



REPUBLIC OF TURKEY
CONSTITUTIONAL COURT

FIRST SECTION

DECISION

Application No: 2014/5425

Date of Decision: 23/7/2014

SECTION ONE

DECISION

President : Serruh KALELİ
Members : Nuri NECİPOĞLU
Hicabi DURSUN
Erdal TERCAN
Zühtü ARSLAN
Rapporteur : Şermin BİRTANE
Applicants : 1) Mansur YAVAŞ
Counsel : Att. Balkan ŞENCAN
2) Republican People's Party
Representatives : Bülent TEZCAN
Gürsel TEKİN

I. SUBJECT OF APPLICATION

1. The applicants assert that the decision of the Supreme Council of Election (SCoE) in relation to the rejection of the request to cancel the election for the Office of the Mayor of Ankara Metropolitan Municipality which was held on 30/3/2014 violated the right to free election, to fair trial and the freedom of expression.

II. APPLICATION PROCESS

2. The applications were directly lodged at the Constitutional Court on the dates of 21/4/2014 and 12/6/2014. As a result of the preliminary administrative examination of the petition and its annexes, it has been determined that there is no deficiency to prevent the submission thereof to the Commission.

3. It has been decided by the Third Commission of the First Section that the examination of admissibility of the application be conducted by the Section and the file be sent to the Section.

4. It has been decided that applications No. 2014/8820 and 2014/5425 be consolidated with the application No. 2014/5425 due to the fact that they are of the same character regarding their subjects and that the examination be conducted over this file.

III. FACTS AND CASES

A. Facts

5. As expressed in the application form and the annexes thereof, the facts are summarized as follows:

6. Mansur Yavaş, the applicant, stood as candidate from the Republican People's Party in the elections for the Office of the Mayor of Ankara Metropolitan Municipality which was held on 30/3/2014 but was not able to be elected. The Republican People's Party objected to the Supreme Council of Election with the request that the said election be canceled on the claim that there were conditions which were contrary to law.

7. It was decided through the decision of the Supreme Council of Election dated 9/4/2014 and numbered 1203 to reject the objection on the grounds that it was determined that the total number of valid ballot papers and the total amount of votes that were given to the political parties verified each other, that the Telecommunication Communication Presidency's blocking access from Turkey as a whole to an Internet site could not be considered as the prevention of propaganda since it was a practice that applied to everyone, that, considering the fact that no mistakes were spotted in the distribution of valid votes to political parties notwithstanding the fact that mistakes were spotted in the additions for the number of voters who voted/the number of envelopes that were used, the number of residual ballot papers/envelopes, the valid votes, the invalid votes during the examination of some minutes in relation to the election, this matter was considered as an error of fact which did not have an impact on the result.

B. Relevant Law

8. Paragraphs one, two, three and four of article 79 of the Constitution are as follows:

"Elections are held under the general administration and supervision of the judicial organs.

It is the duty of the Supreme Council of Election to carry out and have all proceedings carried out regarding the orderly administration and fairness of the election from start to end, to examine and make the final decision on all corruption, complaint and objection cases regarding the elections both during and after the elections and to accept the minutes of the election of the deputies of the Grand National Assembly of Turkey (Additional phrase: 31.5.2007 - 5678/2 art.) and the minutes of the election of the President of the Republic. No application can be made to another authority against the decisions of the Supreme Council of Election.

The duties and authorities of the Supreme Council of Election and other election boards are regulated by law.

The Supreme Council of Election is comprised of seven full members and four substitute members. Six of the members are elected by the General Assembly of the Supreme Court of Appeals whereas five of the members are elected by the General Assembly of the Council of State among their own members, all elected through the secret ballot of an absolute majority

of the full number of members they have. These members elect a president and a vice president among themselves by simple majority and secret ballot."

9. Article 68 of the Constitution is as follows:

“ ...

Political parties are indispensable elements of the democratic political life.

Political parties are founded without getting prior permission and they carry out their activities within the framework of the provisions of the Constitution and laws.

The by-laws and programs and actions of political parties cannot be contrary to the independence of the State, its indivisible integrity with its territory and nation, to human rights, the principles of equality and the state of law, the sovereignty of the nation and the principles of the democratic and secular Republic; they cannot aim at establishing the dictatorship of a class or group or defending and embedding a dictatorship of any kind; they cannot promote offending.

.....

.....

The State provides financial aid to political parties sufficiently and equitably. The principles governing the aid to be provided to parties and the membership fees and donations they can collect are regulated by law."

10. Paragraph one of article 14 of the Code on Basic Provisions on Elections and the Register of Electors dated 26/4/1961 and numbered 298 is as follows:

"The duties and authorities of the Supreme Council of Election are as follows:

...

