



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

Prishtina, 8 July 2014
Br.ref.:AGJ679/14

JUDGMENT

in

Cases No. KI99/14 and KI100/14

Applicant

Shyqyri Syla and Laura Pula

**Constitutional Review
of the Decisions of the Kosovo Prosecutorial Council related to the
election procedure of Chief State Prosecutor**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge and
Arta Rama-Hajrizi, Judge

Applicants

1. The Applicants are Mr. Shyqyri Syla (KI99/14), Chief Prosecutor of the Basic Prosecution Office in Mitrovica and Mrs. Laura Pula (KI100/14), Prosecutor in the Office of the Chief State Prosecutor (hereinafter: the "Applicants"). The Applicants were candidates in the election procedure for the position of the Chief State Prosecutor.

Challenged decision

2. The Applicants challenge the election procedure for the position of Chief State Prosecutor. Applicant Mr. Shyqyri Syla, Referral KI99/14, challenges Decision KPK No.151/2014 of the Kosovo Prosecutorial Council dated 6 June 2014 on nomination of the candidate for the Chief State Prosecutor. Whereas, Applicant Mrs. Laura Pula, Referral KI100/14 challenges Decision KPK/146/2014 dated 5 June 2014 regarding her request for reconsideration of the final list with candidate's evaluation scores of 31 May 2014.

Subject matter

3. The subject matter is the constitutional review of the election procedure for the position of Chief State Prosecutor, respectively, the Decision of the Kosovo Prosecutorial Council on the nomination and proposal of the candidate for the Chief State Prosecutor (KPK No. 151/2014, dated 6 June 2014) Mr. Shyqyri Syla and Decision KPK/146/2014, dated 5 June 2014, regarding the Applicant's request Mrs. Laura Pula for reconsideration of the final list of candidate's evaluation.
4. The Applicants allege that the Kosovo Prosecutorial Council (hereinafter: the KPC) during the election procedure for the position of Chief State Prosecutor violated their rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), namely Article 3 [Equality before the Law], Article 7 [Values] and Article 24 [Equality before the Law] of the Constitution.
5. In addition, Applicant Mr. Shyqyri Syla, Referral KI99/14, requested from the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to impose an interim measure, namely to suspend the appointment procedure of the nominated candidate, awaiting the outcome of the proceedings before the Court.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the "Law") and Rule 56.1 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

7. On 12 June 2014 the Applicants individually submitted their Referrals to the Court.
8. On 13 June 2014 the Applicant (KI99/14, Mr. Shyqyri Syla) submitted to the Court the copy of his complaint filed with the Basic Court in Prishtina, Department for Administrative Matters.
9. On 17 June 2014 the President by Decision GJR. KI99/14 appointed Judge Robert Carolan as Judge Rapporteur. On the same date, the President by

Decision KSH. KI99/14 appointed the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

10. On 17 June 2014, in accordance with Rule 37.1 of the Rules of Procedure, the President ordered the joinder of Referral KI100/14 with Referral KI99/14. By this order, it was decided that the Judge Rapporteur and the composition of the Review Panel be the same as it was decided by the Decisions (GJR. KI99/14 and KSH. KI99/14) of the President on the appointment of the Judge Rapporteur and the Review Panel on 17 June 2014.
11. On 19 June 2014 the Court notified the Applicants of the registration and joinder of the Referrals. On the same date, the Court notified and sent copies of the Referrals to the KPC.
12. On 19 June 2014 the Applicant (KI100/14, Mrs. Laura Pula) submitted to the Court supplemental information and arguments.
13. On 24 June 2014 the Court sent a copy of the Referral to the President of the Republic of Kosovo.
14. On 24 June 2014 the KPC submitted to the Court the documents related to the election procedure.
15. On 26 June 2014 Judge Kadri Kryeziu notified the Court in writing of his not taking part in the deliberations for the period June-July 2014 awaiting the Court's decision regarding certain allegations raised against him.
16. On 3 July 2014 the Court decided to grant the Request for Interim Measures.
17. On the same date, the Court deliberated and voted on the case.

Summary of the facts

18. On 27 March 2014 the KCP published the internal announcement for the position of Chief State Prosecutor.
19. On 11 April 2014 the KPC rendered Decision KPK No. 90/2014 on the appointment of the KPC Panel for Preliminary Review. On the same date, the KPC rendered Decision KPK No. 91/2014 on the appointment of the KPC Commission for reconsideration.
20. On 17 April 2014 the KPC Panel for Preliminary Review, upon review of the applications and the documents submitted by the nine (9) candidates, decided that only six (6) candidates fulfilled the criteria for the position of Chief State Prosecutor as established by the law in force.
21. On 25 April 2014 the Commission for Reconsideration upon review of complaints filed by two (2) not selected candidates during the preliminary review process, decided to approve their request and announced the list of eight (8) candidates eligible for further selection procedure.

