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

Prishtina, 30 September 2019
Ref.no.:RK 1433/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI108/18

Applicant

Blerta Morina

Request for constitutional review of Decision No. 64/04 of the Civil Registration Agency of 13 June 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Blerta Morina, represented by the lawyer Rina Kika (hereinafter: the Applicant).

2. By respecting his self-identification with the male gender, the Court will refer to the Applicant in the same gender (see the case of the European Court of Human Rights regarding the practice of respecting the self-identification of the person *X. v. the Former Yugoslav Republic of Macedonia*, now North Macedonia, Judgment of 17 January 2019, paragraph 1).

Challenged decision

3. The Applicant challenges Decision [No. 64/14] of 13 June 2018 of the Commission for the Review of Appeals against Decisions of the Civil Registry Offices, which functions as part of the Civil Registration Agency at the Ministry of Internal Affairs of the Government of the Republic of Kosovo (hereinafter: the Civil Registration Agency).

Subject matter

4. The subject matter is the constitutional review of the challenged Decision, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 36 [Right to Privacy] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights (hereinafter: the ECHR).

5. The Applicant also requests to be exempted from the obligation to exhaust the legal remedy provided by law, an obligation established by paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, paragraph 2 of Article 47 [Individual Requests] of the Law and item (b) of paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure.

Legal basis

6. The Referral is based on paragraphs 1 and 7 of Article 113 of the Constitution, Articles 22 [Processing Referrals] and 47 of the Law No. 03/L-121 on the Constitutional Court (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 30 July 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 16 August 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

9. On 26 September 2018, the Ombudsperson submitted to the Court, on his own initiative, a request to appear as *Amicus Curiae* ("*Friend of the Court*") regarding case KI108/18. Along with his request, the Ombudsperson submitted a written submission, namely a Legal Opinion, in capacity of the *Amicus Curiae*, regarding the case in question.

10. On 27 September 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Civil Registration Agency.

11. On 9 October 2018, based on paragraph (1) of Rule 55 [*Amicus Curiae*] of the Rules of Procedure, the Judge Rapporteur consulted the Review Panel with regard to the approval of the Ombudsperson's request to appear as *Amicus Curiae* in case KI108/18.

12. On 11 October 2018, the Judge Rapporteur, after consulting the Review Panel, approved the Ombudsperson's request to appear as *Amicus Curiae*, thereby accepting the Legal Opinion submitted by the Ombudsperson as an integral part of the file in case KI108/18. On the same date, the Judge Rapporteur, pursuant to paragraph (2) of Rule 55 of the Rules of Procedure, notified all the judges of the Court about the decision to allow the participation of the Ombudsperson in the capacity of *Amicus Curiae* in the case KI108/18.

13. On 16 October 2018, the Court notified the Ombudsperson that his request to appear as *Amicus Curiae* was considered by the Court and approved based on the aforementioned Rules of Procedure. In this regard, it was confirmed to the Ombudsperson that the Legal Opinion submitted to the Court is already an integral part of the case file KI108/18.

14. On the same date, the Court notified the Applicant and the Civil Registration Agency about the request of the Ombudsperson to appear as *Amicus Curiae* in case KI108/18. The Court also notified them about the decision to allow the participation of the Ombudsperson as *Amicus Curiae* and sent a copy of the Legal Opinion submitted by the Ombudsperson.

15. On the same date, the Court notified and addressed the Kosovo Judicial Council (hereinafter: the KJC) (i) about the registration of the Referral and sent a copy of the Referral; (ii) regarding the request of the Ombudsperson to appear as *Amicus Curiae* in case KI108/18, on the decision to allow the participation of the Ombudsperson as *Amicus Curiae* and sent a copy of the Legal Opinion submitted by the Ombudsperson; and (iii) with the request that by 31 October 2018, to submit relevant comments regarding the Applicant's allegations and the support of such allegations by the Ombudsperson, namely that in the circumstances of the present case, the claim for administrative conflict does not constitute an effective legal remedy. The Court addressed the KJC with four specific questions regarding the assessment of the "*effectiveness*" of the legal remedy, as established on the case-law of the European Court of Human Rights (hereinafter: the ECtHR), as follows:

    (i) Do you consider that the claim for initiation of the administrative conflict as a legal remedy meets the standards of being "sufficiently

certain, not only in theory, but also in practice", in the circumstances of the present case; (ii) Do you consider that a claim for administrative conflict as a legal remedy meets the standards necessary to be considered "available" to the Applicant, "accessible" to him and "effective" regarding the allegations raised in Referral KI108/18. Examples of case-law in this regard would be helpful; (iii) Do you consider that the claim for initiation of the administrative conflict as a legal remedy provides the respective "prospective of redress" and "the reasonable chance of success" as to the Applicant's allegations raised in the Referral KI108/18. Examples of case-law in this regard would be helpful; and (iv) Do you consider that there are "special circumstances" in the case of the Applicant that would potentially meet the criteria for exempting the Applicant from the obligation to exhaust legal remedies".

16. Within the prescribed time-limit, the Court did not receive any reply or comment from the KJC.

17. On 2 November 2018, the Judge Rapporteur, upon consultation with the Review Panel and after notifying all Judges of the Court, sent several questions to the Venice Commission Forum regarding case KI108/18, as follows:

    (i) What is the practice in your Court to review the admissibility of cases, in which the applicants have not exhausted all available legal remedies according to the legislation in force, but claim that the same are not effective in the circumstances of their case?; (ii) Has your Court ever, due to "specific/special circumstances" of an Applicant or his/her arguments for "irreparable damage", exempted her/him from the need to exhaust all legal remedies prior to filling a constitutional complaint (or a similar complaint) with your Court? If yes, links to the respective decisions, preferably in English, would be appreciated; and (iii) Has your Court ever reviewed the merits of a case on transgender rights? If yes, could you please provide us with a link to a copy of such decision, in English preferably" ?

18. Between 2 and 23 November 2018, the Court received a total of 16 (sixteen) replies/comments regarding the Court's request for additional information on the case-law. One reply was received from the ECtHR itself, respectively its Research Department and other responses were received from some constitutional/supreme court members of the Venice Commission Forum, namely Germany, Bulgaria, the Czech Republic, Hungary, Latvia, Mexico, Portugal, Slovakia, Sweden, Liechtenstein, Finland, the Netherlands, Estonia, Croatia and Northern Macedonia. The replies received from the Venice Commission Forum are reflected in paragraphs 105-138 of this Resolution on Inadmissibility.

19. On 8 November 2018, the Court sent a repeated request for comments to the KJC reminding them that their replies/comments regarding the procedural aspect of the exhaustion of legal remedies are useful to address the Applicant's allegations supported by the Ombudsperson's Legal Opinion. In this regard, the Court granted the KJC an additional seven (7) days to submit their replies and comments on the questions posed by the Court, listed above.

20. On 20 November 2018, the KJC submitted its responses and comments to the Court. The responses and comments received from the KJC are reflected in paragraphs 84-88 of this Resolution on Inadmissibility.

21. On the same date, the Applicant requested the Court to notify him *"as soon as possible about the status of the proceedings"* in case KI108/18.

