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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

J U D G M E N T
of the Constitutional Court of the Republic of Belarus

On the conformity of points 2.2, 2.5 and 3 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” to the Constitution and the laws of the Republic of Belarus”

IN THE NAME OF THE REPUBLIC OF BELARUS
J U D G M E N T
of the Constitutional Court of the Republic of Belarus

On the revision of the Judgment of the Constitutional Court of the Republic of Belarus of 4 November 1996 “On the conformity of points 2.2, 2.5 and 3 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” to the Constitution and the laws of the Republic of Belarus”.

The Constitutional Court of the Republic of Belarus comprising of the presiding officer - Chairman of the Constitutional Court G.A.Vasilevich, Deputy Chairman A.V.Maryskin and judges T.S.Boiko, G.A.Vorobei, K.I.Kenik, V.V.Podgrusha, A.A.Sarkisova, A.G.Tikovenko, R.I.Filipchik, V.I.Shabailov, G.B.Shishko,

with the participation of representatives as a litigant: the House of Representatives of the National Assembly of the Republic of Belarus:

G.I.Yurkevich - Assistant Deputy Chairman of the House of Representatives of the National Assembly of the Republic of Belarus;

the Council of the Republic of the National Assembly of the Republic of Belarus:

S.A.Sviridova - Deputy Head of Legal and Expert Department of the Secretariat of the Council of the Republic of the National Assembly of the Republic of Belarus;

expert:

D.A. Gavrilenko - Professor of the Chair of administrative and constitutional law of the Academy of the Ministry of Internal Affairs of the Republic of Belarus, Doctor of Legal Sciences;

has considered in open Court session the materials of the case “On the revision of the Judgment of the Constitutional Court of the Republic of Belarus of 4 November 1996 “On the conformity of points 2.2, 2.5 and 3 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” to the Constitution and the laws of the Republic of Belarus”.

At the Court session were present:

V.O.Sukalo - Chairman of the Supreme Court of the Republic of Belarus; A.V.Ivanovsky - Deputy Procurator General of the Republic of Belarus;

G.N.Vorontsov - Minister of Justice of the Republic of Belarus.

The proceedings “On the revision of the Judgment of the Constitutional Court of the Republic of Belarus of 4 November 1996 “On the conformity of points 2.2, 2.5 and 3 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September, 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” to

the Constitution and the laws of the Republic of Belarus” was instituted by the Constitutional Court on 26 March 1997 under Article 42 of the Law “On the Constitutional Court of the Republic of Belarus” and Article 77 of the Regulations of the Constitutional Court. The case was instituted as a result of a motion of 5 March 1997 filed by the President of the Republic of Belarus.

According to the materials of the case, on 4 November 1996 the Constitutional Court has considered in open session the case “On the conformity of points 2.2, 2.5 and 3 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” to the Constitution and the laws of the Republic of Belarus”. The proceedings on this case were instituted by the Constitutional Court on 20 September 1996 at its own discretion. The case was instituted as a result of a motion filed by the Chairman of the Supreme Council of the Republic of Belarus of the Thirteenth convocation. The motion challenged the conformity between the Constitution, laws of the Republic of Belarus and points 2.2 and 2.5 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it”. On the decision of the Court points 2.2, 2.5 and 3 of the specified Resolution of the Supreme Council of the Republic of Belarus were subject to examination.

The Constitutional Court in its Judgment of 4 November 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” (*Vesnik Konstitucijnaga Suda Respubliki Belarus*, No. 4/1996) found point 3 of the Resolution of the Supreme Council of the Republic of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” concerning the submission of draft amendments and alterations in the Constitution to the obligatory referendum to be unconstitutional and invalid. The Supreme Council of the Republic of Belarus was advised to bring the Resolution into line with the Judgment of the Court.

The motive part of the Judgment of the Constitutional Court of 4 November 1996 specified in particular the following:

the Constitution and the Law “On referendum (plebiscite) in the Republic of Belarus” do not determine the procedure of making amendments and alterations in the Constitution by a referendum;

the practice of constitutional building in many foreign states shows that the approval and adoption of such draft Constitutions shall be preceded by their submission to a referendum; a referendum may also precede the adoption of the final decisions on Constitution by the Parliament;

when calling the referendum on 24 November 1996 the Supreme Council as the highest representative and the unique legislative body of state authority of the Republic of Belarus practically turned out to be foreclosed from the constitutional process.