22. From 29 until 31 May 2014 the interview process of these eight (8) candidates took place.
23. On 31 May 2014 the KPC published the list with the final evaluation scores for each candidate. Pursuant to the provisions of the Regulation on Criteria and Procedures for Selection and Proposal for Appointment of Chief State Prosecutor (hereinafter: the Regulation), the three highest ranking candidates in the list were eligible for the secret voting procedure.
24. The Applicant (Mr. Shyqyri Sylva, KI99/14) was among the three highest ranking candidates, whereas the Applicant (Mrs. Laura Pula, KI100/14) was ranked fifth and therefore not subject of further selection proceedings.
25. Against the aforementioned list with the final evaluation scores, the Applicant (Mrs. Laura Pula, KI100/14) filed with the KPC a request for reconsideration.
26. In her request for reconsideration, the Applicant (Mrs. Laura Pula, KI100/14), claimed that the procedures were violated in terms of awarding scores to the candidates. The Applicant, for the submitted concept document, by one of the members of the Panel stated that she was awarded five (5) points, whereas referring to the table of evaluation scores, considered as an integral part of the Regulation, no less than ten (10) points were required to be awarded.
27. On 5 June 2014 the KPC by Decision KPK/146/2014 rejected as ungrounded the request for reconsideration filed by the Applicant (Mrs. Laura Pula, KI100/14).
28. The KPC in its Decision to reject the Applicant's request for reconsideration held the following:

"The KPC found that the table in page 30 of the Regulation, although it is an integral part of the Regulation, only served as a guiding framework for evaluation, and not as a determining framework for setting the scoring procedure of each KPC member."
29. On 6 June 2014 the KPC composed of seven (7) members held a secret vote and, with four (4) votes elected the nominee for the position of Chief State Prosecutor. The Applicant (Mr. Shyqyri Sylva, KI99/14) received three (votes) and, thus, was not elected as Chief State Prosecutor nominee.
30. One of the seven (7) members of the KPC, who voted for the Chief State Prosecutor nominee, was also a candidate in the election procedure for the position of the Chief State Prosecutor. This member was selected as a candidate in the final list of eight (8) candidates of 25 April 2014, but was not selected as a candidate in the final list of the three (3) highest ranking candidates of 31 May 2014, which was the subject of the secret voting by the KPC Panel. Based on the selection procedure files submitted by the KPC, it appears that this candidate, who is a member of the KPC, was not a member of the KPC Panel for Preliminary Review and KPC Commission for Reconsideration.

31. On the same date the KPC rendered Decision KPK No. 151/2014 on the nomination of the candidate for Chief State Prosecutor.
32. On 12 June 2014 the KPC sent to the President of the Republic of Kosovo the proposal for the appointment of the Chief State Prosecutor nominee.
33. On 13 June 2014 against Decision KPK No. 151/2014 on the nomination and proposal of the candidate for the position of the Chief State Prosecutor dated 6 June 2014, the Applicant (Mr. Shyqyri Syla, KI99/14) submitted a claim to the Basic Court in Prishtina, Department for Administrative Matters.
34. To this date, the President of the Republic of Kosovo has not issued a decree on the appointment of the KPC nominated candidate for the position of Chief State Prosecutor.

Applicants' allegations

35. As stated above, the Applicants allege that the KPC during the election procedure for the position of the Chief State Prosecutor violated their rights guaranteed by the Constitution, namely Article 3 [Equality before the Law], Article 7 [Values] and Article 24 [Equality before the Law] of the Constitution.

1. Applicant's allegations (Mr. Shyqyri Syla, KI99/14)

36. The Applicant argues as follows:

"On 06.06.2014 a meeting of the Kosovo Prosecutorial Council was held, where votes were cast for a candidate for the position of Chief State Prosecutor. In this meeting, a participant and voting member was also the candidate [...] for the position of Chief Prosecutor, but did not make it to the top three candidates.

I consider that the fact that this candidate voted was a matter of conflict of interest, and, furthermore, of arbitrariness, since he did not take part neither in evaluating the documents submitted by the candidates, nor in their interviews, and without having any general knowledge, he casted his vote putting the candidates in an unequal position."