7. To examine immediately the objections that are lodged against the decisions by the provincial election boards which are made in relation to the proceedings on voting day and render the final decision thereon,

8. To examine the objections that are lodged against the minutes that are issued by the provincial election boards and render the final decision thereon,

9. To examine the objections that are lodged to itself within due time following the elections, that may influence the result of the election and that has the character to require the cancellation of the minutes of the election in that electorate or of one or more of the elected without delving into their compliance with the order and duration of the objections that are lodged at the sub-commissions and conclude the final decision thereon,

....”

11. Article 130 of the Code numbered 298 is as follows:

"The decisions of the provincial election boards are objected to in the following manner:

1. *Objections can be lodged at the Supreme Council of Election against the decisions that are made by the provincial election boards and the chairpersons thereof in relation to the rejection of the complaints which are lodged against themselves, within three days following the notification or pronouncement thereof,*

2. *Against the establishment of these boards, within three days following the establishment of the board,*

3. *Against the proceedings on the voting day, immediately,*

4. *Against the other decisions, within three days following the date when these decisions are learned about and until 17.00 at the latest on the third day following the issuance of the provincial consolidation minutes,*

5. *Against the breakdown and counting of votes, the sorting of votes according to the elected, until 17.00 on the third day following the issuance of the provincial consolidation minutes,*

6. *Against the qualification to be elected; or that those who are given minutes are not elected or against the incidents that will impact on the result of the election, until 17.00 on the third day following the issuance of the minutes that are to be given to the elected,*

Directly or through the provincial election boards by the persons who are written in article 110.

So much so that, in the event that the objections that are lodged by the provincial heads and headquarters of political parties or by independent candidates due to the incidents and cases influencing the result of the election within (7) days following the issuance of the minutes are considered by the boards that have the authority to render the final decision on the result of the election to influence the result of the election, the facts that the decisions rendered at lower levels are final or finalized or that no application is made to the boards level by level and within due time do not constitute a reason for the examination and rejection of this objection.

Such objections are lodged in writing. It is necessary to write on the objection petition the name, surname and full address of the objector, to indicate the statement and evidence for the nature and justification of the incidents that are notified and asserted and to attach the documents thereof and, if it is not possible to obtain these documents, to specify the reasons thereof and to indicate where and how these can be obtained.

However, following the candidacy becoming final, no objection can be filed against the candidates on reasons except for the claims that the candidate is not Turkish, s/he is younger than the age that is indicated in the code, s/he is illiterate or has a conviction that makes him/her lose his/her eligibility for being elected. This provision also applies to extraordinary objections.

Petitions that do not bear such conditions are rejected."

12. Article 131 of the Code numbered 298 is as follows:

"During the progress of any kind of election, a complaint can be lodged at the Supreme Council of Election in writing directly by those that are indicated in article 110 due to those procedures, measures and other proceedings of the Supreme Council of Election except for the decisions that the Supreme Council of Election objected to or it rendered through objection and due to the unlawful actions for which no other way of complaining or applying to another

body is indicated in this code and, yet, that has exceeded the boundaries of competence of sub-commissions or has such a nature.

Written complaints need to include the conditions in article 112. Upon these complaints, a decision is made by the Supreme Council of Election immediately and finally."

13. Article 132 of the Code numbered 298 is as follows:

"The Supreme Council of Election performs examinations on the documents. Furthermore, it conducts all investigation and all kinds of examination proceedings that it deems necessary. It requests all kinds of information and documents from the relevant authorities. These authorities are obliged to submit the requested information and documents as soon as possible and within seven days at the latest.

According to need and requirement, the president of the Council can also delegate the officers of the Supreme Court of Appeals and of the Council of State in order for them to work in such affairs.

A copy of the objection petition is notified to that person the minutes of whom are objected to. The person the minutes of whom are objected to can defend herself/himself in writing if s/he chooses to but s/he can also defend herself/himself in person or by means of an attorney before the council upon his/her request on the date that is to be set by the Supreme Council of Election. The council concludes its decision on the objections and notifications that are made thereto within three months at the latest following the date when the objections and notifications are submitted thereto.

The decision of the council is final. No other bodies can be applied to and legal remedies cannot be resorted to against it.

The provisions of paragraphs 1 and 3 above also apply to objections that will be made to the body that is authorized to make the final decision in relation to the election results according to the nature of the election.

However, this council concludes its final decisions on the objections within fifteen days.

No other bodies can be applied to and legal remedies cannot be resorted to against the decisions that are written in the above paragraphs.

In the case that the minutes are canceled, the provisions in their private codes are applied."