22. On 29 November 2018, the Court notified the Applicant about the status of the proceedings in case KI108/18, informing him about the procedural steps which had been taken up to that date. Through the same letter, the Court also notified the Applicant about its questions addressed to the KJC and the replies that the latter submitted to the Court, thus sending him a copy of the Court's letter sent to the KJC and the KJC response submitted to the Court. In that case, the Court invited the Applicant to submit his comments on the comments submitted by the KJC. Finally, the Court also requested the Applicant to notify the Court, within seven (7) days of receipt of the letter, about two additional issues, by answering the following questions: (i) *Have you filed any request for expedited procedure or an equivalent request with the Basic Court in Prishtina? If so, please submit a copy of the relevant document and any other document, additional information or reply that you consider as relevant in this regard; and (ii) Has the Basic Court in Prishtina taken any steps so far?*

23. On 10 December 2018, the Applicant submitted a reply in respect of the two abovementioned questions of the Court and submitted comments regarding the comments submitted by the KJC on 20 November 2018. The additional replies and comments received from the Applicant are reflected in paragraphs 89- 93 of this Resolution on Inadmissibility.

24. On 12 December 2018, the Court sent to the KJC, for its information, a copy of the additional comments received from the Applicant as additional comments to the KJC replies and comments submitted to the Court.

25. On 23 March 2019, the Applicant, on his own initiative, notified the Court that the Department for Administrative Matters of the Basic Court in Prishtina (hereinafter: the Basic Court) from the moment that his claim for administrative conflict was filed on 24 July 2018, until the moment of the last reporting to the Court, has not yet sent *"any summon, invitation, or other request"* in connection with the initiated claim. The Applicant stated that, as a consequence, on 22 March 2019, he submitted his second request for "*expedition of the proceedings*" in relation to his claim and sent to the Court a copy of his request for expedition of procedure addressed to the Basic Court. Finally, the Applicant requested the Court to notify him about the stage of proceedings in which the Referral KI108/18 is being considered.

26. On 28 March 2019, the Court sent a letter to the Basic Court notifying it about the registration of the Referral and requesting that it notifies the Court, no later than 9 April 2019, regarding the stage of proceedings at which is the consideration of the claim for administrative conflict filed by the Applicant on 24 July 2018.

27. On 12 April 2019, the Basic Court responded to the Court, notifying the latter as follows: *"Referring to your request, we inform you that the case A. No. 1822/2018 of 24.06.2018 according to the claim of the claimant, Blerta Morina, no procedural action has been taken by this court despite the fact that the court is aware of the urgency of the matter to be addressed. This is due to the large number of cases awaiting to be dealt with according to priority of receipt to the court".*

28. On the same date, the Court notified the Applicant that Referral KI108/18 is still under consideration, and informed him about the further procedural steps which had been taken up to that date.

29. On 16 April 2019, 5 June 2019 and 4 July 2019, the Applicant notified the Court that on the same dates he submitted his third, fourth and fifth request for expedition of proceedings before the Basic Court.

30. On 21 August 2019, the media reports highlight the fact that the Basic Court, before which the Applicant's claim for administrative conflict is pending, on 27 December 2018 rendered a decision on merits in a case similar to the case under consideration before this Court. The latter, from the same media reports, found out that the Court of Appeals, on 2 August 2019, fully upheld the decision of the Basic Court, which ordered the administrative authorities of the Municipality of Prizren to change to the person "Y" [the exact identity will not be disclosed by the Court, *ex officio*, based on paragraph (6) of Rule 32 of the Rules of Procedure] the name at his request and the gender marker from "F" (Female) to "M" (Male). The details of this case are reflected in paragraph 167 of the Resolution on Inadmissibility.

31. On 5 September 2019, the Review Panel considered the preliminary report of the Judge Rapporteur and, unanimously, made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts of case KI108/18

32. The Applicant was born in Gjakova. At the time of the submission of the present Referral to the Court, in the civil registry books of the Republic of Kosovo, the Applicant is registered with the name "Blerta Morina" and with the female gender marker, namely "F".

33. According to the case file, it appears that the Applicant has always had a tendency to identify himself with the male gender rather than with the female gender, as assigned at birth. As an adult, he claims to live and appear as a *"man in all areas of life: at work, in the city, while spending time with family, at home, while spending time with friends and in all other situations and circumstances of daily life."* He also claims that the name and gender listed in his identification documents do not match with the name with which he is presented and with the gender with which he is identified. Such fact, according to the allegation, compels him *"to go through difficult and discriminatory experiences in his daily life".*

34. On 27 December 2017, according to the case file, the Applicant was visited by a psychologist and a psychotherapist for the purposes of discussing the issue of hormonal treatment for physical "*transition*" from female to male. (For the definition of "*transition*" (see, *inter alia,* the publication referred by the Applicant of the World Professional Association for Transgender Health, "*Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*")). The Applicant received a positive recommendation from the medical expert he had visited. In January 2018, the Applicant conducted another medical visit to a clinic in North Macedonia, where he began hormonal treatment related to the transition.

35. On 4 April 2018, the Applicant filed a Referral with the Office of Civil Status, Department for General Administrative Matters in the Municipality of Gjakova (hereinafter: the Office of Civil Status). The Applicant's request contained two components. The first component concerned the Applicant's specific request to change his personal name from "Blerta" to "Blert"; while the second component of the request concerned the Applicant's specific request to change the gender marker from "F to "M". The Applicant requested the Civil Registry Office to have his personal name and gender marker changed according to his proposal in all identification documents so that "*the name and gender marker are in harmony with his gender identity*". In his request, the Applicant explained that he, since childhood, had tendencies to dress as a male and identify with the male gender rather than the female gender assigned at birth. The Applicant reasoned his request to change his name and gender marker, stating that he felt discriminated against and excluded from society because of the inconsistency of his gender identity with the gender marker in his identification documents. He stated that the name "Blerta" impedes his integration in the society because it does not enable him to live freely and in accordance with his gender identity, namely the male gender. As a result, he argued that changing the name constituted an essential condition for his integration into society. Concerning his request for the gender marker, he argued that the gender assigned to a person at birth is not the primary determinant since there is importance to be put also on the personal perception of the gender or the gender which the person considers to be his or her own. Therefore, according to him, the requirement to change the gender marker is grounded since the gender determination in the documents should be adjusted to the gender with which the person is identified. In support of his arguments, the Applicant cited and referred to the following acts/practices applicable in the legal order of the Republic of Kosovo:

36. Articles 22 [Direct Applicability of International Agreements and Instruments] and 53 [Interpretation of Human Rights Provisions] of the Constitution; (ii) Article 8 of the ECHR; (iii) Articles 3, 6 and 12 of the Universal Declaration of Human Rights (hereinafter: the UDHR); (iv) Article 17 of the Covenant on Civil and Political Rights (hereinafter: CCPR); (v) ECtHR cases: *B. v. France* (Judgment of 25 March 1992) and *Christine Goodwin v. United Kingdom* (Judgment of 11 July 2002); (vi) Articles 12 [Modes for changing personal names] and 17 [Procedure for alteration of personal names based on a request] of Law No. 02/L-118 on Personal Name (hereinafter: Law on Personal Name); (vii) paragraph 1.8 of Article 6 [Reasons for the personal name change] of

Administrative Instruction no. 19/2015 on the Conditions and Procedures for Personal Name Change and Correction (hereinafter: Administrative Instruction on Personal Name); (viii) paragraph 1.9 of Article 3 [Definitions] of Law No. 05-L-020 on Gender Equality (hereinafter: the Law on Gender Equality); (ix) Article 1 [Purpose] of Law No. 05/L-021 on Protection from Discrimination (hereinafter: Law on Protection from Discrimination); and (x) The Legal Opinion of the Ombudsperson, in the capacity of Friend of the Court (*Amicus Curiae*) for the Basic Court in Prishtina regarding the state of homophobia and transphobia in Kosovo of 2 May 2017 (hereinafter: the Legal Opinion of the Ombudsperson) regarding the state of homophobia and transphobia in Kosovo).