37. The Applicant requests the Court:

"To annul the election procedure and impose interim measure to stop the appointment decree."

2. Applicant's allegations (Mrs. Laura Pula, KI100/14)

38. The Applicant argues that the KPC arbitrarily failed to comply with the Regulation on Criteria and Procedures on Nomination and Appointment of the Chief State Prosecutor (hereinafter: the Regulation).
39. In this regard, she holds as follows: *"Therefore, this puts into question the principle of legal certainty, since the candidates could not expect that the*

scoring manners may differ from the one provided by the Regulation on Criteria and Procedures on Nomination and Appointment of the Chief State Prosecutor.”

40. Regarding her allegation regarding a violation of her constitutional rights, guaranteed by Articles 3, 7 and 24 of the Constitution, the Applicant also refers to the provision of the Convention on Elimination of All Forms of Discrimination Against Women, and argues as following:

“The failure to observe gender equality is found in the fact that amongst the eight (8) candidates for Chief Prosecutor, I am the only female candidate. According to the Convention on Elimination of All Forms of Discrimination against Women, discrimination against women is an infringement of equality of rights and respect for human dignity, it hampers participation of women in equal conditions with men in political, social, economic and cultural life, it hampers improvement of welfare of society and family, and furthermore, renders difficult the development of potentials of women in serving their homeland and humanity.

According to Article 2, item “q” of this Convention, it is provided that “all forms of discrimination against women are prohibited, and that states shall refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.

Based on the above, we also consider that there has been a violation of Article 22 of the Constitution of the Republic of Kosovo – Universal Declaration on Human Rights, item 6, concretely the Convention on Elimination of All Forms of Discrimination against Women.”

41. With regard to the exhaustion of legal remedies, the Applicant claims the following:

“Furthermore, the Law on the KPC does not provide any legal remedy related to complaints against a KPC decision. One must emphasize that the absence of a legal remedy for appealing KPC decisions at a second instance has been identified also by international mechanisms in Kosovo, while the provision of an appeal procedure is also a recommendation of the Venice Commission, which suggested that such a remedy be included when amending the laws on the KPC and the KJC.”

Relevant legal provisions related to the appointment of the Chief State Prosecutor

I. Article 109 [State Prosecutor], paragraph 7 of the Constitution

The Chief State Prosecutor shall be appointed and dismissed by the President of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council. The mandate of the Chief State Prosecutor is seven (7) years, without the possibility of reappointment.

II. Law No. 03/l-224 on the Kosovo Prosecutorial Council

Article 5 [Composition and Selection of Members of the Council]

1. *The Council shall be composed of nine (9) members who are citizens of the Republic of Kosovo, five (5) of whom shall be prosecutors.*

2. *The five (5) prosecutors serving as members of the Council shall include:*

2.1. *the Chief State Prosecutor;*

2.2. *one (1) prosecutor from the Special Prosecution Office elected by the prosecutors serving in that Office;*

2.3. *one (1) prosecutor from Appellate Prosecution Office elected by the prosecutors serving in that Office, and*

2.4. *two (2) prosecutors from Basic Prosecution Office elected by the prosecutors serving in that Office.*

3. *The non-prosecutor members of the Council shall be appointed by the Council based on a list of at least five (5) candidates for each position submitted by the relevant bodies and shall include:*

3.1. *one (1) member from the Chamber of Advocates who has specialized in criminal law, upon the proposal of the Executive Council of the Chamber of Advocates;*

3.2. *one (1) professor from the law faculties of Republic of Kosovo upon the proposal of the Higher Education Department or other relevant authority related to higher education;*

3.3. *one (1) representative of civil society with senior professional preparation and with knowledge from the field of human rights.*

[...]

Article 20 [Appointment of Chief State Prosecutor and Chief Prosecutors]

1. *The Chief State Prosecutor shall be nominated by the Council from among prosecutors and shall be appointed by the President for a seven (7) year term, with no possibility for reappointment.*

2. *The Council shall appoint Chief Prosecutors for all other units of the State prosecutor. Subject to the qualifications set forth in the Law on State Prosecutors, any prosecutor is eligible to be appointed to the post of the Chief Prosecutor.*

3. *A Chief Prosecutor shall be appointed by the Council for a four (4) year term, with the possibility for one additional term.*

4. In order to ensure that the State Prosecutor reflects the multiethnic nature of Kosovo, the Council shall endeavor to ensure that members of Communities that are not in the majority in Kosovo shall be appointed to management roles.

