



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

Prishtina, 17 August 2011
Ref. No.: RK129/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 21/10

Applicant

Arta Hyseni

**The Decision of the Supreme Court of Kosovo,
dated 12 February 2010, A No. 1030/2009**

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
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Adopts the following Resolution:

Applicant

1. The Applicant is Ms. Arta Hyseni from Llapashtica e Poshtme, Pudujeva.

Challenged Decision

2. The Decision of the Supreme Court of Kosovo, dated 12 February 2010, A No. 1030/2009

Legal basis

3. 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 56(2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter 'the Rules of Procedure').

Subject matter

4. On 30 March 2010 the Applicant filed a Referral with the Constitutional Court of Kosovo. The Applicant challenged the decision of the Supreme Court of Kosovo, dated 12 February 2010, A No. 1030/2009 which rejected her complaint against the Election Commission on Appeals and Complaints (ECAC) arising from her dissatisfaction with the failure to declare her elected to the Municipal Assembly of Podujeva following the Local Elections held on 15 November 2009.
5. In particular, the Applicant alleges that the following provisions of the Constitution were violated were violated: Articles 3 and 24 [EQUALITY BEFORE THE LAW], and Article 45 [FREEDOM OF ELECTION AND PARTICIPATION].

Summary of proceedings before the Constitutional Court

6. The Applicant filed a Referral with the Constitutional Court on 30 March 2010. The President of the Court appointed Prof. Dr. Ivan Cukalovic as Judge Rapporteur and Review Panel composed of Enver Hasani (presiding) and Judges Kadri Kryeziu, and Iliriana Islami.

Summary of the Facts

7. The Applicant was a candidate in the Local Elections held in Kosovo on 15 November 2009 for the Municipal Assembly of Podujeva. The Applicant maintains that the preliminary results issued by the Central Elections Commission (CEC) showed that she obtained 179 votes and was therefore entitled to be elected as a member of the Municipal Assembly for Pudujeva. However, when the final results were certified by the CEC on 14 December 2009 she was shown as having obtained 187 votes whereas another candidate had received 192 votes. This meant that she was not elected to the Municipal Assembly.
8. She states that she suffered damage arising from the Local Election because of either intentional manipulation or due to a mathematical miscount of the votes. The Applicant originally appealed the result to the Election Complaints and Appeals Commission (ECAC) on 17 December 2009.
9. The ECAC rejected her complaint through its decision 495/2009, dated 22 December 2009. She maintains that the ECAC did not review the factual situation of the votes at all. The ECAC in that decision stated that because the Central Elections Commission (CEC) had certified the results of the Local Elections on 14 December 2009 that the results were binding. The ECAC therefore rejected the complaint as unfounded.

10. On 29 December 2009, dissatisfied with this result, the Applicant purported to make a further complaint to the ECAC. This time she states that she submitted all the evidence of the complaint and she included tabulated clarification of the vote count of the election.
11. By its decision A. no.529/2009 the ECAC concluded that the appeal of the Applicant related to an adjudicated matter and concluded that the second complaint was inadmissible.
12. The Applicant appealed this decision to the Supreme Court of Kosovo. The Supreme Court rejected her appeal on 12 February 2010. In its Judgment the Supreme Court stated that the alleged inconsistency of final results with preliminary results or the expectation of the complainant did not present a reason for complaining against the CEC.

Assessment of the Admissibility of the Referral

13. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, further specified in the Law on the Constitutional Court and the Rules of Procedure.
14. In its Resolution on Inadmissibility issued in the Referral of Mimosa Kusari-Lila, 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. The Constitutional Court referred to that Resolution and repeated its observations in another Judgment of the Court in the case of Kimete Bikliqi vs. The Central Election Commission, Case No. KI. 09/10, dated 14 December 2010. Some quotations from the former Decision are worth emphasising again.

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.”

15. When the Constitutional Court examines the events that led to the bringing of the Referral it notes the fact that the Applicant had a Decision from the ECAC in relation to her dissatisfaction with the results of the Local Election for the Municipality of Podujeva. She attempted to lodge a further Appeal to the ECAC and it decided that her appeal had already been dealt with. She appealed this second Decision of the ECAC to the Supreme Court who decided that her appeal to them was not founded.
16. Rule 36.1 and 2 of the Rules provide:

Rule 36

Admissibility Criteria

1. The Court may only deal with Referrals if:

a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted, or

b) the Referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or

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: a) the Referral is not prima facie justified, or

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

c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or

d) when the Applicant does not sufficiently substantiate his claim;

17. This Court recalls that it cannot revisit or overturn the Decisions of the CEC or the ECAC unless there has been a violation of individual rights and freedoms guaranteed by the Constitution. In this regard the onus is on the Applicant to establish that the violation has occurred. Bearing in mind, again, the wide margin of appreciation that is granted to Kosovo in how it conducts its elections the Constitutional Court is not satisfied that the Applicant in the particular circumstances of this Referral has substantiated her claim and therefore the Court must reject the Referral as being manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure, unanimously

DECIDES

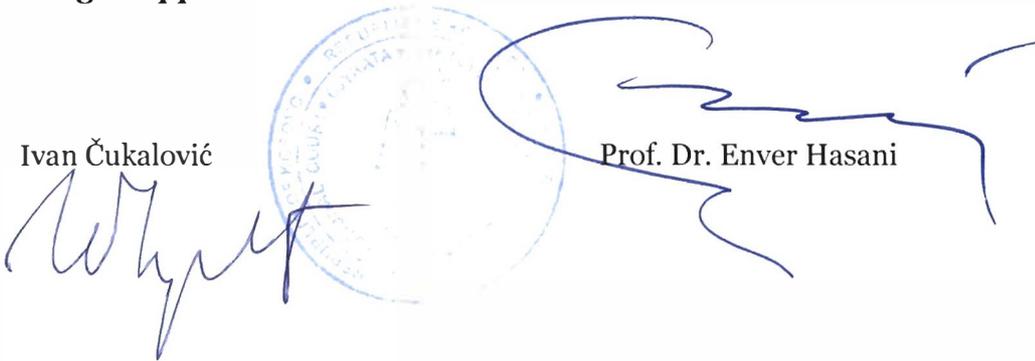
- I. TO REJECT this Referral as Inadmissible;
- II. The Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and
- III. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Ivan Čukalović

Prof. Dr. Enver Hasani

The image shows two handwritten signatures in blue ink. The signature on the left is for Ivan Čukalović, and the signature on the right is for Prof. Dr. Enver Hasani. In the background, there is a circular official seal of the Constitutional Court of the Republic of Kosovo. The seal contains the text 'REPUBLIKA E KOSOVës' at the top, 'KURTYRI NËN KONTROLLIN E DREJTËSISË' in the middle, and 'KONSTITUCIONALNO-SUDSKA PALATA' at the bottom. The seal is partially obscured by the signatures.