37. On 26 April 2018, the Civil Registry Office by Decision [No. 02-201-02-8319] rejected the Applicant's request in respect of both the aforementioned components. In the reasoning of its Decision, the Civil Registry Office stated that the Applicant did not meet the criteria set out in the Administrative Instruction on Personal Name. According to the Civil Registry Office, the reasonableness provided by the Applicant does not stand and fails to meet the purpose of sub-paragraph 1 of paragraph 6 of Article 6 of this Administrative Instruction on Personal Name as the name "Blerta" does not impede the integration of the person in society in the Republic of Kosovo. The Civil Status Office did not reason the rejection of the request for the change of gender marker.

38. On 29 May 2018, the Applicant filed an appeal against the Decision [No. 02-201-02-8319] of 26 April 2018 of the Office of Civil Status before the Civil Registration Agency. In the appeal, the Applicant requested the Civil Registration Agency to annul the challenged Decision of the Civil Status Office because, allegedly, the same is "*unlawful and discriminatory.*" In this regard, the Applicant stated three reasons. Firstly, according to the Applicant, this Decision was rendered in the absence of an authorization prescribed by law and consequently had no legal basis. Secondly, according to the Applicant, this Decision was rendered in contradiction with the legal provisions governing the form or mandatory elements of an administrative act because, *inter alia*, the Office of Civil Status failed to provide reasoning in accordance with Article 48 (Reasoning of a written administrative act) of the Law No. 05/L-031 on General Administrative Procedure (hereinafter: LAP). Thirdly, according to the Applicant, this Decision was unlawful because it was contrary to the Constitution, the ECHR and the case-law of the ECtHR, the UDHR, the CVPR, the Law on Gender Equality and the Law on Protection from Discrimination.

39. On 13 June 2018, the Civil Registration Agency by Decision [No. 64/04] rejected the Applicant's appeal as ungrounded. The Civil Registration Agency considered that the Decision of the Civil Status Office was rendered in accordance with (i) Article 12 of the Law on Personal Name and Administrative Instruction on Personal Name; and (ii) Article 11 (Components stemming from natural events) and Article 32 (Basic birth documents) of the Law on Civil Status.

40. As regards the first component, namely the Applicant's complaint regarding the non-approval of the change of the personal name from "Blerta" to "Blert",

the Civil Registration Agency stated that the reason given by the Applicant for the change of the personal name does not stand because it *"provided no evidence, document, other note or photograph, archive document showing that personal name Blerta Morina is preventing the person from her integrating in the society"*.

41. With regard to the second component, namely the Applicant's complaint regarding the non-approval of his request for the change of the gender marker, the Civil Registry Agency stated that the Applicant's request was not grounded, *"because by law it is meant that the verification of gender and eventually the change or correction of this component of the civil status is done only with a medical report or decision"*. Furthermore, the Civil Registration Agency stated that *"a person must make eventual changes to the constituents of the civil status which are facts deriving from a natural event, including the gender of the person as a natural fact, must be regulated by a medical report, then the medical report produces legal consequences in constituents of the civil status"*. The Civil Registration Agency concluded its reasoning by pointing out that the Applicant did not provide convincing evidence *"that he is entitled to change the personal name [...] and gender as a natural fact"*.

42. On 24 July 2018, the Applicant filed a claim for administrative conflict against the Decision [No. 64/04] of the Civil Registration Agency of 13 June 2018, with the Basic Court.

43. On 30 July 2018, the Applicant filed his present Referral with the Court.

44. On 4 December 2018, 22 March 2019, 16 April 2019, 5 June 2019 and 4 July 2019, the Applicant filed the first, second, third, fourth and fifth request for expedition of proceedings regarding the claim for administrative conflict filed with the Basic Court.

45. To date, according to the Applicant's allegation and from the case file and the information submitted to the Court, it results that the Basic Court has not decided upon the Applicant's claim for administrative conflict.

Applicant's allegations

46. The Applicant alleged that Decision [No. 64/04] of 13 June 2018 of the Civil Registration Agency violated his fundamental rights and freedoms guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 36 [Right to Privacy] of the Constitution in conjunction with Article 8 (Right to respect for private and family life) of the ECHR. In his allegations raised before the Court, the Applicant initially (i) seeks that his Referral be declared admissible and, consequently submits his arguments with respect to the request for exemption from the exhaustion of legal remedies provided by law; he further submits his allegations of alleged violations of the abovementioned articles as a result of the challenged Decision of the Civil Registration Agency, namely (ii) the change of the name from "Blerta" to "Blert" and (iii) the change of the gender marker from "F" to "M"; and finally, he also submits (iv) his arguments concerning the claim for compensation for non-pecuniary damage caused by the Republic of Kosovo in the event of the violation of his rights and fundamental freedoms. In

the following, the Court will present the Applicant's allegations focusing on these four categories of issues.

(i) With regard to the exhaustion of legal remedies

47. As to the admissibility of the Referral, the Applicant focused his argument on the procedural requirement of exhaustion of all legal remedies before submitting a Referral to the Court, considering that in his opinion, all other admissibility requirements have been met.

48. In this regard, the Applicant referred to the case-law of the ECtHR and the Court itself, noting that the latter, in many cases, clarified the importance of the obligation to exhaust legal remedies and the fact that this obligation subsumes the principle of subsidiarity, which implies that the state authorities and the courts should initially be able to prevent or remedy constitutional violations. At the same time, the Applicant stated that, in the legal system of the Republic of Kosovo, the obligation to exhaust legal remedies is based on the assumption that the legal order provides effective remedies to address the violation of fundamental rights and freedoms established in the Constitution. In the present case, the Applicant alleges that *"the available legal remedies are ineffective for addressing the respective violations"* and consequently requests that, based on the practice of the ECtHR and of the Court, be exempted from the fulfillment of this obligation laid down in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

49. In this context, the Applicant states that the parties are only required to exhaust "*accessible*" and "*sufficient*" legal remedies and that the existence of such remedies must be "*certain in practice and not only in theory*". Otherwise, such remedies shall be deemed "*inadequate and ineffective*". Moreover, according to the ECtHR case-law, the existence of "*special circumstances*" may exempt the Applicants from the obligation to exhaust legal remedies. In support of these arguments, the Applicant refers to the case-law of the ECtHR in cases *Selmouni v. France* (Judgment of 28 July 1999, paragraph 75 and references therein) and *Van Oosterwijck v. Belgium* (Judgment of 6 November 1980, paragraph 36 and references therein).

