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

Prishtina, on 18 April 2018
Ref. No.: RK 1217/18

RESOLUTION ON INADMISSIBILITY

in

Cases Nos. KI107/17 and KI129/17

Applicants

Shahadin Destani and Bekim Kryeziu

Constitutional review of Decisions KGJK no. 218/2017 and KGJK no. 217/2017 of the Kosovo Judicial Council, of 23 June 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge.

Applicants

1. The Referral KI107/17 was filed by Mr. Shahadin Destani, from Dragash, municipality of Prizren (hereinafter, the first Applicant).

2. The Referral KI129/17 was filed by Mr. Bekim Kryeziu, from Malisheva (hereinafter, the second Applicant).

Challenged Decisions

3. The Applicants challenge two identical Decisions of the Kosovo Judicial Council (hereinafter, KJC), namely Decision KGJK no. 218/2017 and Decision KGJK no. 217/2017, both of 23 June 2017. Through these Decisions, the Applicants were not *"proposed to the President of the Republic of Kosovo to be appointed judge with an initial mandate beginning at the basic courts in Kosovo"*.

Subject Matter

4. The subject matter of the Referrals is the constitutional review of the challenged Decisions, which allegedly violated the Applicants' rights guaranteed by Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial], Article 45 [Freedom of Election and Participation] and § 4 of Article 108 [Kosovo Judicial Council] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

Legal basis

5. The Referrals are based on Article 113 (7) of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter, the Law), and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 6 September 2017, the first Applicant submitted the Referral KI107/17 to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 8 September 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

8. On 20 September 2017, the Court informed the first Applicant about the registration of the Referral KI107/17.

9. On 22 September 2017, the Court sent a copy of the Referral KI 107/17 to the KJC with the invitation to present comments, if any, the latest by 6 October 2017. On that date, the KJC submitted comments with respect to Referral KI107/17.

10. On 10 October 2017, the Court informed the first Applicant about the KJC's comments with the invitation to submit observations, if any, the latest by 20 October 2017. The first Applicant did not submit any additional observations.

11. On 28 October 2017, the second Applicant submitted the Referral KI129/17 to the Court.

12. On 3 November 2017, the President, pursuant to Rule 37 (1) of the Rules of Procedure, ordered the joinder of Referral KI 129/17 to the Referral KI 107/17 and, accordingly, the Judge Rapporteur and the composition of the Review Panel in the Referral KI 129/17 remained the same as in the Referral KI 107/17.

13. On 8 November 2017, the Court informed the second Applicant about the registration of his Referral KI 129/17. On the same day, the Court sent a copy of the Referral KI 129/17 to the KJC with the invitation to present comments, if any, the latest by 15 November 2017.

14. On 10 November 2017, the Court notified the Applicants and the KJC of the joinder of the Referral KI 129/17 to the Referral KI 107/17.

15. On 14 November 2017, the KJC submitted comments with respect to Referral KI129/17.

16. On 15 November 2017, the Court informed the second Applicant about the KJC's comments with the invitation to submit observations, if any, the latest by 24 November 2017. On that date, the second Applicant submitted his observations.

17. On 10 January 2018, the Review Panel considered the report of the Judge Rapporteur and, by majority, recommended to the Court the inadmissibility of the Referrals.

Summary of facts

18. In 2016, the KJC announced a public vacancy on recruitment of sixty-one (61) judges at the level of basic courts. The time period to submit the application form started from 25 April 2016 until 25 May 2016. Both Applicants applied for a position as a judge.

19. On 27 April 2017, the Commission for Recruitment, Exam, Appointment and Reappointment of Judges of the KJC (hereinafter, the Commission) published the final list of the candidates that had successfully passed the written test. As the Applicants were included on the list, they both underwent an interview.

20. On 6 June 2017, the Commission published the accumulated results of the written test and of the interview. The Commission also clarified that only the candidates who had accumulated 100 or more points would be recommended for the follow up voting procedure within the KJC. The first Applicant had accumulated 97.6 points, in total; whilst the second Applicant had accumulated 90.2 points, in total. As a result, they were not included in the list of candidates to be recommended to the KJC for voting.

21. On 9 June 2017, the Applicants filed their appeals with the Commission for Review of the KJC, *"due to incomplete or erroneous confirmation of the factual situation"*. The Applicants, in separate appeal submissions, requested

the Commission for Review to reassess the written exams and recount the scores gained in the written exam and oral interview.