5. If a candidate proposed as a Chief Prosecutor is a member of the Council, he or she cannot participate in deliberations or voting for the appointment of the Chief Prosecutor.

6. The Council shall be authorized to remove a Chief Prosecutor from that position, pursuant to a performance assessment conducted in accordance with applicable law, or upon a finding of criminal conduct, mismanagement, incompetence, or failure to fulfill the duties of the position.

[...]

III. Regulation on Criteria and Procedures for Selection and Proposal for Appointment of Chief State Prosecutor

Section 9 [KPC Preliminary Review Panel]

1. KPC shall establish a Panel for preliminary review of applications for Chief State Prosecutor, with the following composition:

1.1 One KPC member; Chair;

1.2 One prosecutor from APO who did not apply for SPP; and

1.3 One prosecutor from SPRK who did not apply for CSP.

2. The Panel shall have a competence and sole responsibility for consideration of applications for CSP if they satisfy the criteria provided for under Section 3 paragraph 1, 2, 3 and 4 and the section 4 of this Regulation.

3. The Panel shall, within 7 days, review the applications and prepare a shortlist of candidates satisfying the criteria for CSP.

4. Candidates who do not meet the criteria for CSP shall be notified in written. The notification should contain also the information on the entitlement of the candidate to make a request for review by the Reconsideration Commission within 5 days from the day of receipt of notification.

5. The candidates who satisfy the criteria for CSP shall be notified in written.

6. Notification regarding the paragraph 4 and 5 of this section shall be published in both official languages on SPO and KPC webpage. The candidates shall be informed by official e-mail or telephone through a

message. Acknowledgment of receipt of notification shall be mandatory for all candidates for CSP.

Section 10 [Reconsideration Commission]

1. KPC shall establish a Reconsideration Commission, which shall be competent and in charge to review appeals filed against decisions of the KPC Panel for preliminary review of applications for CSP.

2. The Reconsideration Commission shall be composed of:

2.1 Chief State Prosecutor, Chair;

2.2 One prosecutor from APO who did not apply for SPP; and

2.3 One prosecutor from SPRK who did not apply for CSP.

3. The Commission shall, within 5 days of expiry of deadline for receipt of appeals render a decision on each appeal received.

4. Candidates who filed the appeals and the KPC members shall be notified of the decision of Commission;

5. Decisions of the Commission shall be published on KPC and SPO webpage, at least 24 hours after rendering the decision.

Section 12 [Evaluation Commission, Interview and Voting]

1. KPC members who are not excluded under paragraph 5 of the Article 20 of Law on KPC shall make the Commission for evaluation, interviewing and voting stage.

Section 13 [Evaluation of Candidates for Chief State Prosecutor]

1. Evaluation of candidates for Chief State Prosecutor shall include the personal, professional and moral integrity, which will be based on:

1.1 Performance evaluation in the last three years;

1.2 Information received from ACA,

1.3 Information received from FIU;

1.4 Information received by KIA;

1.5 Information regarding eventual disciplinary measures imposed against the candidates and information from ODC if any candidate is subject to disciplinary investigations by ODC.

2. Chief State Prosecutor is obliged to request information from paragraph 1, items 1.2; 1.3; 1.4; and 1.5 of this section for all the candidates who applied for CSP. These information will be put in the file of the candidate and KPC members will have access on them.

The information from paragraph 1, items 1.2; 1.3; 1.4 and 1.5 of this section for the candidates disqualified by the panel and the Commission on re-

consideration shall be submitted to the future Chief State Prosecutor.

Section 16 [Scoring of Candidates]

- 1. Scoring of candidates shall be based on forms number two 2 and 3.*
- 2. Each KPC member shall put the points for candidates according to form 2 and*
- 3. Points of all KPC members shall be summarized in a single form for each candidate.*
- 4. Following the scoring of candidates, KPC shall list the candidates according to the points acquired during the evaluation and interviewing process, shortlisting three candidates with majority of points.*
- 5. Each KPC member shall put the points for a candidate not more than 100 (one hundred) points as follows:*
 - 5.1 Regarding the self-evaluation documents one candidate can get mostly 20 (twenty) points;*
 - 5.2 On concept-paper one candidate can get mostly 30 (thirty) points;*
 - 5.3 Regarding the verbal interview one candidate can get mostly 20 (twenty) points;*
 - 5.4 On the integrity one candidate can get mostly 30 (thirty) points;*
- 6. The three candidates with majority of points shall undergo a secret ballot process by KPC members.*
- 7. A candidate included in the shortlist of three (3) candidates for KPC voting may, within three (3) days of notification, ask the KPC to reconsider his/her request only on grounds of procedural violations in the course of implementation of this Regulation.*
- 8. The notification from paragraph 7 of this section is done in written form and there is attached a copy of general points of the candidate.*
- 9. The candidates which are not listed among the three (3) first candidates with the highest number of points have the right to have access in his/her evaluation documents to verify the pointing. Nevertheless, the candidate has no right to know the identity of KPC member who made evaluation and individual pointing.*
- 10. KPC shall, within seven (7) days upon receiving the request of the candidate to verify the pointing shall decide if such request will be granted or rejected and it shall promptly inform in writing the candidate of the decision being rendered.*

