

**Case number:**

Up-135/19, U-I-37/19

ECLI:

ECLI:SI:USRS:2019:Up.135.19

Challenged act:**Operative provisions:****Abstract:****The Right to a Public Hearing in an Electoral Dispute regarding Local Elections**

By Decision No. **Up-135/19, U-I-37/19**, dated 5 June 2019 (Official Gazette RS, No. 45/19), the Constitutional Court decided on a constitutional complaint regarding the election of the members of the City Council of the Municipality of Ljubljana. Allegedly, there were irregularities relating to the financing of the election campaign, and yet the Administrative Court, which decided with finality on questions of law and fact, rejected the motion to carry out a main hearing, which is required by the Constitution. Furthermore, the Constitutional Court decided on a petition for the initiation of proceedings to review the constitutionality of the Local Elections Act (the LEA), as allegedly it does not expressly determine that in an electoral dispute the Administrative Court must carry out a “public and oral” hearing.

The Constitutional Court stressed that in electoral disputes initiated after the day of voting in local elections the Administrative Court decides on the constitutionality and legality of the decision of the representative body of the municipality on the legal remedy by which the election results are challenged due to irregularities in the election procedure; therefore, an electoral dispute does not entail proceedings for the judicial review of administrative acts. A legal remedy against the election results must enable all irregularities that could affect the election results to be claimed. Since the Administrative Court is both the appellate authority and the court deciding on the case, it must ensure the right to vote full judicial protection and decide with finality on the electoral dispute.

The right to a main hearing is a human right, and is ensured by Article 22 of the Constitution. The Constitutional Court held that whenever it is necessary – in order for a court to adopt a constitutionally consistent and lawful decision in a particular dispute – to correctly establish the relevant facts by taking into account all the circumstances of the concrete case, the court at issue must hold a main hearing. Such a situation is all the more emphasised if the court decides on a right of a party at the first instance of adjudication that is also the last instance and in which it must adopt the final decision. Since in an electoral dispute initiated after the day of voting both the active and passive rights to vote are protected, it is of special importance that such disputes be carried out transparently, in order for trust in the credibility of the election results to be established. Therefore, in the electoral dispute at issue a public main hearing holds special importance.

As regards protection of the right to vote after the day of voting, the requirement that a public hearing be carried out applies already for the authority that at the first instance decides on the legal remedy by which the election is challenged. In local elections, under the regulation in force, this authority is the municipal (city) council. The same requirement also applies to the Administrative

Court, which in fact is the appellate authority, but as a court it must resolve the electoral dispute by a final decision such that full judicial protection is ensured. If the procedural requirements are fulfilled, as well as the requirements regarding the burden of allegation and the burden of proof, the court must, as a general rule, enable the parties to present their positions and reasons, unless the legal remedy manifestly has no chance of success.

The Constitutional Court established that appropriate application of Article 51 of the Act on the Judicial Review of Administrative Acts (the AJRAA-1), as required by the second paragraph of Article 102 of the LEA, imposes on the Administrative Court the obligation to carry out a main hearing in deciding on an electoral dispute initiated after the day of voting in local elections; therefore, the complainant's claim that the LEA fails to regulate such issue is unfounded. Consequently, the Constitutional Court dismissed the petition for the initiation of proceedings to review the constitutionality of the LEA.

As regards the assessment of whether the constitutional complaint was well founded, the Constitutional Court explained that election results may only be abrogated in exceptional circumstances, when irregularities that affected or could have affected the election results are clearly proven. The burden of allegation and the burden of proof lie with the person or entity that challenges the elections. When assessing the effect of irregularities on the election results, the court at issue must first ascertain whether the alleged irregularities could have actually affected the election results. If it is manifest that they could not have, the court does not need to carry out a main hearing. However, if they could have affected the election results, it is necessary to ascertain whether such irregularities in fact occurred. The nature of irregularities can be such that it is either possible to numerically express their effect on the election results and thereby to establish the correct results, or this is not possible and it is therefore necessary to assess, in light of the circumstances of the case, whether such irregularities would raise doubt in a reasonable person as to the credibility of the election results due to their effect thereon.

In the case at issue, the complainant claimed irregularities that entail violations of statutory rules on the financing of an election campaign and which can affect the election results. The effect of such irregularities cannot be numerically expressed. In this respect, the Constitutional Court stated that during the election procedure the state and local authorities must remain neutral, which means that they must not enable individual candidates to use budgetary funds for electoral purposes. Such could namely result in a distorted formation of the free will of voters (the active right to vote) and in a violation of equality between the candidates in the election (the passive right to vote). The substance of irregularities and the assessment of their effect on the election results on the basis of the criteria that take into account the nature of the right to vote require, in turn, that the relevant facts be established. Usually, these facts are disputable between the parties to proceedings. The Constitutional Court did not concur with the Administrative Court's statement that in the electoral dispute proceedings only questions of law were at issue. The consequence of such position of the Administrative Court was that in the appellate procedure the opposing party did not even have the right to be heard. The Constitutional Court stressed that this is unacceptable from the viewpoint of the right to a main hearing determined by Article 22 of the Constitution in an electoral dispute. Furthermore, it stated that ensuring the public nature of a judicial decision entails an independent element of a public trial that does not substitute for the right to a public hearing. Since the Administrative Court failed to carry out a public hearing, the Constitutional Court abrogated the challenged judgment in the part referring to the assessment of whether the allegations in the appeal were well founded, and in this part remanded the case to the Administrative Court for new adjudication.

Thesaurus:

Legal basis:**Cases joined:****Full text:****Type of procedure:**

ustavna pritožba

ocena ustavnosti in zakonitosti predpisov in drugih splošnih aktov

Type of act:

zakon

posamični akt

Applicant:

Viljem Kovačič, Ljubljana

Date of application:

4. 2. 2019

Date of Decision:

5. 6. 2019

Type of decision adopted:

odločba

Outcome of proceedings:

razveljavitev ali odprava

zavrženje

zavrnitev

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