50. The Applicant specifically alleges that in the circumstances of his case: (i) the legal remedy has actually been used; (ii) the legal remedy is inadequate and "*ineffective*"; and (iii) there are "*special circumstances*" for his exemption from the obligation to exhaust all legal remedies provided by law.

51. As regards the first (i) and second (ii) arguments, the Applicant states that he used the available legal remedies. He states that he has exhausted all legal remedies in administrative proceedings by filing appeal against the decision of the Civil Status Office and challenging the latter before the Civil Registration Agency, which upheld the decision of the former. The Applicant states that he also initiated the claim for administrative conflict with the Basic Court. However, and despite the fact that his claim is pending before the Basic Court, according to the Applicant, the Court should exempt the Applicant from the obligation to exhaust these legal remedies because the latter are allegedly

inadequate and "*ineffective*", because "*the available legal remedies provide only theoretical and not practical certainty in the Applicant's case*".

52. In addition, the Applicant states that without prejudice to the decision of the Basic Court or the Court of Appeals, "*the lengthy period of time for reviewing and resolving an administrative case in the Applicant's case renders the legal remedy inadequate and ineffective, precisely because of the particular circumstances of the present case*". Therefore, the Applicant asserts that the filing of claim for administrative conflict and subsequently a potential appeal to the Court of Appeals "*does not constitute an effective legal remedy as it does not address the violation of rights of the Applicant within a reasonable time as guaranteed by the Constitution and the ECHR*".

53. In arguing that the legal remedies available are "*ineffective*" in the circumstances of the present case, the Applicant first refers to the General Annual Report of the KJC of 2017, according to which in the Basic Court, where the claim was filed, there were 5,304 pending cases in total. During 2017, a total of 2,268 administrative cases were resolved, while according to the KJC quarterly report for 2018, it has been concluded that there are a total of 5,297 unresolved cases. The estimated time of resolving administrative cases in 2017, according to these data, for one case is estimated to be approximately 853 days in the first instance. Further, the calculations of the Court of Appeals show that it takes 412 days to resolve a second-instance case. Therefore, according to the allegation, it takes on average three (3) years and four (4) months to resolve an administrative case pending before the Basic Court and the Court of Appeals. In this regard, the Applicant states that the European Commission in its Progress Report on Kosovo published in April 2018 assessed that the large number of administrative cases pending before the Basic Court "*is unlikely to be reduced in the future*".

54. The Applicant also alleges that there is a real possibility that the Basic Court will not decide the case on merits, but only remand it to the administrative proceedings before the administrative authorities that have already decided, which makes the length of the proceedings at least twice longer. In highlighting this problem, the Applicant also refers to the findings of the Ombudsperson in his Report No. 425/2015 of 22 August 2016 regarding the lack of effective legal remedies addressed to the Ministry of Labor and Social Welfare and the Basic Court. The Ombudsperson, according to the Applicant, in this report found that in the administrative disputes the courts did not enter in the assessment of the merits of the case but only held procedural violations and consequently the latter were remanded for reconsideration to the authority which has initially made the decision, whilst that administrative body decides again in the same way. Among other things, according to the allegation, the Ombudsperson, in this Report, also "*found that there has been a violation of human rights by the claims filed by the complainants, because the legal remedies were ineffective and did not secure the exercise of the right to which the complainants were entitled*".

55. Regarding the length of the proceedings, the Applicant states that the ECtHR and the Court have already stated that the length of the proceedings itself "*does not render the legal remedy ineffective and that the reasonableness of the*

length of the proceedings should be assessed in the circumstances of the case", namely, according to the Applicant, based on the "*complexity of the case*"; "*conduct of the relevant authorities*" and the "*case under consideration*" for the Applicant in that dispute.

56. As to the "*complexity of the case*", the Applicant alleges that the present case relates only to a party seeking his right to change the name and gender marker and all relevant evidence has been attached to the claim. The Applicant's requests do not pose great legal complexities. Gender identity is a protected legal category under Article 1 of the Law on Protection from Discrimination and paragraph 1.9 of Article 3 of the Law on Gender Equality and "*falls within the framework of the state positive obligations to protect the right to privacy under Article 36, Article 22, Article 53 of the Constitution*". The ECtHR case-law in a number of cases specifies the state's positive obligation to legally recognize the gender identity with which the person is identified and offers a broad practice of "*what can be considered a violation of the right to privacy in the context of legal recognition of gender identity and what cannot be considered as such*". According to the Applicant, the fact that this is the first case presented by a transgender person seeking to have his gender identity legally recognized and his name changed so as to coincide with his gender identity, should not be considered a characteristic that makes the case complicated. In support of his allegations the Applicant refers to the cases of the ECtHR: *B. v. France*, cited above; *Christine Goodwin v. United Kingdom*, cited above; and *A.P. Garcon and Nicot v. France* (Judgment of 6 April 2017).

57. With regard to the "*conduct of the Applicant and of the relevant authorities*", the Applicant states that he filed a claim within the legal time limit and there is no circumstance or evidence to consider that the Applicant's conduct affected or would have affected the delay of the proceedings. The Applicant considers the change of the name and of the gender marker "*essential for his personal and social development, and for such reason he is ready to use all legal remedies until the legal recognition of his gender identity*".

58. Whereas, as regards the "*conduct of the authorities*", the Applicant states that in this context the duration of addressing administrative cases at the Basic Court and the risk that in most cases claims are not decided on merits, but it is decided that the matter is remanded to the administrative authorities for retrial, and the latter, according to the Applicant and referring to the relevant reports of the Ombudsperson, in most cases decide as in the first case. Accordingly, the Applicant states that "*the responsibility for delay rests with the relevant authorities*".

59. Finally, with regard to the "*issue under consideration*" for the Applicant, he emphasizes that the changes suffered by the "*transition process*" through hormone therapy are increasingly visible in the physical aspect. The issue of changing the name and gender marker "*is essential for the Applicant.*" Failure to deal with the case in a timely manner "*would cause a violation of his rights, as the status of name and gender by which the Applicant is identified and presented mismatch with the name and gender marker appearing in his*

identification documents would continue and the Court will not be able to hear his case within a reasonable time".

60. In this respect, the Applicant states that the ECtHR in a number of cases considered the "*case under consideration for the Applicant*" as "*a special circumstance*" for assessing the violation of the right to a trial within a reasonable time, guaranteed by Article 6 of the ECHR. Such a criterion, the Applicant emphasizes, has also been used by the ECtHR in civil status cases, such as the cases of the ECtHR: *Bock v. Germany* (Judgment of 21 February 1989); *Laino v. Italy* (Judgment of 18 February 1999) and *Mikulić v. Croatia* (Judgment of 7 February 2002). The ECtHR held that "*the cases concerning the civil status of the Applicants require special care for their examination within a reasonable time*", finding that there has been a violation of the right to a trial within a reasonable time in all three aforementioned cases.

61. Finally, and with regard to the Applicant's third argument (iii), namely the existence of "*special circumstances*" in the circumstances of the present case, the Applicant refers to the cases of ECtHR *Van Ooserwijck v. Belgium* (Judgment of 6 November 1980 and the relevant references therein) and *Selmouni v. France* (Judgment of 28 July 1999 and the relevant references therein) according to which, according to the Applicant, the existence of "*special circumstances*" may exempt the Applicant from the obligation of exhaustion of legal remedies which he has at his disposal. The ECtHR also stated, according to the Applicant, that the application of the exhaustion rule should also include the context. In relation to the latter, the Applicant emphasizes as a "*special circumstance*" in his case the "*inconsistency of his appearance and behavior with the gender presented in the identification documents*" and the "*legal and political context*" related to the community which he represents.

