

**Case number:**

U-I-349/18, Mp-1/18, Mp-2/18

**ECLI:**

ECLI:SI:USRS:2018:U.I.349.18

**Challenged act:****Operative provisions:****Abstract:**

[Publisher's Note: The full text of this Decision/Order is available only in Slovene. The text published below is a summary prepared for the annual report.]

**An Electoral Dispute in the Elections to the National Council**

By Decision No. **U-I-349/18, Mp-1/18, Mp-2/18**, dated 29 November 2018 (Official Gazette RS, No. 81/18), the Constitutional Court decided on an electoral dispute in which the appellants – a candidate for election to the National Council who was not elected and the nominator of his candidacy – substantively challenged the confirmation of the office of an elected member of the National Council, namely that of the representative for the field of education and training. The appellants filed their appeals on the basis of the third paragraph of Article 50 of the National Council Act (the NCA), which, however, does not allow all candidates who participated in the election the right to an appeal but only those candidates who were elected but whose office the National Council did not confirm. The appellant as a candidate for election to the National Council who was not elected and his nominator, i.e. a professional organisation, were, in view of the third paragraph of Article 50 of the NCA, not entitled to file an appeal. In order for the Constitutional Court to be able to decide on the appeals, it *ex officio* initiated proceedings for a review of the constitutionality of Article 50 of the NCA. Namely, the question of the constitutionality of the statutory regulation of the procedure for the National Council to decide on the appeal (Article 25 of the Constitution) and the procedure for exercising judicial protection of the right to vote before the Constitutional Court (the first paragraph of Article 23 of the Constitution) was raised. In its Decision the Constitutional Court established that the statutory regulation is inconsistent with the Constitution and determined the manner of execution of its Decision such that it declared that all candidates and their nominators are entitled to file an appeal with the Constitutional Court. Hence, it did not reject the appeals due to lack of active standing but considered them substantively.

In the reasoning, the Constitutional Court stressed that the right to vote in elections to the National Council (like the right to vote in elections to the National Assembly) has a special legal nature as, despite being a personal right, it can only be exercised in a collective manner, i.e. together with other voters in a manner organised in advance and according to a procedure determined in advance. The principles of the equal and general right to vote (the first paragraph of Article 43 of the Constitution) also apply thereto, which due to the definition of the National Council as the representative body for individual social interests (Article 96 of the Constitution) are only established within individual interest groups. Furthermore, the principles of free voting and voting by secret ballot also apply thereto.

The Constitution does not include provisions on judicial protection of the right to vote in elections to the National Council. In light of the absence of express constitutional provisions, it falls within the discretion of the legislature to determine which court is competent for ensuring judicial protection. The legislature regulated the procedure for ensuring judicial protection of the right to vote in elections to the National Council together with confirmation of the office of the members of the National Council. Judicial protection of the right to vote in elections to the National Council is not primarily intended to protect the subjective legal position of individual voters or candidates, but the public interest and constitutional values. These values are the same as those in elections to the National Assembly, namely a fair electoral procedure in which electoral rules are respected, the credibility of the election result, and the trust of citizens in the fair conduct of the election. The objective character of judicial protection of the right to vote in elections to the National Council is ensured in the same manner as in elections to the National Assembly so that only such established irregularities in the election are taken into account that affected or could have affected the election result. In order to ensure objective protection of the right to vote, not only candidates who were elected and whose office the National Council did not confirm have the right to initiate a dispute, but also all other candidates who stood in the elections but were not elected, as well as their nominators.

A statutory regulation that grants the right to initiate an electoral dispute only to elected candidates whose term of office the National Council did not confirm, but not also to all the other candidates and nominators who have filed an appeal with the National Council and alleged voting irregularities, entails for the latter group a hollowing out of the right to judicial protection determined by the first paragraph of Article 23 of the Constitution. Whenever the assessed regulation entails an interference with a human right so significant that it is considered a denial (or a hollowing out) of the human right in question, a review of the admissibility of the interference does not require weighing the proportionality between the interference with the human right, on the one hand, and the possible constitutionally admissible objective, on the other. Namely, no admissible objective can justify denial of the right to judicial protection. The Constitutional Court therefore decided that the first sentence of the third paragraph of Article 50 of the NCA is inconsistent with the first paragraph of Article 23 of the Constitution.

Also as regards the appeal procedure before the National Council, the Constitutional Court held that it does not include the essential elements that should be determined in order to effectively exercise the right to a legal remedy determined by Article 25 of the Constitution. The imprecision and deficiency of the statutory regulation of the appeal procedure before the National Council render it impossible or significantly difficult to exercise the right to a legal remedy and, consequently, the right to judicial protection before the Constitutional Court. Therefore, such a regulation entails an interference with the right to a legal remedy. It is obvious that there is no constitutionally admissible reason for such a deficient and imprecise regulation of the procedure before the National Council. Therefore, the regulation is inconsistent with the right to a legal remedy determined by Article 25 of the Constitution.

The special character of the right to vote and the requirement that electoral disputes be resolved as quickly as possible require special, expeditious, and effective judicial protection. To this end, the legislature must determine, in addition to the persons entitled to initiate an electoral dispute, the type of the legal remedy (e.g. an appeal, action, or request), the time limit for filing a legal remedy, the reasons due to which such may be filed, the rules on the burden of allegation and the burden of proof, the assessment criteria, the competent court, and the authorisations of courts during the decision-making process. The imprecision and deficiency of the statutory regulation of the electoral procedure as regards the election of the members of the National Council render it impossible or significantly difficult to exercise the right to judicial protection. Therefore, such a regulation entails an interference with this human right. It is obvious that there is no constitutionally admissible reason for such a

deficient and imprecise regulation. Therefore, the regulation of the procedure for judicial protection of the right to vote is inconsistent with the right to judicial protection determined by the first paragraph of Article 23 of the Constitution.

Once the Constitutional Court decided on the constitutionality of the statutory regulation, it proceeded to decide on the appeals filed against the election results. It held that in the National Council the irregularities in the process of deciding on the appeals did not affect the election results and that the election of the elected candidate was lawful, as the alleged irregularities concerning his candidacy did not occur and because the one established inconsistency concerning the candidacy of another candidate who, like the appellant, was not elected, could not have affected the election result. Therefore, the appeals were unfounded and the Constitutional Court dismissed them.

**Thesaurus:**

**Legal basis:**

**Cases joined:**

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**Full text:**

**Type of procedure:**

ocena ustavnosti in zakonitosti predpisov in drugih splošnih aktov  
poslanski mandati, mandati članov državnega sveta

**Type of act:**

zakon  
drugi akti

**Applicant:**

Zoran Božič, Nova Gorica

**Date of application:**

16. 1. 2018

**Date of Decision:**

29. 11. 2018

**Type of decision adopted:**

odločba

**Outcome of proceedings:**

ugotovitev – je v neskladju z Ustavo/zakonom  
zavrnitev

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