IV. EXAMINATION AND JUSTIFICATION

14. The individual application of the applicants numbered 2014/5425 was examined during the session held by the court on 23/7/2014 and the following are ordered and adjudged:

A. Claims of the Applicants

15. The applicants have asserted that the right to fair trial that is defined in article 36 of the Constitution and the rights to elect and be elected and the freedom of expression that are included in article 67 of the Constitution were violated, stating that the decisions of the Supreme Council of Election are decisions which have judicial nature, that individual applications can be lodged against the decisions of the SCoE just like the decisions of other

judicial bodies, that the provision in article 79 of the Constitution stipulating that another body cannot be applied to against the decisions of the SCoE needs to be understood in the sense that its decisions are final, that, in its decision dated 9/4/2014, the SCoE did not sufficiently examine the evidence and claims that they set forth, that there is an evident error of discretion in the decision, that the SCoE rejected the objection that the reasons for invalidity of the ballot papers which are deemed invalid at many ballot boxes are not written, that the SCoE did not fulfill its positive obligation in relation to the orderly conduct of elections, that it did not take sufficient measures, that the fact that ballot papers for mukhtars were put in the same envelope with other ballot papers was considered legally invalid resulted in approximately 125.000 votes to be deemed invalid in Ankara, that, however, the votes with the same conditions around the country in general were deemed valid on the initiative of the election boards, that inconsistent practice was caused in this manner, that the SCoE rendered contradictory decisions regarding objections on the same issue, that the election of Mansur Yavaş, the applicant, was prevented due to the irregularities in the election.

B. Evaluation

1. In terms of venue *ratione personae* of the application of the Republican People's Party, the applicant

16. Paragraph three of article 148 of the Constitution is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public force. In order to make an application, ordinary legal remedies must be exhausted."

17. Paragraph (1) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court dated 30/11/2011 and numbered 6216 with the side heading "*Right to individual application*" is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."

18. Article 46 of the Code numbered 6216 with the side heading "*Those who have the right to individual application*" is as follows:

"(1) The individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation.

(2) Public legal persons cannot make individual applications. Legal persons of private law can make individual application only with the justification that only the rights of the legal person they are have been violated.

..."

19. In article 46 of the Code numbered 6216, it is stipulated that the individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in the violation.

20. In the second sentence of paragraph (2) of the same article, the rule stipulating that public legal persons cannot lodge individual applications, that private law legal persons can only lodge individual applications on the justification that their rights pertaining to only the legal person are violated is present.

21. Paragraph two of article 68 of the Constitution includes the principle "Political parties are indispensable elements of the democratic political life." and following that paragraph three states "Political parties are founded without getting prior permission and they carry out their activities within the framework of the provisions of the Constitution and codes."

22. In the decision of the Constitutional Court dated 10/2/1994 and numbered M. 1992/2, D. 1994/1, it is stated that when the Constitutional rules in relation to political parties are reviewed, the Constitution maker attaches a special importance and value to this matter but political parties are not qualified as public organizations in the Constitution.

23. In the decision of the Constitutional Court dated 30/7/2008 and numbered M. 2008/1, D. 2008/2, it is stated that political parties are under the protection of the rules of the Constitution that are relevant to the subject and of articles 10 and 11 of the European Convention of Human Rights, which regulate the freedom of " association" and of "thought and expression".

24. Accordingly, it is apparent that political parties are not public legal persons in terms of their legal nature. Although it is emphasized in the decisions of the Constitutional Court which are stated above that political parties are different than ordinary associations considering the special regulations which are included in the Constitution in relation to political parties, this determination does not prevent them from lodging applications as private law legal persons in the individual application procedure as per paragraph(2) of article 46 of the Code numbered 6216.

25. As per paragraph three of article 148 of the Constitution and paragraph (1) of article 45 of the Code numbered 6216, real and legal persons who think that, out of their fundamental rights and freedoms which are guaranteed by the Constitution, any right or freedom that is within the scope of the European Convention on Human Rights and its additional protocols, to which Turkey is a party, is violated by public force and who has civil rights are given the capacity to sue in terms of individual application to the Constitutional Court. On the other hand, in paragraph (2) of article 46 of the Code numbered 6216, it is stated that, as required by the nature of individual application, private law legal persons can only lodge individual applications on the justification that their rights pertaining to legal personality are violated. Paragraph number (1) of the said article requires that current and personal rights must be directly violated in order to be able to lodge an individual application.