62. With regard to the former, "*special circumstance*" the Applicant first states that the designation of the female and not of the male marker, and at the same time the name "Blerta" and not "Blert" in his identification documents constitute "*obstacles which do not allow him the enjoyment of the right to private life and put him in situations that violate his human dignity*".

63. In this regard, he reiterates that in January 2018, he started the process of physical transition, and as a result of the hormonal treatment, he "*has already begun to experience distinct physical changes while losing female characteristics*". Furthermore, considering that the Republic of Kosovo lacks care and other medical services for transgender persons, the Applicant is treated in North Macedonia, and conducts medical visit every four (4) months. As a result, he has to cross the border and be subject to the checking of identification documents, whilst the difference in his physical appearance is even greater, and he is constantly subject to violations of his constitutionally guaranteed rights against discrimination and protection of privacy, in particular. Degrading treatment at border crossings, according to the Applicant, is also ongoing as a result of his participation in international conferences, taking into account that he is also the director of the non-governmental organization "CEL", which deals with advocacy, protection and

improvement of the life of the LGBT *("Lesbian, Gay, Bisexual and Transgender")* community.

64. With regard to the latter, *"special circumstance"* namely the *"legal and political context"*, the Applicant states that *"one should take into account the fact that the transgender community is a highly marginalized and prejudiced category in the Kosovo society"*. This fact, according to the Applicant is *"a known fact"* and as such was confirmed by the Ombudsperson in the *Amicus Curiae* sent to the Basic Court regarding the state of homophobia and transphobia in Kosovo as well as in the Annual Report for 2017.

65. To illustrate this context, the Applicant states that it is important to mention two of the most important events in the history of the LGBTI *("Lesbian, Gay, Bisexual, Transgender and Intersex")* community in Kosovo, namely the attack on the Kosovo 2.0 newspaper in 2012 and the organization of the Pride Parade in 2017 [Clarification: the Applicant in some cases refers to the LGBT acronym and in some cases to the LGBTI acronym]. The Applicant states that these events reveal *"the homophobia and transphobia of Kosovar society"*. Despite some positive developments, it is clear, according to the Applicant, that *"the state authorities do not use applicable laws to properly address violations and cases involving the LGBTI community"*.

66. Finally, the Applicant states that *"the acceptance for the constitutional review of the Decision of the CRA* [Civil Registration Agency] *by the Constitutional Court is necessary and important to reflect positive social change in the legal context of the treatment of the LGBT community by the local institutions in Kosovo"*. By accepting the constitutional review of the challenged Decision, the Court, according to the allegation, *"would establish a much-needed standard in Kosovo for the protection of the rights and freedoms of the LGBTI community in Kosovo"*. According to the allegation, *"the legal and political context in relation to the protection of the LGBTI community in Kosovo must also be considered in favor of the Applicant's request to be exempted from the obligation to exhaust all legal remedies"*.

(ii) As to the merits, namely the Applicant's request to change his name from "Blerta" to "Blert"

67. The Applicant alleges that Decision [No. 64/04] of the Civil Registration Agency was rendered in violation of his fundamental rights and freedoms guaranteed by Articles 23, 24 and 36 of the Constitution in conjunction with Article 8 of the ECHR.

68. In this context, the Applicant states that the rejection to change his name violated his right to privacy, which, according to the ECtHR's case-law, includes also the gender identity. The Applicant states that elements such as gender identification, name, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the ECHR. Furthermore, the Applicant continues stating that the ECtHR held that *"the notion of personal autonomy is an important principle that defines the interpretation of guarantees under Article 8 of the ECHR and that, since the very essence of the ECHR rests on respect for human dignity and freedom, the right of*

transgender persons to personal development, physical and moral security is protected by the Convention". In support of this allegation, the Applicant refers to the cases of ECtHR *B. v. France*, cited above; *Christine Goodwin v. United Kingdom*, cited above; and *A.P. Garcon and Nicot v. France*, cited above. Therefore, in this respect, the Applicant also alleges that the aforementioned Decision was also rendered in violation of his rights guaranteed by Article 23 of the Constitution.

69. The Applicant also alleges that Decision [No. 64/04] of the Civil Registration Agency was rendered in violation of Article 24 of the Constitution and is consequently discriminatory. In support of this allegation, the Applicant bases on the reasoning of the Civil Registration Agency, according to which, "*giving the justification that a person wishes to change his/her name because of his or her gender identity does not constitute sufficient reason for Kosovo citizens to use their right to change their name*". According to the Applicant, this reasoning excludes the Applicant, on the basis of gender identity, from enjoying the rights guaranteed to all other citizens. By not treating gender identity as a protected constitutional and legal category, the challenged Decision, in addition to violating Article 24 of the Constitution, allegedly also violates the Law on Protection from Discrimination and the Law on Gender Equality.

70. In addition, according to the Applicant, the challenged Decision was rendered also in violation of the LAP, the Law on Personal Name and the Administrative Instruction on the Change of Personal Name. In this regard, the Applicant submits to the Court two categories of arguments (i) "*lack of reasonableness*" and (ii) "*lack of additional documents*".

71. As to the former category, the challenged Decision rejected the Applicant's request to change his name based on the "*lack of reasonableness*" of this request. According to the Applicant, the "*lack of reasonableness*" is not a legal basis upon which a request to change a name can be rejected.

72. More specifically, according to the Applicant, Article 12 of the Law on Personal Name guarantees that the personal name can be changed at the request of a person, and the procedure for changing the name also sets out the relevant restrictions provided for in Article 18 of the Law on Personal Name. The latter does not define "*lack of reasonableness*" as one of the legal grounds based on which a request may be rejected. Therefore, according to the Applicant, "*lack of reasonableness*" does not constitute a legal basis on which a request can be rejected. The same case is with the Administrative Instruction on Personal Name and with the Application Form itself available to the parties when filing requests for changing of the name. The documentation required through the latter is limited to the criteria of Article 18 of the Law on Change of Personal Name.

73. Moreover, the relevant Application Form specifies the reasons given in a declarative manner, in the concrete case because the personal name "*impedes the person's integration into society*", but does not require the presentation of narrative explanations. However, despite the fact that the narrative explanations are not required by the Law on Change of Name, Administrative

Instruction on Personal Name, nor the relevant Application Form, and despite the findings of the Civil Registration Agency, the Applicant also filed his request in the narrative form where he explained that he is a transgender person and presented the reasons as to why his name "*impedes the integration of the person into society*".

74. In this respect, the Applicant states that beyond the fact that the "*lack of reasonableness*" used by the Civil Registration Agency in rejecting his request no longer coincides with the factual situation because the Applicant submitted the relevant reasons when submitting the request, namely "*lack of reasonableness*", is inconsistent with and has no legal basis on the Law on Personal Name, and consequently, is inconsistent with the LAP. This is because based on Article 52 (Unlawfulness of an administrative act) in conjunction with Article 4 (The principle of legality), an administrative act is unlawful if issued in the absence of an authorization based on a law.