22. On 14 June 2017, the Commission for Review (Decision no. ZVGJ/17/0279) approved as grounded the appeal of the first Applicant. On the same date, the Commission for Review (Decision no. ZVGJ/17/0268) approved as grounded the appeal of the second Applicant. Both appeals were considered grounded because *"the correct responses that the candidate*[s] *had given during* [their] *oral interview had not been taken into account, thus resulting in him being awarded insufficient points"*.

23. On 21 June 2017, following the abovementioned Decisions, the Applicants were included in the final list of candidates who were recommended to the KJC for voting.

24. On 23 June 2017, the KJC (Decision KGJK no. 218/2017 and Decision KGJK no. 217/2017) decided that the Applicants *"shall not be proposed to the President of the Republic of Kosovo to be appointed judge"*.

25. The respective relevant part of the challenged Decisions reads:

> *In the KJC meeting of 23 June 2017, after the candidates were voted one by one, it turned out that* [the Applicants] *did not get the simple majority vote of the KJC members.*

26. On 3 July 2017, the KJC published the final list of the candidates that would be recommended to the President of the Republic of Kosovo for appointment. The Applicants were not part of that list.

27. On 31 July 2017, the President of the Republic of Kosovo decreed 53 new judges. The Applicants were not appointed as judges.

Applicants' allegations

28. Both Applicants claim a violation of their rights guaranteed by Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial], Article 45 [Freedom of Election and Participation] and Article 108 (4) [Kosovo Judicial Council] of the Constitution.

First Applicant, Referral KI107/17

29. The first Applicant alleges that the KJC (Decision no. KGJK 218/2017, of 23 June 2016) *"disregarded the constitutional standards concerning selection of judges for the basic courts in Kosovo"*. He also alleges that the members of the KJC conducted *"an arbitrary and unconstitutional voting"* by leaving him *"out of the list of selected candidates, without any reasons being provided as to the conditions that the candidate had failed to meet"*.

30. In addition, the first Applicant also alleges that his right to election, under Article 45 [Freedom of Election and Participation] of the Constitution, was violated through the application of Article 32 of the Regulation No. 5/2016 of

the KJC which *"gives the KJC an arbitrary authority when voting and selecting the candidates following the entire recruitment process"*.

31. The first Applicant further alleges that this precise norm is *"a constitutional violation because the KJC members may, without providing any reasons, disqualify a candidate who has successfully gone through all recruitment procedures"*.

32. In the end, the first Applicant requests the Court to find a violation of the abovementioned Articles of the Constitution; to declare the challenged Decision of the KJC null and void; to declare Article 32 of the Regulation no. 5/2016 as an unconstitutional norm; to annul and to order the KJC to recommend the name of Applicant to the President of the Republic of Kosovo to be decreed.

Second Applicant, Referral KI129/17

33. The second Applicant alleges that the KJC (Decision no. KGJK 217/2017, of 23 June 2016) *"has violated his rights [...] because it has not decided based on the merits of the candidate and based on the principles of independence and impartiality"*.

34. The second Applicant also alleges that the Decision of the KJC is not reasoned considering that he does not know *"how did the voting procedure go, how many votes (...) in favor, how many against and how many abstentions"*.

35. In addition, the Applicant claims that he has *"passed the exam for judge in an equal manner as other 54 candidates that have been appointed"*, but *"the KJC has arbitrarily denied my right and discriminated me against other candidates"*.

36. In the end, the Applicant requests the Court to declare his Referral admissible; to conclude that there has been a violation of Articles 24 (1), 31 (1), 108 (1) and (4) of the Constitution; to declare the challenged Decision of the KJC as invalid; and to order the KJC to hold a new voting procedure and to recommend the his name to the President of the Republic of Kosovo.

37. In sum, the Applicants mainly allege that the KJC's regulations are unconstitutional, the KJC decision is not reasoned and the KJC violated the merits-based principle.

Comments submitted by the Kosovo Judicial Council

38. The KJC submitted comments with respect to the admissibility and merits of both Referrals KI107/17 and KI129/17.

39. In respect of the admissibility of the Referrals, the KJC considers that the Applicants have not exhausted all legal remedies available by law. In this regard, the KJC argued that *"the Decision of the KJC is an administrative act against which an administrative conflict may be initiated before the Basic Court in Prishtina"*.