Section 17 [Voting Process for Chief State Prosecutor]

1. *First three (3) candidates who get more points will undergo the process of secret ballot.*
2. *Voting of three (3) candidates ranked according to the points shall be done in secret ballot by the KPC members, excluding KPC member if he is one of three candidates for whom there will be voted.*
3. *If the secret ballot results to be even, another secret ballot will be conducted again, only for the candidate who received even votes until the voting in which a candidate gets the necessary votes for CSP.*
4. *The candidate who in the secret ballot acquires the majority of votes of KPC members shall be proposed for appointment as Chief State Prosecutor of Kosovo, to the President of Republic of Kosovo.*
5. *A proposal for appointment shall be signed by the KPC Chair. The proposal for appointment shall contain a written reasoning, including the whole selection process of the proposed candidate for appointment as Chief State Prosecutor.*
6. *KPC shall submit the proposal for appointment to the President of State no later than five (5) days from the day the KPC decision was rendered.*
7. *The KPC secret ballot shall be open to public, but KPC may vote to close the part of the meeting discussing merits of candidates for CSP.*

Admissibility of the Referral

42. First of all, in order to be able to adjudicate the Applicants' Referral, the Court has to examine whether the Applicants have met the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.
43. In this respect, the Court refers to Article 113, paragraph 7, of the Constitution, which establishes that:

"Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."
44. The Court considers that the Applicants are authorized parties, in compliance with Article 113, paragraph 7, of the Constitution.
45. The Court also refers to Articles 48 and 49 of the Law, which provide that:

"48. In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.

49. The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been

served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced.”

46. The Court also takes into account Rule 36 (1) of the Rules of Procedure, which stipulates:

“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.”

47. As stated above, the Applicants challenge the election procedure for the position of Chief State Prosecutor. In this regard, Applicant (Mrs. Laura Pula, KI100/14) specifically challenges Decision KPK No. 146/2014 of the KPC Panel for Reconsideration, dated 5 June 2014, whereas Applicant (Mr. Shyqyri Sylja, KI99/14) challenges KPC Decision KPK No. 151/2014, dated 6 June 2014, on the nomination of the candidate for Chief State Prosecutor.
48. The Court notes that the provisions of the law in force, Law No. 03/L-224 on the Kosovo Prosecutorial Council, does not envisage legal remedies against the decisions challenged by the Applicants.
49. In this respect, the Court considers that the Applicants are only obliged to exhaust “[...] remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success. The remedy’s basis in domestic law must therefore be clear “(See Case *Scavuzzo-Hager and Others v. Switzerland*, App. No. 41773/98, ECHR, 7 February 2006,).
50. However, the Court notes that even if there are legal remedies, in the Applicants’ case they are not proved to be efficient. Moreover, taking into consideration the specificity of the election procedure for the position of Chief State Prosecutor and the necessity this to be done in a timely fashion, the Court is of the opinion that there is no legal remedy to be exhausted.
51. In this regard, with reference to cases adjudicated by the Court regarding the appointment and reappointment procedure of judges and prosecutors, specifically with reference to the case No. KI114/10, *Vahide Badivuku*, Constitutional Court, Resolution on Inadmissibility of 8 May 2011, the Court considers that based on the circumstances of the case and completed proceedings, this Referral differs from the aforementioned case for the following reasons:
52. Firstly, before the entry into force of Law No. 03/L-199 on Courts, the administrative conflict procedure against the final administrative acts was initiated in the Supreme Court. Upon entry into force of the aforementioned Law on Courts (1 January 2013), the administrative conflict procedure is regulated as follows:

Article 14 [The Administrative Matters Department of the Basic Court]

“1. The Administrative Matters Department of the Basic Court shall adjudicate and decide on administrative conflicts according to complaints against final administrative acts and other issues defined by Law.

