adoption of the Law no.03/L-073 on General Elections in the Republic of Kosovo and the Law no.03/L-040 on Local Elections in the Republic of Kosovo.*
23. *The European Court of Human Rights (ECHR) stressed that the right to vote is an active right and the right to be elected is a passive right. The applicant alleges that her right to be elected has been violated. Nevertheless, there is a difference between the right to be elected and the right to stand for elections. The ECHR case-law shows that there is a considerable freedom of action that the States enjoy in relation to their electoral system and that they have a wide margin of appreciation for the way the elections were conducted and how election results are announced. In the case of United Communist Party of Turkey vs. Turkey, the Court stressed that: “the (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 Sadek and Others (no.2) vs. Turkey, no.25144/94 et al, 31, ECHR 2002-IV).*
24. *The ECHR continuously stressed the importance of free and democratic elections in its Decisions. In the same Decision, the Court expressed its opinion in the following way: “Democracy is viewed as the only political model envisaged by the Convention and in compliance with the circumstances, the only that complies with it.” In the same Decision, the ECHR quoted the Code of Good Practice, adopted by the European Commission on Democracy Through Law (The Venice Commission) in the 51 (Instructions) and 52 (Report) sessions on 5-6 July and 18-19 October 2002 (Opinion no.190/2002, CDL-AD(2002) 23 rev). The Venice Commission stated that:*
- “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 also underlines that the organisation of elections must be monitored by an impartial body, responsible for the application of the electoral law and that there must be an effective system of appeal in place. According to the law in Kosovo, these two functions are performed by the CEC and the ECAC respectively by the courts, as*

provided by law. These are permanent and impartial bodies that decide about all matters related to elections, certification of results and the appeals related to the election process, as provided by law and electoral regulations.

26. The reasoning that the CEC and the ECAC has that authority is based on the assumption that there must be certainty for the election process. The need for certainty requires the annulment of elections only in case of serious violations and the burden of proof lies with those alleging such violations.“

The Law on Elections in Kosovo

19. The law in relation to the conduct of elections in the Republic of Kosovo is governed by Law 03/L-073, the Law on General Elections in the Republic of Kosovo and Law No. 03/L-072, the Law on Local Elections in the Republic Of Kosovo. Article 26 of the Law on Local Elections provides:

Article 26

Chapter XVI (The counting of ballots and announcement of election results), and any provision relating to the subject matter thereof, of the Law on General Elections in the Republic of Kosovo shall mutatis mutandis apply to local elections unless otherwise provided by this Law.

20. Article 101 of the Law on General Elections provides general provisions for the counting of ballots and the announcement of election results and it gives power to the CEC to make Rules accordingly. It states as follows:

Article 101

General Provisions

101.1 The procedures of counting of the ballots shall be governed by the following objectives: accuracy, transparency, efficiency, capability for recount and repeat elections, and protection of the secrecy of the vote.

101.2 Regular ballots cast at Polling Stations within Kosovo will be counted at those Polling Stations immediately after the close of voting.

101.3 The counting procedures shall be in accordance with the CEC rules.

21. The CEC has made Rules governing many aspects of elections. The first of these was Electoral Rule Nr. 01/2008, On Registration and Operation of Political Parties which entered into force on 29 June 2009. The most recent was Electoral Nr. 15/2010 concerning Early Elections and Extraordinary Elections which entered into force on 2 March 2010.

22. The most relevant of the Rules made in relation to this case is Electoral Rule Nr. 09/2009 on Polling and Counting Inside Polling Stations on Municipal Election Commission Level, which entered into force on 25 June 2009. These Rules govern the processes for the counting of ballots and for the counting and reconciliation of conditional ballots. The ECAC determines complaints in relation to the polling process. The Applicant appealed to the ECAC in relation

to her complaint and her complaint was rejected by the ECAC and subsequently by the Supreme Court. The Applicant has not been able to substantiate where in the entire process there was a violation of the Law or the Rules that affected her constitutional rights.

23. The Court takes this opportunity to repeat the provisions of Article 53 of the Constitution which obliges the Court to interpret human rights and fundamental freedoms in a manner consistent with the decisions of the ECHR. That Article provides as follows:

Article 53 [Interpretation of Human Rights Provisions]
Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.

24. In the case of Mathieu-Mohin and Clerfayt vs. Belgium, Application no. 9267/81, the ECHR stressed that, “the Contracting States to the European Convention on Human Rights have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time. Electoral systems seek to fulfill objectives which are sometimes scarcely compatible with each other: on the one hand, to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances the phrase “conditions which will ensure the free expression of the opinion of the people in the choice of the legislature” implies essentially - apart from freedom of expression (already protected under Article 10 of the Convention) - the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election”.
25. In the same Decision, the ECHR stated: ‘It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate “wasted votes”.’
26. The European Court of Human Rights pointed out that “in any consideration of the electoral system in issue, its general context must not be forgotten. The system does not appear unreasonable if regard is had to the intentions it reflects and to the respondent State’s margin of appreciation within the Belgian parliamentary system - a margin that is all the greater as the system is incomplete and provisional”.
27. The ECHR ultimately decided in that case that there was not a disproportionate limitation such as would thwart “the free expression of the opinion of the people in the choice of the legislature”.
28. The role of the Constitutional Court in the election process is recognized by the Law on General Elections, and Article 106.1 provides that the CEC shall certify the election results when all outstanding complaints concerning polling and counting have been adjudicated by the ECAC and by the Constitutional Court. The Court has no other role in the election process other than to adjudicate on the issue as to whether there has been a violation of individual rights and

freedoms guaranteed by the Constitution. In the present case the Applicant has not been able to substantiate where in the entire process there was a violation of the Law or the Rules that affected her constitutional rights.

29. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *García Ruiz v. Spain*, no. 30544/96, § 28, European Court on Human Rights [ECHR] 1999-I).
30. Bearing in mind that that the Republic of Kosovo has a wide margin or appreciation in the manner by which, through its laws, it provides for the holding of fair and free elections and bearing in mind that the Applicant has not been able to point to a breach of the law or of the Constitution that affects her constitutional rights the Court therefore concludes that there has been no violation of her rights.

FOR THESE REASONS

Pursuant to Article 113 (7) of the Constitution, Article 20 of the Law and Section 55 of the Rules of Procedure, the Constitutional Court by a majority:

DECIDES

- I. The Referral is Admissible.
- II. There is no violations of the rights as alleged by the Applicant.
- III. 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.
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Prof. Dr. Ivan Čukalović

Prof. Dr. Enver Hasani



The image shows the handwritten signatures of the Judge Rapporteur and the President of the Constitutional Court. The Judge Rapporteur's signature is on the left, and the President's signature is on the right. In the center, there is a blue circular official seal of the Constitutional Court of Kosovo. The seal contains the text 'REPUBLIKA E KOSOVES' at the top, 'GJYKATA KUSHTETUESE' in the middle, and 'REPUBLICA KOSOVO' at the bottom. The seal also features a central emblem and the text 'USAVNI SUD HRVATINA'.