40. Furthermore, the KJC referred to the case-law of the Constitutional Court, namely Case No. KI114/10 (Applicant *Vahide Badivuku*, Judgment of 18 May 2011) where the Constitutional Court, in similar circumstances, *"considered that such requests are inadmissible"*.

41. The KJC concluded that *"the Referral of Mr. Shahadin/Mr. Bekim to be treated in the same way and accordingly the Constitutional Court to render a decision on inadmissibility"*.

42. In respect of the merits of the Referral, the KJC considers that *"the Decision*[s] *of the KJC (...) of 23 June 2017* [were] *rendered in accordance with the Constitution of the Republic of Kosovo and the applicable law"*. The KJC further considers that the challenged Decisions were *"rendered rightfully and that its substance has not violated any of the Applicants' rights who was a candidate for a judge at the basic court level"*.

43. The KJC concluded by proposing to the Constitutional Court to declare as inadmissible the Applicants' Referrals.

44. The first Applicant, Referral KI107/17, did not respond to the KJC's comments

Observations submitted by the second Applicant, Referral KI129/17, in relation to the comments of the KJC

45. The second Applicant submitted observations in relation to the comments of the KJC, objecting them entirely *"as ungrounded and in contradiction with the evidence* (he) *presented in the Referral"*.

46. The second Applicant confirms his initial *petitum* and claims that *"the KJC (...) intended to mislead the Constitutional Court since we only have to do with the final decision no. 217/2017 of 23.06.2017 and whether the voting procedure was arbitrary and in contradiction with the Constitution"*.

Admissibility of the Referrals

47. The Court first assesses whether the Referrals fulfill the requirements of admissibility as established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

48. In this respect, the Court refers to §§ 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

> *1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *(...)*
> *7. 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.*

49. The Court also refers to § 2 of Article 47 [Individual Requests] of the Law which provides:

> *The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*

50. Furthermore, the Court refers to § (1) (b) of Rule 36 [Admissibility Criteria] of the Rules of Procedure which foresees:

> *(1) The Court may consider a Referral if:*
> *[...]*
> *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted [...].*

Principles on exhaustion of legal remedies

51. It stems from the abovementioned provisions that the Constitutional Court is subsidiary to the regular courts safeguarding human rights. Thus it is appropriate that the regular courts should initially have the opportunity to determine questions regarding the compatibility with the Constitution.

52. The rationale for the exhaustion rule is to afford the relevant authorities, primarily the regular courts the opportunity to prevent or put right the alleged violations of the Constitution. It is based on the assumption, reflected in Article 32 of the Constitution and 13 of the ECHR, that the Kosovo legal order will provide an effective remedy for violations of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery. (See the European Court of Human Rights (hereinafter, the ECtHR) case *Selmouni v. France,* Application No. 25803/94, Judgment of 28 July 1999, § 74).

53. The Court has consistently considered that the principle of subsidiary requires all applicants to exhausts all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. The Court has further considered that applicants are liable to have their respective cases declared inadmissible by the Court, when failing to avail themselves of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. (See Constitutional Court cases KI139/12, *Besnik Asllani,* Resolution of 30 November 2012, § 45; No. Kl. 07/09, Demë KURBOGAJ and Besnik KURBOGAJ, Resolution, § 18; KI89/15, *Fatmir Koci,* Resolution of 21 November 2014, § 35; No. KI24/16, Applicant *Avdi Haziri,* Resolution, §39).

54. Notwithstanding the abovementioned principle, the exhaustion rule is to be applied with some degree of flexibility and without excessive formalism, given the context of protecting human rights. In fact, the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. (See ECtHR cases *Ringeisen v. Austria,* Application No. 2614/65, Judgment of 16 July 1971, § 89; *Lehtinen v. Finland,* Application

No. 39076/97, Decision as to admissibility, 14 October 1999; and *Kozacioglu v. Turkey,* Application No. 2334/03, Judgment of 19 February 2009, § 40).

55. An applicant must make use of legal remedies which are likely to be effective and sufficient. When a remedy has already been pursued, use of another remedy which has essentially the same objective is not required. The Court then examines whether, in the circumstances of the case, the applicant did everything that could reasonably be expected of him/her to exhaust all effective legal remedies.