2. All cases before the Administrative Matters Department of the Basic Court shall be adjudicated by one (1) professional judge unless otherwise provided by Law.”

53. Secondly, the Court notes that there is only one position of Chief State Prosecutor as, for example, compared to multiple positions for the appointment or reappointment of judges and prosecutors. The Court is thus aware that it has received several Applications from judges and prosecutors who did not get reappointed. The present case, however, is factually distinguishable. First, because in those other cases there have been multiple positions and the regular courts could remedy the Applications if a violation was proven months later. Second, in the present case, it does not appear that there is sufficient time for any other Court to address that remedy before the appointment by the President of the Republic of Kosovo.
54. The Court, thus, concludes that the Applicants have no available remedies to exhaust before pursuing their claims of a constitutional violation.
55. In addition, the Court also holds that the Applicants submitted their Referrals to the Court within the four (4) months time limit.
56. Further, the Court notes that the Applicants have indicated what constitutional rights they claim to have been violated and they challenge the concrete Decisions KPK No. 146/2014, dated 5 June 2014, and KPK No. 151/2014, dated 6 June 2014.
57. Therefore, the Court concludes that the Referrals are admissible.

Merits of the case

58. The Applicants mainly allege that the challenged Decisions rendered during the election procedure for the position of Chief State Prosecutor violated their rights as guaranteed by Articles 3 [Equality Before the Law], 7 [Values] and 24 [Equality Before the Law] of the Constitution.
59. In this respect, the Court refers to the aforementioned provisions of the Constitution:

Article 3 [Equality Before the Law]

1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.

2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full

respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.

Article 7 [Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.

Article 24 [Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.

3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

60. Regarding the rights sought by the Applicants, the Court recalls that *"it is master of the characterization to be given in law to the facts of the case and is not bound by the characterization given by an applicant or a government. A complaint is characterized by the facts alleged in it and not merely by the legal grounds or arguments relied on."* (See *mutatis mutandis* Case *Ștefănică and others v. Romania*, App. No. 38155/02, ECtHR, Judgment of 2 November 2010, par. 23).
61. Therefore, the Court will analyze the complaints of the Applicants based on the alleged facts and the evidence attached to the Referrals regarding their allegations of violation of fundamental rights guaranteed by the Constitution and the European Convention on Human Rights (hereinafter: the "ECHR").
62. In this respect, the Court shall also assess the applicability of the requirements laid down in Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a Fair Trial] ECHR with regard to the election procedure conducted by the KPC.
63. Article 31 of the Constitution establishes:

“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.”

64. In addition, Article 6 (1) ECHR establishes:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

65. The Court further refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which establishes:

“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”

66. The Court notes that in the Applicant’s case (Mrs. Laura Pula, KI100/14), the Decision on rejecting her request for reconsideration (KPK/146/2014 dated 5 June 2014) was rendered by the Commission for Reconsideration established by the KPC according to the aforementioned applicable legal provisions. Whereas the Decision on the nomination of the candidate for Chief State Prosecutor (KPK No. 151/2014 dated 6 June 2014) was rendered by seven (7) members of the KPC following a secret vote.

67. In this respect, the Court notes that the KPC, as a body established by the Constitution, during the election procedure for the position of Chief State Prosecutor should comply and meet the requirements laid down in Article 31 of the Constitution and Article 6 ECHR.

68. Consequently, the Court shall review the merits of each of the Applicants’ allegations.

1. Merits of the case of Applicant Mr. Shyqyri Syla, Referral KI99/14

69. Referring to the election procedure in the Applicant’s case, the Court recalls that the Applicant was among the three highest ranking candidates, who were eligible to being submitted to a further selection procedure, namely the vote by secret ballot by the KPC.

70. Consequently, on 6 June 2014 the KPC composed of seven (7) members conducted a vote by secret ballot, whereby the nominee for the position of Chief State Prosecutor was elected with four (4) votes out of seven (7) votes. The

Applicant received three (3) votes and, thus, was not elected as Chief State Prosecutor nominee.

71. The Court further recalls that one of the seven (7) members of the KPC, who voted for the Chief State Prosecutor nominee, was also a candidate in the election procedure for the position of Chief State Prosecutor. This member, as a candidate was selected in the final list of eight (8) candidates of 25 April 2014, but was not selected in the final list of the three (3) highest ranking candidates, subject of the secret voting by the KPC.