75. As to the second category, namely, "*lack of additional documents*", the Applicant states that part of the Decision of the Civil Registration Agency stating that "*the Applicant has not provided evidence, photographs and other documents that would prove that the name hinders the integration of the person into society*", is in violation of the Law on Change of Personal Name and Administrative Instruction on Personal Name. Moreover, according to the Applicant, even if this were to be the case, the Civil Registration Agency acted in violation of the relevant provisions of the LAP, without requiring the Applicant the same before issuing its Decision. This is because, according to the Applicant, Article 11 (Principle of Information and Active Assistance) of the LAP obliges the Civil Registration Agency to assist the parties in protecting and exercising their legal rights and interests in the conduct of administrative proceedings, including clarifications on "*the essential legal requirements as well as the procedures and formalities provided for the issuance of an administrative act or the realization of a required real act, including the documents and statements to be submitted*". This request is also embodied in paragraph 4 of Article 73 (Form and content of request), of the LAP on the basis of which, "*The public authority shall try to understand what is required in the submitted request and, if necessary, contact the applicant for further clarification or supplementation*", which the Civil Registration Agency has failed to do. In the same regard, the Applicant also alleges a violation of Article 131 (Procedure for examination of the complaint by the competent public authority) and Article 132 (Procedure for examination of the complaint by the superior authority) of the LAP.

(iii) As to the merits, namely, the Applicant's request to change the gender marker from "F" to "M"

76. The Applicant states that the Civil Registry Agency rejected the request to change the gender marker as ungrounded because he did not submit a medical report which would prove the gender change as a constitutive element of civil status. This decision was issued by the Civil Registration Agency pursuant to Article 11 (Components stemming from natural events) and Article 32 (Basic Birth Documents) of the Law on Civil Status. According to the Applicant, the conditioning of recognition of gender identity by a medical report which proves

and identifies changes of gender assigned at birth is contrary to Article 36 of the Constitution in conjunction with Article 8 of the ECHR, Article 23 of the Constitution in conjunction with Article 3 of the ECHR and Article 53 of the Constitution, on the basis of which the fundamental rights and freedoms are to be interpreted in the light of the ECtHR case-law.

77. The Applicant elaborated the case-law of the latter by referring to certain specific ECtHR decisions, namely the case *A.P. Garcon and Nicot v. France* (cited above) and *Van Kück v. Germany* (Judgment of 12 June 2003). In these cases, the Applicant points out, the ECtHR found that not all transgender persons wish, and not all may be subjected to medical treatment or surgery and requests that such interventions be made to legally recognize gender identity, are not considered compliant practices "*with the respect for human freedom and dignity that are at the same time one of the main principles of the ECHR*". Therefore, the Applicant argues that the ECtHR case-law "*noted that the conditioning of legal recognition of gender identity even within the right to inviolability of physical integrity*", which implies also non-imposition of medical treatment. Therefore, the conditioning of the recognition of gender identity of transgender persons with sterilizing surgery or medical treatment, or surgical intervention or medical treatment that is likely to cause sterilization "*prevents a person from enjoying his or her right to gender identity and personal development which is a fundamental aspect of the right to respect for private life*".

78. In the context of the medical report which would confirm the change of gender assigned at birth of the Applicant, the latter also refers to the Law on Gender Equality, on the basis of which the gender identity "*covers the gender-related identity, appearance or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth*". According to the Applicant, the Law on Gender Equality is binding on the Civil Registry Agency in dealing with his request for change of gender because (i) *lex specialis derogat legi gjenerali*, and consequently the Law on Gender Equality as *lex specialis* regulates in particular the issue of gender, and thus has priority over other general laws; and (ii) *lex posterior derogat legi priori*, and consequently as a law adopted in 2015 versus the Law on Civil Status adopted in 2011, should have priority in the interpretation of his fundamental rights and freedoms.

79. The Applicant in the context of the Law on Gender Equality also invokes and alleges a violation of paragraph 1.3 of Article 3 (Definitions) which defines the definition of male gender as "*any person that considers itself as such, regardless of age or marital status*". In this regard, the Applicant argues that this definition does not include the determination of the gender that the person had at birth, but rather the "*subjective perception of gender or gender which the person considers to be his own*".

80. In this regard, the Applicant concludes his allegation by stating that the main basis on which the Civil Registration Agency relies that the Applicant has not provided a medical report evidencing gender differences is a conditioning of the legal recognition of the Applicant's gender identity and as such it is unconstitutional conditioning which is inconsistent with the aforementioned

case-law of the ECtHR, a practice which constitutes the main source of interpretation of fundamental rights and freedoms under Article 53 of the Constitution.

(iv) With regard to the Applicant's claim for compensation of non-pecuniary damage

81. The Applicant seeks compensation for non-pecuniary damage on account of *"violation of his/her freedoms and personality rights, pursuant to Article 183, paragraph 1 of Law No. 04/077 on Obligational Relationships"*. He states that the non-recognition of the Applicant's gender identity through a decision rejecting to change his name and gender marker *"caused psychological distress and suffering to the Applicant whilst making him feel excluded and rejected from the society and the state to which he belongs"*. Such refusal puts the Applicant in a situation that repeatedly violates his right to privacy, *inter alia*, whenever he is required to show an identification document.

82. The Applicant states that the right to compensation falls under Article 41 (Just Satisfaction) of the ECHR, which determines compensation in the event that the Court finds that there has been a violation of fundamental rights and freedoms. In many cases of violation of the right to privacy, the Applicant states that the ECtHR has decided that the party is entitled to the right to compensation for non-pecuniary damage. For example, in cases *Akdivar and Others v. Turkey* (Judgment of 16 September 1996) and *B. v. France* (cited above), the ECtHR awarded the parties the right for non-pecuniary compensation after finding that their privacy was violated by the Turkish state, namely the French state. For the latter, the ECtHR awarded an amount of 100,000.00 French francs because the gender identity of the Applicant had not been recognized.

83. The Applicant further claims that in the case *Dolenec v. Croatia* (Judgment of 26 November 2009), the ECtHR reiterated that mental health is an essential part of private life and relates to the aspect of the person's moral integrity. Maintaining mental stability in this context is a necessary precondition for respecting the right to privacy. In this regard, the Applicant stated that he continues to experience psychological distress and pressure due to the non-recognition of his gender identity by the state. Accordingly, he asserts that the state must compensate for the non-pecuniary damage caused due to violation of the right to privacy and the right to a dignified life, pursuant to paragraph 1 of Article 13 of the Law 04/L-077 on Obligational Relationships (hereinafter: LOR). In the name of this compensation, the Applicant requests to be compensated in the amount of EUR 5,000.00.

The Applicant's final request addressed to the Court

84. The Applicant requests the Court to:

(i) declare the Referral admissible for review; (ii) to hold that there has been a violation of the right to privacy, as established in Article 36 of the Constitution in conjunction with Article 8 of the ECHR; (iii) to hold that there has been a violation of dignity, as provided for in Article 23 of the Constitution; (iv) to

hold that there has been a violation of the right to equal protection against discrimination as provided for in Article 24 of the Constitution; (v) to order the Civil Registration Agency to approve as grounded the request to change the name from "Blerta" to "Blert" and the gender marker from "F" to "M" in the central registry of civil status; and (vi) to order the Civil Registration Agency to compensate the Applicant for non-pecuniary damage in the amount of € 5,000.00 as well as the costs of the proceedings and those of the lawyer.