56. The ECtHR case law held that the exhaustion of legal remedies requirement must be determined based on the principles of distribution of burden of proof. In fact, an applicant needs to show that *"he/she did everything that could reasonably be expected of her/him to exhaust legal remedies"*. (See ECtHR case *Selmouni v. France*, Ibidem § 76; *Akdivar and Others v. Turkey*, Application no. 21893/93, Decision of 19 October 1994, § 68; and *D.H. and Others v. The Czech Republic*, Application no. 57325/00, Judgment of 13 November 2007, § 116).

57. Moreover, Applicants are only obliged to exhaust legal remedies that are available in theory and in practice at the relevant time, that is to say, that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success. (See ECtHR case *Sejdović v. Italy,* Application no. 56581/00, 1 March 2006, § 46).

58. However, the ECtHR has also held that *"the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies"*. (See *Sejdović v. Italy, Ibidem,* § 45).

59. In sum, mere doubts regarding the effectiveness of a particular remedy will not absolve an applicant from the obligation to try it; only in exceptional circumstances an applicant can address the Court in respect of his/her grievances without having made any attempt to seek redress before the regular courts.

Application of these principles to the Referrals

60. The Court recalls that the application of the abovementioned principles have been determined by the ECtHR through its case-law. Thus, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court's interpretation of human rights and fundamental freedoms shall be consistent with the decisions of the ECtHR.

61. At the outset, the Court emphasizes that the abovementioned provisions establish the *"exhaustion of all legal remedies"* as a crucial Referral's requirement for admissibility, which needs to be specifically assessed on case-by-case basis. As required by the ECtHR case law, it is essential to have regard to the particular circumstances of each individual case in reviewing whether the legal remedies have been exhausted.

62. The Court considers that the Referrals can be received and processed only if the Applicants show that: all available legal remedies provided by the law have been exhausted; there is no available legal remedy provided by the law; there exists a legal remedy, but it is not effective; or there are exceptions applicable to the particular circumstances of their case. (See Constitutional Court case No. KI145/15, Applicant *Florent Muçaj,* Resolution on Inadmissibility, 14 June 2016, § 32).

63. The Court recalls that the interpretation and application of Article 13 of the Convention have been determined in detail by the ECtHR through its case-law; thus the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, shall interpret Article 32 of the Constitution consistent with the decisions of the ECtHR.

64. The Court recalls that the exhaustion rule complies with the subsidiarity principle and is meant to afford the regular courts the opportunity to prevent or put right an alleged violation of the Constitution. (See Constitutional Court case No. KI41/09 *AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo*, Resolution on Inadmissibility, 21 January 2010; see also ECtHR case *Selmouni vs. France, Ibidem*, § 74).

65. The Court notes that the Applicants do not dispute that the challenged Decisions of the KJC are administrative acts.

66. The Court considers that, at least in theory, there is a legal remedy provided by the law and available to the Applicants, meaning the initiation of administrative conflict against the challenged Decisions as an administrative acts.

67. In fact, the Court recalls Article 7 [Access to the Courts] of the Law No. 03/L-199 on Courts which provides:

> [...]
> *3. Every person has the right to address the courts to protect and enforce his or her legal rights. Every person has the right to pursue legal remedies against judicial and administrative decisions that infringe on his or her rights or interests, in the manner provided by Law.*

68. Moreover, Article 14 [The Administrative Matters Department of the Basic Court] of the Law on Courts, also provides:

> *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.*

69. In addition, Article 13 of the Law No. 03/L-202 on Administrative Conflicts provides:

> *An administrative conflict can also start against the administrative act of the first instance, against which in the administrative procedure, complain is not allowed.*

70. Furthermore, Article 22 of the aforementioned Law on Administrative Conflicts provides:

> *[...]*
> *2. By the plaintiff request, the body whose act is being executed, respectively the competent body for execution can postpone the execution until the final legal decision, if the execution shall damage the plaintiff, whereas postponing is not in contradiction with public interest and postponing would not bring any huge damage [...].*
> *4. For postponement of execution, the competent body shall issue decision not later than three (3) days from the date of receiving the request for postponement.*
> *[...]*
> *6. The plaintiff can claim from the court to postpone the execution of administrative act until the court decision is taken, according to the conditions foreseen by paragraph 2 of this Article.*
> *7. The court will decide within three (3) days upon receiving the claim.*

71. The Court recalls that the Applicants mainly allege that the KJC's regulations are unconstitutional, the KJC decision is not reasoned and the KJC violated the merits-based principle.