72. Based on the above facts, the Applicant challenges the Decision of KPC on the nomination of the candidate for the position of Chief State Prosecutor (KPK No. 151/2014 dated 6 June 2014), and argues that:

“I consider that the voting of this candidate was a conflict of interest, and furthermore there was arbitrariness, since he did not take part in evaluating the documents submitted by the candidates, and neither in their interviews, and without having any general knowledge, he cast the voting putting the candidates in an unequal position.”

73. The Court considers that the KPC during the election procedure for the position of Chief State Prosecutor has to meet the principles and requirements set forth in Article 6 ECHR and the European Court of Human Right’s (hereinafter the “ECtHR”) case law in order to ensure transparent, fair, objective and an election procedure based on equality.

74. As to whether the KPC has met the procedural guarantee including appearances of “impartiality”, the Court further refers to the ECtHR’s settled case-law. In the *Wettstein* case, the ECtHR held that the existence of impartiality for the purposes of Article 6, paragraph 1, must be determined according to: “(i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is, whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality” (See, among other authorities, *mutatis mutandis* Case *Wettstein v. Switzerland*, App. No. 33958/96, ECtHR, par.42).

75. In this respect, the Court specifically referring to the importance and nature of the position of Chief State Prosecutor notes that even appearances of impartiality are of great importance (See *mutatis mutandis* Case *De Cubber v. Belgium*, App. No. 9186/ 80, ECtHR, Judgment of 26 October 1984, par. 26). What is at stake is the confidence which a public authority such as the KPC during the election procedure for the position of Chief State Prosecutor in a democratic society must inspire in the public as well as the public confidence in the person elected as Chief State Prosecutor.

76. In the Court’s view, these circumstances serve objectively to justify the Applicant’s apprehension that the KPC, during its voting procedure for the Chief State Prosecutor nominee by including the member, who was also a candidate for the position of Chief State Prosecutor lacked the necessary

appearance of impartiality. Thus, the Court considers that the member who was a candidate for the position of the Chief State Prosecutor should have been excluded from the voting and nomination procedure and replaced by another member.

77. Based on the foregoing, the Court finds that, in the present case there has been a violation of the right to fair proceedings guaranteed by Article 31 of the Constitution and Article 6, paragraph 1, ECHR.
78. Furthermore, the Court does not consider it necessary to deal further with the Applicant's allegations of a violation of Articles 3, 7 and 24 of the Constitution, in particular as it has found violations of Article 31 of the Constitution and Article 6 ECHR.

2. Merits of the case of Applicant Mrs. Laura Pula, Referral KI100/14

79. The Court notes that based on the list of 31 May 2014 with the final evaluation scores for each candidate published by the KPC, the Applicant was ranked fifth and therefore was not subject of the voting and nomination procedure. Following the publication of this list, the Applicant filed with the KPC a request for reconsideration.
80. In her request for reconsideration, the Applicant argued that one of the members of the Panel, for the concept document she submitted, awarded her five (5) points, whereas as to the table of evaluation scores, considered as an integral part of the Regulation, no less than ten (10) points were required to be awarded.
81. Consequently, on 5 June 2014, the KPC by Decision KPK/146/2014, rejected as ungrounded the request for reconsideration filed by the Applicant, holding the following:

“The KPC found that the table in page 30 of the Regulation, although it is an integral part of the Regulation, only served as a guiding framework for evaluation, and not as a determining framework for setting the scoring procedure of each KPC member.”

82. In this regard, the Applicant argues as follows:

“Therefore, this puts into question the principle of legal certainty, since the candidates could not expect that the scoring manners may differ from the one provided laid down in the Regulation on Criteria and Procedures on Nomination and Appointment of the Chief State Prosecutor.”

83. Based on the above, the Applicant alleges a violation of the principle of legal certainty.
84. The Court recalls that this principle is enshrined explicitly in one of the fundamental rights covered by the Constitution and the ECHR, namely the right to a fair trial. In this regard, the Court considers that the principle of legal certainty is at stake if legal obligations are not fully respected. The Court recalls

that this principle is also to be guaranteed during the election procedure conducted by all public authorities. Hence, the KPC during the election procedure was required to keep the same standard towards each of the candidates.