The Judgment noted also that the formula of the questions, contained in the points 2.2 and 2.5 of the Resolution of the Supreme Council under examination, do not meet the requirements of Article 3 of the Law on referendum as well as the meaning of the draft decisions submitted to

the referendum, whereas under the Law the ballot paper shall be provided as a question and not in the form of a statement.

Having heard the representatives of the litigants, experts, having examined the available materials of the case, having analysed the relevant provisions of the Constitution and laws of the Republic of Belarus, having studied the practice of calling and holding republican referenda, the Constitutional Court considers that the Judgment of the Constitutional Court of 4 November 1996 “On the conformity of points 2.2, 2.5 and 3 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” to the Constitution and the laws of the Republic of Belarus” should be revoked on the following grounds.

Article 74 of the Constitution of the Republic of Belarus of 15 March 1994 provided that republican referenda shall be called by the Supreme Council of the Republic of Belarus, following the proposal of the President of the Republic of Belarus or of at least 450000 citizens who have the right to vote. Within thirty days after submitted of the proposal of the President or citizens in accordance with the Law the Supreme Council shall fix the republican referendum date. The issue of holding a republican referendum may be considered by the Supreme Council also upon the initiative of at least 70 deputies of the Supreme Council of the Republic of Belarus.

Thus, under Article 74 of the Constitution of 1994, the Supreme Council was granted the right to determine the kind of referendum only in respect of the issues initiated by at least 70 deputies of the Supreme Council. If the proposal on holding republican referendum has been submitted by the President of the Republic of Belarus or by at least 450000 citizens, the Supreme Council had no right to change the kind of republican referendum proposed by the specified subjects.

Under Article 15 of the Law “On referendum (plebiscite) in the Republic of Belarus” the Resolution of the Supreme Council on calling republican referendum specified the date of holding referendum, formulation of the question submitted to referendum for its further insertion in the ballot paper, determined the procedure for financing and other issues connected with the holding referendum.

Having analysed of the norms of the Constitution and laws the Court has come to the conclusion that the President when submitting the proposals on holding referendum in prescribed manner determines its kind by himself; the Supreme Council, hereupon, shall fix republican referendum date and take measures for securing it. This conclusion is confirmed also by the practice of holding the referendum on 14 May 1995 which was initiated by the President of the Republic of Belarus. In this case the Supreme Council fixed only republican referendum date and took measures for securing it on the basis of the fact, that the kind of referendum was determined by the President. Such an understanding of the Constitution and the Law “On referendum (plebiscite) in the Republic of Belarus” found its confirmation in points 1 and 2 of the Resolution of the Supreme Council of the Republic of Belarus of 13 April 1995 “On holding republican referendum on issues submitted by the President of the Republic of Belarus and measures for securing it” .

Under Articles 83 and 149 of the Constitution of 1994 amendments and alterations in the

Constitution have been carried out both by the Supreme Council and by means of a republican referendum. In case the Supreme Council has called a republican referendum on making amendments and alterations in the Constitution, a decision adopted through a referendum is final in accordance with Article 39 of the Law "On referendum (plebiscite) in the Republic of Belarus". Under Article 77 of the Constitution it may be repealed or revised only through another referendum, unless otherwise stipulated by the referendum. Such a conclusion is based also on the norms of Article 3 of the Constitution according to which the people shall be the single source of State power and Article 149 of the Constitution according to which a decision to amend or supplement the Constitution by means of a referendum shall be passed if the majority of citizens, included on the register of electors, vote in favour. Thus, a referendum on amendments and alterations in the Constitution is obligatory and its decision is final and does not need to be approved by anyone.

As it follows from the materials, when considering the case on points of fact and issuing the Judgment of 4 November 1996 the Court did not study the issue who has the right to determine the kind of referendum as well as the practice of calling and holding republican referenda.

Under Article 6 of the Constitution of 1994 the State shall be founded of the principle of separation of powers: legislative, executive and judicial. State bodies, within the limits of their authorities, shall act independently and co-operate with one another, and restrain and counterbalance one another. Article 7 of the Constitution of 1994 determined that the State and all of its bodies officials shall be bound by the law and act within the limits of the Constitution and laws adopted in accordance therewith.