72. However, the Court further recalls that the Applicants allege that *"opening an administrative conflict against this* [challenged] *decision would not guarantee success and efficiency (...) within a reasonable period of time, considering that the same matter can last tens of years"*. In addition, they claim that *"these remedies have not demonstrated to be efficient"*.

73. Therefore, the following question to be assessed by the Court is whether the Applicants have demonstrated, as they should according to the burden of proof that falls on them, that the existing legal remedy is not effective. (See ECtHR cases *Akdivar and others v. Turkey,* Application No. 21893/93, Judgment of 16 September 1996, §§ 66 and 77; *Selmouni vs. France, Ibidem,* § 64).

74. In the context of the present case, the distribution of burden of proof is shared between each Applicant and the KJC. According to the ECHtR case law, it is first incumbent on the Applicants to explain whether they have exhausted any legal remedies and if not, why.

75. Then, it is incumbent on the the KJC, claiming non-exhaustion, to satisfy the Court that it's proposed remedy: a) exists in theory and practice; b) is accessible and effective; c) is capable of providing redress in respect of the Applicant's complaints; and d) offers reasonable prospects of success. (See ECtHR cases *Paulino Tomás v. Portugal,* Application no 58698/00, Decision as to admissibility of 27/03/2003 and *Mikolajová v. Slovakia,* Application no. 4479/03, Judgment of 18 January 2011, § *34*).

76. However, once this burden of proof has been satisfied, it falls back to the Applicants again to prove that the remedy advanced by the KJC was in fact exhausted, and if this is not the case, to counter argue the arguments of the

KJC, respectively that: a) for some reason, the proposed remedy was inadequate and ineffective in the particular circumstances of the case; or b) that there are special circumstances absolving the Applicant from fulfilling the requirement for the exhaustion of the remedy.

77. Finally, as mentioned above, the ECtHR has also held that an applicant cannot be regarded as having failed to exhaust domestic remedies if he/she can show that an available remedy, which he/she has not used, was bound to fail.

78. In that respect, the Court observes that the Applicants expressed their doubts on the *"success and efficacy"* of the existent remedy. However, they have not demonstrated that the existing remedy would not be effective.

79. The Court recalls that the Applicants alleged that initiating an administrative conflict against the KJC decision is not effective as it could last tens of years. KJC considered that the Applicants have not exhausted all legal remedies available by law, as its decision is an administrative act against which an administrative conflict is available. The Applicants have not replied to the argument of KJC.

80. The Court considers that the above quoted provisions of the applicable law regarding administrative conflicts show that the Applicants could have requested postponement of the execution of the challenged Decisions of the KJC. They choose not to try that remedy at all and did not prove that it would be ineffective.

81. In direct relation with this consideration, the Court refers to the Constitutional Court case No. KI106/17 (Applicant *Qerim Begolli*, Resolution on Inadmissibility, 21 December 2017), where the Applicant also applied for one of the 61 available positions for a judge at the basic court level in Kosovo. He was also not appointed as a judge.

82. However, instead of filling a Referral directly with the Constitutional Court, as the Applicants have done in this case, the Applicant, in the case No. KI106/17, initiated administrative proceedings against an identical Decision of the KJC, where a *"security measure"* was also requested in accordance with the applicable law.

83. In sum, the Court reiterates that mere doubts regarding the effectiveness of a particular remedy will not absolve the Applicants from the obligation to try such a remedy or to show that it would be ineffective. (See Constitutional Court case No. KI17/16, Applicant *Holding Company Fond Inex Interexport a.d. vs. Government of the Republic of Kosovo*, Resolution on Inadmissibility, 12 April 2016, § 36).

84. The Court considers that the Applicants in the present Referrals have merely showed doubts, without providing evidence that the legal remedy provided by the law was indeed ineffective in practice.

85. Therefore, the Court concludes that the Applicants have not demonstrated that the existing legal remedy was not effective and thus they should be absolved from the obligation to try to exhaust such existing legal remedy.