KJC responses and comments

85. The Court addressed the KJC with a request to comment on the four specific questions listed in the part of the proceedings before the Court (see paragraphs 15, 19 and 20 of this Resolution on Inadmissibility). The Court communicated to the KJC that the specific issues raised by Referral KI108/18 were based on the case-law of the ECtHR in respect of the exhaustion of legal remedies as a procedural precondition to address the merits of a Referral. The Court addressed the KJC with such a request twice. The first time, on 16 October 2018, and considering that the KJC had not responded to the Court's questions, the Court addressed the KJC with the same questions for the second time on 8 November 2018. On this occasion, the KJC submitted its responses and comments to the Court.

86. In respect of the Court's first question as to whether the claim for administrative conflict can be regarded as a legal remedy that meets the standards of being a legal remedy "*sufficiently certain, not only in theory but also in practice*" in the circumstances of the present case, the KJC expressed the view that "*the claim as a regular legal remedy for initiating administrative conflict meets all standards to be sufficiently certain in the present case and other cases given that the courts are independent, apolitical, impartial and ensure equal access to all*". In addition, the KJC cited paragraph 4 of Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution: "*In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation*". [Clarification note: KJC mentions paragraph 5 of Article 55 of the Constitution but in the text it cited verbatim paragraph 4 of Article 55 of the Constitution]. The KJC did not provide any case-law examples, as requested by the Court.

87. In respect of the Court's second question as to whether a claim for administrative conflict can be regarded as a legal remedy that meets the standards necessary to be considered "*available*" to the Applicant, "*accessible*" to him and "*effective*" in relation to the allegations raised, the KJC stated that: "*the claim for the initiation of an administrative conflict as a legal remedy meets the standards necessary to be considered as a legal remedy available to the Applicant, as the courts enable and provide equal access to all and always strive to be as effective and efficient as possible in resolving cases despite facing a large number of pending cases that are accumulated due to a series of factors* as [are] *the remaining cases from previous years, new cases*

received at work, insufficient number of judges, etc". The KJC did not submit any case-law examples, as requested by the Court.

88. In respect of the Court's third question as to whether a claim for administrative conflict can be regarded as a legal remedy providing the relevant "*possibility of correction*" and "*reasonable prospect of success*" in relation to the allegations raised, the KJC stated that: "*only the court's decision can substantiate this, as the KJC is a body mandated to administer only the judiciary, but has no competence to interfere with the work of judges, who under the Constitution and laws are independent in deciding cases before the courts*". The KJC did not provide any case-law examples, as requested by the Court.

89. In respect of the fourth question of the Court as to whether it can be considered that there exist "*special circumstances*" in the Applicant's case that would potentially meet the criteria for the Applicant's exemption from the obligation to exhaust legal remedies, the KJC stated that: "*we consider that it is within the Constitutional Court's mandate to decide whether there are special "circumstances" in the Applicant's case KI108/18 that would potentially meet the criteria for exempting the Applicant from the obligation to exhaust legal remedies.*"

Applicant's additional comments to KJC comments and Applicant's replies to additional questions of the Court

90. The Court notified the Applicant about the responses received by the KJC and offered him the opportunity to submit his comments on them.

91. As to the KJC's response regarding the Court's first question as to whether a claim for administrative conflict can be regarded as a legal remedy that meets the standards of being a "*sufficiently certain remedy, not only in theory, but also in practice*", in the circumstances of the present case, the Applicant stated that the KJC responded by saying that the required standards were met and justified this with the argument that "*the courts are independent, apolitical, impartial and provide equal access to all*". However, according to the Applicant, those arguments of the KJC are not directly related to the certainty of the legal remedy and have nothing to do with ensuring a fair trial within a reasonable time as one of the main grounds that renders "*the administrative conflict ineffective*". Further, the Applicant stated that the KJC reference to paragraph 4 of Article 55 of the Constitution, which speaks about the limitations of human rights by public institutions, is "*entirely irrelevant to the question raised by the Constitutional Court*". The Applicant considered that the KJC did not address the standard for which it was asked by the Court, but merely stated that the administrative conflict "*meets all sufficient standards to be sufficiently certain in the present case and in other cases*". According to the allegation, this finding of the KJC is a statement that "*is not based on any fact or concrete evidence*".

92. With regard to the reply of the KJC to the Court's second question as to whether a claim for administrative conflict can be regarded as a legal remedy that meets the standards necessary to be considered "*available*" to the

Applicant, "*accessible*" to him and "*effective*" in relation to the allegations raised, the Applicant stated that the KJC provided ungrounded and contradictory findings which do not stand. In this regard, the Applicant states that the provision of equal access, according to the allegation of the KJC, does not make the legal remedy "*available, accessible and effective*" in relation to the allegations in case KI108/18. The contradiction of the KJC is that "*on one hand it considers that the administrative conflict meets the standards necessary to be considered as an available and effective legal remedy, while on the other hand it lists the reasons which impede the resolution of cases within a reasonable time, such as: the large number of pending cases due to the accumulation of cases from previous years, new cases received at work, insufficient number of judges, etc*". In terms of length of proceedings, the Applicant states that in the nine-month period of 2018, it is shown that the number of pending cases in the Basic Court has increased by 16.2% since the end of 2017, and now the estimated time for resolving a case in administrative proceedings in the first instance is 1,521 days or on average four (4) years and one (1) month.

93. The Court also requested the Applicant to answer two specific questions of the Court as to whether any request to expedite the proceedings before the Basic Court had been filed and whether the latter had taken any steps so far to proceed the claim, initiated by the Applicant on 22 July 2018.

94. As to the former, the Applicant notified the Court that a request for expedition was submitted on 4 December 2018 where it was requested that due to the "*special circumstances*" of the case, the latter should be given priority. In this respect, it was also stated that no summon or invitation was received from the Basic Court. As to the second, the Applicant informed the Court that the Basic Court "*has not taken any steps so far and we have not yet received any summon, invitation or other request from the trial judge.*"

***Amicus Curiae* of the Ombudsperson**

95. In the Legal Opinion submitted to the Court, the Ombudsperson stated that the main purpose of this intervention was to argue and provide a legal analysis regarding case KI108/18. Throughout the text of the Legal Opinion, the Ombudsperson stated that he would refer to the Applicant as Mr. Blert Morina, namely as a male applicant, because this is the gender with which he is identified, and will therefore use this reference without prejudice to the Court's decision regarding this Referral.

96. The purpose of this Legal Opinion, according to the case file, is to support the request for exemption from the exhaustion of legal remedies because, according to the Ombudsperson, "*the circumstances of the case render the awaiting of the processing of the claim by the Basic Court in Prishtina/Department for Administrative Matters, ineffective and inadequate remedy*".

97. In this regard, the Ombudsperson states that according to the ECtHR case-law, the Applicants should exhaust available "*effective*" legal remedies "*before the case can be referred to the Constitutional Court, but they must guarantee*

effectiveness and efficiency". This rule, according to the ECtHR, should be applied with a degree of flexibility and without excessive formalism, since the exhaustion rule is neither absolute nor should it be applied automatically, "*but it is very important to take into account the particular circumstances of each individual case*". Citing the case of the ECtHR in *Akdivar and Others v. Turkey* (cited above), the Ombudsperson emphasized that the general legal context should be taken into account in the present case, as well as the personal circumstances of the Applicant.