When passing its Judgment of 4 November 1996 the Court did not take into account that the President of the Republic of Belarus when submitting the proposal for holding obligatory referendum on adoption of amendments and alterations in the Constitution of the Republic of Belarus of 1994 to the Supreme Council acted within the limits of his powers and in accordance with the Constitution and laws of the Republic of Belarus.

The Court also did not take into account the fact that the Supreme Council of the Republic of Belarus having adopted on 6 September 1996 Resolution "On holding a republican referendum in the Republic of Belarus and on measures for securing it" by which the Supreme Council has called the republican referendum on issues initiated by the President and by the deputies of the Supreme Council has acted within the limits of its powers, the Constitution and laws.

In spite of further adoption by the Supreme Council of the decisions on making alterations to Resolution No. 578 of 6 September 1996, it remains in force in full, because all the requirements of the Law "On the Supreme Council of the Republic of Belarus" have not been observed.

The wording of point 3 of the Resolution of the Supreme Council No. 761 of 5 November 1996 "On making alteration in the Resolution of the Supreme Council "On holding a republican referendum in the Republic of Belarus and on measures for securing it" has been changed. However, the date of the inaction of this Resolution was not designated, even though, according to Article 54 of Law On the Supreme Council of the Republic of Belarus" all resolutions have a

binding force from the moment determined by the Supreme Council. On 6 November 1996 the Supreme Council adopted Resolution No. 762 "On Inaction of the Resolution of the Supreme Council of the Republic of Belarus "On Revision of the Resolution of the Supreme Council of the Republic of Belarus "On holding a republican referendum in the Republic of Belarus and on measures for securing it", where it was noted that Resolution No. 761 enters into force from the moment of adoption. However, the date of the inaction of Resolution of 6 November 1996 No. 762 was not determined as well, and, accordingly, these resolutions were not enacted.

In the Judgment of the Court of 4 November 1996 was made a reference to the absence in the legislation of the procedure for submission of draft amendments and alterations in the Constitution by means of referendum. This conclusion is not grounded, since under Articles 3, 37, 73, 74, 77, 78, and 149 of the Constitution of 1994 and the Law "On referendum (plebiscite) in the Republic of Belarus" the procedure of the submission of amendments and alterations is well established.

In the Judgment of 4 November 1996 as a proof of the necessity for a special procedure for the adoption of Constitution through referendum was quoted foreign experience when the introduction of such drafts to referendum follows after their approval by the Parliament, as well as that the referendum may precede the making by the Parliament the final decisions concerning the constitution. Such an approach of the Court had a selective character, since the practice of constitution construction in a number of foreign nations (Russia, France, Kazakhstan, etc.) shows the adoption of constitution through referendum.

Irrelevant is the assertion in the Court Judgment that at the time of the fixing of the date of referendum for 24 November 1996 the Supreme Council as a supreme representative and sole legislative body of the state power of the Republic of Belarus was virtually excluded from the constitutional process. The majority of the deputies of the Supreme Council submitted to the President their proposals on the draft of amendments and alterations in the Constitution, suggested by him. The standing commissions of the Supreme Council submitted their amendments to the Commission on adaptation of the draft amendments and alterations set up by the President. Contributions to its work were made by the deputies of the Supreme Council of the Republic of Belarus. The deputies of Communist and Agrarian fractions elaborated their own draft amendments and alterations in the Constitution. These draft amendments and alterations in the Constitution were discussed during the session of the Supreme Council. As a result of this, to the referendum were suggested two drafts of the Constitution of 1994 with amendments and alterations.

The Court makes a note that the Judgment of 4 November 1996 bears a contradictory character, the resolutions do not correspond to the motivations and are not based on the Constitution and laws. The study of the case documentation was practically reduced to the search whether the suggested alterations and amendments to the Constitution are the drafts of a new Constitution or is it possible to submit them to a republican referendum.