26. In the concrete application, the Republican People's Party has applied to the SCoE, claiming that there were contrarities to law in the election for the Office of the Mayor of Ankara Metropolitan Municipality which was held on 30/3/2014, has requested the cancellation of the said election and has lodged an individual application upon the rejection of its request. There is no doubt that matters in relation to elections which are the most significant way for political parties that are considered to be an indispensable element of democratic life to express themselves are among the rights that belong to the legal personality of political parties. Therefore, it is apparent that the proceedings in relation to the rejection of

the application lodged at the SCoE on the claim that some irregularities took place in the election for the Office of the Mayor of Ankara Metropolitan Municipality impacted on the rights of CHP, a political party, that belongs to its legal personality. Therefore, there is no deficiency in terms of the capacity to apply.

2. In Terms of Admissibility

27. Although the applicants have asserted that their right to fair trial as defined in article 36 of the Constitution and their right to be elected as included in article 67 of the Constitution and their freedom of expression were violated due to the decision of the SCoE dated 9/4/2014, which is the subject of application, it is understood that no explanation and evidence that are based on the concrete facts and cases in relation to the violation of the freedom of expression are provided, that concrete evidence on how the political propaganda opportunities were specifically restricted was not submitted, that the essence of the complaint is related to the right to be elected according to the examination of the application form and its annexes. Not bound by the legal description of incidents that is made by the applicant, the Constitutional Court evaluated the claims of applicants within the framework of the right to be elected.

28. In the examination of the application file, since it is primarily required to identify the issue of whether or not the application falls within the scope of the venue of the Constitutional Court as per its subject within the framework that is drawn in paragraph three of article 148 of the Constitution, an evaluation in terms of the last sentence of paragraph two of article 79 of the Constitution and paragraph (3) of article 45 of the Code numbered 6216 was not carried out in relation to this file.

29. Paragraph three of article 148 of the Constitution is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public force."

30. Paragraph (1) of article 45 of the Code numbered 6216 with the side heading *"The right of individual application"* is as follows:

"Everyone can apply to the Constitutional Court based on the claim that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."

31. According to the provisions of the Constitution and Code that are cited, in order for the merits of an individual application that is lodged at the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public force, must fall within the scope of the European Convention on Human Rights (the Convention) and the additional protocols to which Turkey is a party, in addition to it being guaranteed in the Constitution. In other words, it is not possible to decide on the admissibility of an application which contains a claim of violation of a right that is outside the common field of protection of the Constitution and the Convention (App. No: 2012/1049, 26/3/2013, § 18; App. No: 2012/917, 16/4/2013, § 16).

32. Article 3 of the Additional Protocol No. 1 of the ECHR, to which Turkey is a party, is as follows:

"The High Contracting Parties undertake to hold free elections 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."

33. According to the case law of ECtHR, the expression "legislation" that is included in the said article does not absolutely mean the national parliament, the said expression is required to be interpreted in the light of the constitutional structure of states, the parliaments of federated states in federal states are also accepted as "legislative" body within the meaning of this article (*Mathieu-Mohin and Clerfayt v. Belgium*, App. No: 9267/81, 2/3/1987, *Matthews v. United Kingdom*, App. No: 24833/94, 18/2/1999, § 40).

34. In addition to this, the ECtHR does not consider the elections for local administrations which do not have sufficient legislative power in terms of scope and force as within the scope of the election of "legislative body" (*X. v. United Kingdom*, App. No: 7215/75, 5/11/1981; *Clerfayt, Legros v. Belgium*, App. No: 10650/83, 17/5/1985; *Booth-Clibborn v. United Kingdom*, App. No: 11391/85, 5/7/1985; *Malarde v. France*, App. No: 46813/99, 5/9/2000; *Molka v. Poland*, App. No: 56550/00, 11/4/2006).

35. As it is seen, the right that is protected within the scope of the ECHR is related to the election of the legislature and since the claims of violation in relation to the election for the Office of the Mayor of Ankara Metropolitan Municipality which has the nature of a local administration as per article 127 of the Constitution are not considered to be within the scope of the ECHR as an independent right, it is not possible to make the claims of violation towards this right the subject of individual application.

36. As a result, the subject of the claim of violation of the applicants falls out of the sphere of protection of the fundamental rights and freedoms which are guaranteed by the Constitution and fall within the scope of the Convention.

37. In the light of the reasons explained, since the rights which the applicants assert to have been violated as expressed in the application petition do not fall within the joint sphere of protection of the Constitution and the ECHR and its additional protocols to which Turkey is a party, it is necessary to decide that the application is inadmissible due to "lack of venue in terms of subject" without being examined in terms of other conditions of admissibility.

V. JUDGMENT

In the light of the reasons explained, it is **UNANIMOUSLY** decided on the date of 23/7/2014 that the application is **INADMISSIBLE** due to "*lack of venue in terms of subject*", that the trial expenses be charged on the applicants.

President
Serruh KALELİ

Member
Nuri NECİPOĞLU

Member
Hicabi DURSUN

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Member
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