85. The Court notes that the KPC accepted that the aforementioned annex with the evaluation procedure is an integral part of the Regulation. Therefore, the Court holds that the annex clearly establishes the evaluation method by providing the minimum and maximum points for the concept documents and other evaluation components during the election procedure. Therefore, the KPC, by ignoring its own established rules, created a situation characterized by the presumption of arbitrariness.
86. As a consequence, the aforementioned KPC Decision, by which the Applicant's request for reconsideration was rejected, lacks also clear reasoning. The right to a reasoned decision is rooted in a more general principle embodied in the ECHR, protecting an individual from arbitrariness. In this regard, *"the Decision should contain reasons that are sufficient to reply to essential aspects of the party's factual and legal substantive or procedural argument"* (See *mutatis mutandis* Case *Toriya v. Spain*, App. No. 18390/91, ECHR, Judgment of 9 December 1994, par. 30).
87. Based on the foregoing, the Court finds that there is violation of the right to fair proceedings guaranteed by Article 31 of the Constitution and Article 6 ECHR.
88. With regards to the Applicant's allegation of violation of the principle of non-discrimination, the Court notes that under the Constitution, one of the values upon which the constitutional order of the Republic of Kosovo is based is the principle of non-discrimination. In this regard, the Republic of Kosovo has *"to ensure gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life."*
89. The Court notes that the aforementioned principle, which is enshrined in the Constitution, namely Articles 3, 7 and 24, must be guaranteed throughout the entire election procedure in the institutions of the Republic of Kosovo.
90. As to the present case, the Applicant (Mrs. Laura Pula, KI100/14), was the only female applicant submitting the "concept document" as part of the testing and scoring procedures. In this relation, the Applicant alleges:

"The failure to observe gender equality is found in the fact that amongst the eight (8) candidates for Chief Prosecutor, I am the only female candidate. According to the Convention on Elimination of All Forms of Discrimination against Women, discrimination against women is an infringement of equality of rights and respect for human dignity, it hampers participation of women in equal conditions with men in political, social, economic and cultural life, it hampers improvement of welfare of society and family, and furthermore, render difficult the development of potentials of women in serving for their homeland and humanity.

According to Article 2, item “q” of this Convention, it is provided that “all forms of discrimination against women are prohibited, and that states shall refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation”

91. Although there are appearances raising serious questions that the Applicant may have been discriminated against because of her gender in the testing procedure, the Court finds that she has not substantiated that she was actually discriminated against in the testing procedure because of her gender. Thus, the aforementioned principle of non-discrimination has not been violated.
92. Based on the foregoing, the Court considers that the failure of the KPC in its Decision, KPK No. 146/2014 dated 5 June 2014, to accept its own established rules and to provide a clear reasoning with respect to the essential aspects of the Applicant’s factual and legal procedural argument is in breach of the right to fair proceedings.
93. Thus, the Court considers that there is a violation of Article 31 of the Constitution, in connection with Article 6 ECHR.

Conclusion

94. In conclusion, the Court assesses that the election procedure conducted by the KPC constitutes a violation of the right to fair proceedings, guaranteed by Article 31 of the Constitution and Article 6 ECHR. Thus, the Court holds that the election procedure for the position of Chief State Prosecutor is to be repeated, without prejudice as to the outcome of that repeated procedure.

FOR THESE REASONS

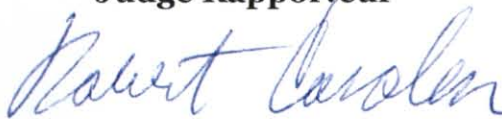
The Constitutional Court, pursuant to Article 113.7 of the Constitution and Rule 56 (1) of the Rules of Procedure, at its session held on 3 July 2014, unanimously

DECIDES

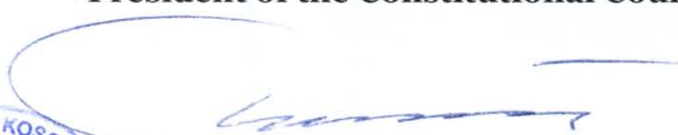
- I. TO DECLARE the Referrals admissible;
- II. TO HOLD that there has been violation of Article 31 of the Constitution in conjunction with Article 6 ECHR;
- III. TO ANNUL the challenged Decisions KPK No. 146/2014 and KPK No. 151/2014 on the Nomination of the candidate for Chief State Prosecutor;
- IV. TO ORDER the KPC to repeat the election procedure for the position of Chief State Prosecutor in conformity with this Judgment, without prejudice as to the outcome of that repeated procedure;
- V. TO ORDER the KPC, pursuant to Rule 63 (5) of the Rules of Procedure, to submit information to the Constitutional Court about the measures taken to enforce this Judgment;
- VI. TO NOTIFY this Decision to the Parties;
- VII. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- VIII. TO DECLARE this Judgment effective immediately.

Judge Rapporteur

President of the Constitutional Court



Robert Carolan



Prof. Dr. Enver Hasani