Having admitted the lawfulness of the introduction of alterations and amendments in the Constitution, independent of their volume for the republican referendum, at the same time, the Court in its Judgment inaccurately interpreted specific norms of some articles of the Constitution of 1994. Among them are Articles 74 and 149 and relevant norms of the Law "On referendum (plebiscite) in the Republic of Belarus". The Court also pointed that draft alterations

and amendments in the Constitution may not be introduced to an obligatory republican referendum.

Furthermore, the Court thinks that the Resolution of the Supreme Council of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and measures for securing it” does not have a binding character and is not a normative act. It does not provide for mandatory rules of a general character aimed at long-term validity and repeated application. This conclusion is also confirmed by the legislative act of a recommendation character “On normative legal acts of the CIS Member States”, approved by the Resolution of the Interparliamentary Assembly of the CIS Member States on 13 May 1995. According to Article 2 of the mentioned Act, a normative legal act is defined as a written official document of a determined form, adopted by a law-creating body within the framework of its competence with the purpose to establish, alter or abolish certain legal norms, that is, all-binding regulations of a permanent or temporary character, aimed at repeated application. A similar approach to the definition of a normative act was applied during discussions by the Supreme Council of the Republic of Belarus of the draft of the Law “On interpretation of Articles 125 and 127 of the Constitution of the Republic of Belarus” adopted in first reading by the Supreme Council on 4 September 1996. This conclusion was confirmed by the opinions of the experts on this case.

The Supreme Council of the Republic of Belarus, while adopting the Resolution of 6 September, 1996 exercised, according to Article 116 of the Provisional Regulations of the Supreme Council of the Republic of Belarus, administrative functions instead of normative ones.

According to Articles 125 and 127 of the Constitution of the Republic of Belarus of 1994 the Constitutional Court of the Republic of Belarus was endowed the authority to control the conformity to the Constitution of normative acts in the country. The Constitutional Court abused the limit of its competence having entered procedures on the case “On the conformity of points 2.2, 2.5 and 3 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September, 1996” On holding a republican referendum in the Republic of Belarus and on measures for securing it” and considered the issue of conformity of the act which is not of a normative character to the Constitution.

The first paragraph of Article 146 of the Constitution of 1994 provided for that laws and other acts of state bodies are promulgated on the base and in conformity with the Constitution. According to Article 7 of the Constitution of 1994 the state, all its bodies and officials are bound by law, act within framework of the Constitution and the laws adopted in conformity with it.

In connection with the fact that the consideration of the aspect of conformity of the Resolution of the Supreme Council of the Republic of Belarus “On holding a republican referendum in the Republic of Belarus and measures for securing it” to the Constitution was not a competence of the Constitutional Court and was not based on the Constitution and the laws of the Republic of Belarus, according to Article 7 of the Constitution, Article 49 of the Law “On the Constitutional Court of the Republic of Belarus” the Judgment of the Constitutional Court does not have legal force and subject to abolishment, and the proceedings should be ceased.

Based on these facts and Article 116 of the Constitution of 1994 with alterations and

amendments, approved on the republican referendum, Articles 2¹, 11, 36, 38, 42, and 49 of the Law “On the Constitutional Court of the Republic of Belarus”, Articles 22, and 77 of the Regulations of the Constitutional Court, the Constitutional Court

RULED:

1. To revoke the Judgment of the Constitutional Court of the Republic of Belarus of 4 November 1996 “On the conformity of points 2.2, 2.5 and 3 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” to the Constitution and the laws of the Republic of Belarus” and consider it null and void from 4 November 1996.

2. To end the proceedings on the case “On the conformity of points 2.2, 2.5 and 3 of the Resolution of the Supreme Council of the Republic of Belarus of 6 September 1996 “On holding a republican referendum in the Republic of Belarus and on measures for securing it” to the Constitution and the laws of the Republic of Belarus”.

3. To publish the present Judgment in ten days time from the date of its passing in “Vedamasty Vyarkhovnaga Saveta Respubliki Belarus”, “Narodnaya Gazeta”, “Zvyazda” as well as in those publications where the Resolution under verification was published.

4. The present Judgment shall come into force from the date of its passing, shall be final and subject to no appeal or protest.

**Presiding officer -
Chairman of the Constitutional Court
of the Republic of Belarus G.A.Vasilevich**

Minsk, 15 April 1997
No. J-56/97