86. The Court recalls that the Applicants further claim that an exception is applicable to the particular circumstances of their case by referring to the Constitutional Court cases No. KI34/17 (Applicant *Valdete Daka*) and No. KI55/17 (Applicant *Tonka Berisha*). The first Applicant states that these two cases *"are identical to the case at hand"* and were *"admitted"* by the Constitutional Court.

87. In this respect, the Court reiterates that the exhaustion rule is neither absolute nor capable of being automatically applied; it needs to be applied with some degree of *"flexibility"* and *"without excessive formalism"*, given the context of protecting human rights.

88. In that connection, the Court recalls that flexibility and lack of excessive formalism was called upon on all three cases regarding the election procedure of the Chief State Prosecutor, the President of the Court of Appeals and the President of the Supreme Court. (See Constitutional Court cases No. KI99/14 and KI100/14, Applicants *Shyqyri Syla and Laura Pula*, Judgment of 8 July 2014; No. KI34/17, Applicant *Valdete Daka*, Judgment of 12 June 2017; and No. KI55/17, Applicant *Tonka Berisha*, Judgment of 13 January 2017).

89. The Court recalls that such approach was called upon due to the singular and specific circumstances of such cases; however, it is not called upon in light of the circumstances of the present Referrals.

90. The Court notes that the relevant part of the Judgment[s], invoked by the Applicants as being in their favor, in cases Nos. KI99/14 and KI100/14, reads:

> *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 (...) 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.* (See *Shyqyri Syla and Laura Pula, Ibidem,* § 53)

91. The Court recalls that the essential clue of the aforementioned Judgment is whether the regular courts could ultimately remedy such a specific situation, if given the chance. That point relates directly as to whether the Court should disregard the exhaustion rule in the present Referrals. The answer to that question is positive. It is true that the administrative proceedings for remedying the alleged violations of the Applicants' rights may take longer; however, the circumstance of the first and second Applicant being one of many candidates who applied for 61 available positions does not amount to a

situation where exhaustion of all applicable legal remedies can be disregarded. Therefore, in light of the circumstances of the present Referrals it cannot be said that there is no effective legal remedy for the Applicants to exhaust.

92. The Court also refers to its case No. KI145/15 (Applicant *Florent Muçaj*), where the Applicant directly contested before the Constitutional Court a Decision of the Kosovo Prosecutorial Council (hereinafter, the KPC). The Court rejected the Applicant's request as inadmissible for being premature because of non-exhaustion of all available legal remedies. The court considered that *"the KPC is a collective body and its member from the civil society is just one of the members. The contestation in the regular courts of the mandate of one of its members does not inhibit the normal functioning of the KPC". (See Florent Muçaj, Ibidem,* § 40)

93. The Court emphasizes that it cannot subsume the role of the regular courts in reviewing allegations that may be best reviewed by the regular courts themselves. Exceptions to such rules are rare and they only apply in cases where it is considered that a remedy that might be offered by the regular courts is *prima facie* ineffective and when delaying in making a decision could lead to significant and irreparable damage to institutional functioning.

94. The Court further emphasizes that such exception must also pass the test that the harm to be caused by not applying flexibility on the exhaustion rule would be far greater than becoming a strict observer of this fundamental principle of the subsidiary constitutional protection mechanism. These exceptions are permissible only in light of specific circumstances of the case and with logical reasons as to why such exceptions are to be granted.

95. Thus, the Court considers that, as it was reasoned above, such exceptions are not called upon in respect of the present Referrals.

96. Consequently, the Court finds that the Applicants have not exhausted all available legal remedies pursuant to Article 113 (7) of the Constitution, Article 47 (2) of the Law and Rules 36 (1) (b) of the Rules of Procedure.

97. Therefore, the Referrals are rejected as inadmissible.

98. Finally, having concluded that the Referrals are inadmissible, the Court considers that there is no need to assess the Applicant's allegations on the constitutionality of KJC's regulations, lack of reasoning of the KJC decision and the KJC violation of the merits-based principle.

FOR THESE REASONS

Pursuant to Article 113 (7) of the Constitution, Article 47 (2) of the Law and Rule 36 (1) (b) and 56 (2) of the Rules of Procedure, 10 January 2018, the Court, by majority,

DECIDES

I. TO DECLARE the Referrals as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Almiro Rodrigues

President of the Constitutional Court

Arta Rama-Hajrizi