98. According to the Ombudsperson, the Applicant's request to be exempted from his obligation to exhaust all legal remedies based on the lack of an effective legal remedy in his case is also based on the KJC General Annual Report - where the statistics show 5,304 pending cases and the fact that the average time taken to conclude an administrative case pending before the Basic Court and the Court of Appeals is three (3) years and four (4) months. Such a prolonged delay, according to the Ombudsperson, cannot be qualified as an effective legal remedy in the context of Referral KI108/18.

99. The Ombudsperson also stated that the Court's case-law confirms such a finding in cases KI99/14 and KI100/14 (Applicants *Shyqyri Syla and Laura Pula*, Judgment of the Constitutional Court of 3 July 2014) where it was held that: "*even if there are legal remedies, in the Applicant's 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.*" In support of this argument, the Ombudsperson also referred to two other cases before this Court, namely case KI11/09 (Applicant *Tomë Krasniqi*, Decision to strike out the referral of 17 May 2011) and KI06/10 (Applicant *Valon Bislimi*, Judgment of 30 October 2010).

100. With regard to this case-law, the Ombudsperson is of the opinion that the Applicant's case is similar in two relevant respects. Firstly, as in the case of the election of the Chief Prosecutor, in the case of the Applicant, even if there are legal remedies, in his case they have not proved to be effective. On the contrary, based on statistics, the Ombudsperson states, "*not only have the legal remedies not proven to be effective, but also the legal remedies have proved positively inefficient*". Secondly, in the case of the election of the Chief Prosecutor, the Court emphasized the "*necessity*" that the election procedure be done in a timely fashion and because of that urgency it was decided that there were no legal remedies for exhaustion. According to the Ombudsperson, the case of the Applicant is an urgent case and therefore it is necessary that the case be resolved "*in a timely fashion and as soon as possible*".

101. Furthermore, the Ombudsperson states that although the Applicant has not undergone surgery, he is nevertheless shown to be "*experiencing the same feelings of vulnerability, humiliation and anxiety created when the domestic law situation falls in conflict with an important aspect of personal identity*". The evidence provided by the Applicant on situations requiring the showing of identification documents and the inconsistencies as well as the traumatic situations of crossing the border crossings make the Ombudsperson find that: "*The non-compliance of the legal status of Mr. Morina, with his personal*

gender identity, has an extremely severe impact on a number of frequent situations in his daily life". In such circumstances, the Ombudsperson considers that asking the Applicant to wait *"three years and four months"* is unreasonable, considering the real possibility that the Basic Court will not decide on the merits at all, but only remand the case for reconsideration.

102. The Ombudsperson also referred to his Report with recommendations issued on case A. No. 72/2015 regarding the lack of effective legal remedies of 17 October 2016, which *inter alia*, found that in administrative disputes the regular courts have not reviewed the merits of the case in the respective proceedings, but only found procedural violations and decided to remand the cases to the administrative body that initially rendered the decision and subsequently the case was decided in the same way again. In such cases, the Ombudsperson found that *"there has been a violation of human rights as the claim filed by the complainants in the capacity of an effective legal remedy were ineffective and did not ensure the exercise of their right under the law"*.

103. With regard to the merits of the Referral, the Ombudsperson emphasizes the obligation laid down in Article 53 of the Constitution, according to which human rights and fundamental freedoms must be interpreted in accordance with the ECtHR's case-law. In this regard, it was emphasized that the interpretation of the ECHR by the ECtHR has created a space for the application of the prohibition of discrimination based on sexual orientation and gender identity. It is a particular obligation of a state to protect human rights through its own legal system, thus ensuring that rights can be effectively enjoyed.

104. In this regard, the Ombudsperson states that the Court should take into account the case of *Christine Goodwin v. the United Kingdom* (cited above), in which the ECtHR stated that: *"It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity [...] The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, [...] be regarded as a minor inconvenience arising from a formality [...].* On the contrary, there is a conflict between social reality and the law that places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation, and anxiety (*ibid, emphasis added*)".

105. Finally, the Ombudsperson concluded by stating that the Applicant had provided sufficient evidence in support of his request to be exempted from the obligation to exhaust all legal remedies due to the fact that *"the circumstances of the case make the awaiting of proceedings in respect of the claim before the Basic Court an ineffective and inadequate remedy"*. The Ombudsperson noted that the Court's case-law indicates that in some cases it had *"flexible access and found that the Applicants had no effective legal remedy and therefore allowed the use of this jurisdiction without exhausting legal remedies"*.

Responses received from the Venice Commission Forum

106. As reflected in the proceedings before the Court, the latter addressed some specific questions to the Venice Commission Forum. The Court received a total of 16 responses, the content of which will be presented below.

107. As a preliminary note, the Court clarifies that the Venice Commission Forum is a forum which enables member courts of the Venice Commission to ask other member courts for specific information on their case-law. Therefore, the Venice Commission Forum should not be understood as an official opinion offered by the Venice Commission as such, since the procedure for seeking such an opinion differs from the informal procedure that characterizes the Forum. The latter serves as an incubator of information which enables courts to research on each other's case-law, with a view of benefiting from mutual experience in similar cases. In this regard, it is self-evident that the responses received are not binding on any court seeking additional information from the other courts. The only answers which are binding on the Court are those relating to decisions taken by the ECtHR, given that under Article 53 of the Constitution, all fundamental rights and freedoms must be interpreted in accordance with the decisions of the ECtHR.

Contribution submitted by the European Court on Human Rights

108. In its responses addressed to this Court, the ECtHR Department of Research and Library, under the supervision of the Juristconsult, submitted a document titled as "*a contribution to the case-law*", which emphasized the most important cases decided by the ECtHR in the area of transgender rights. As a note of attention, the following was also stated: "*This document was prepared by the Research and Library Division, under the guidance of the Juristconsult. It does not oblige the Court* [the ECtHR]".

109. As regards the recognition of the new gender identity, the ECtHR emphasized the case of *Christine Goodwin v. the United Kingdom* (cited above, paragraphs 90, 91 and 103) where it was held, *inter alia*, that "*the lack of legal recognition of her changed gender*" constituted a violation of Article 8 of the ECHR; whereas the inability of a transsexual person to marry was considered a violation of Article 12 (Right to marry) of the ECHR. The ECtHR, for a similar line of reasoning, also recommended that the following cases be considered: (i) *I.* v. *the United Kingdom* (Judgment of the ECtHR Grand Chamber of 11 July 2002, paras 69-73); (ii) *Grant v. the United Kingdom* (ECtHR Judgment of 23 May 2006, paras. 40-43) in which the ECtHR ruled that the denial of legal recognition of gender identity change and the denial of age-based pension applicable to other women, constituted a violation of Article 8 of the ECHR; (iii) *L. v. Lithuania* (ECtHR Judgment of 11 September 2007, paragraph 59), where it was found that there had been a violation of Article 8 of the ECHR due to the authorities' failure to submit implementing legislation to enable transsexual persons to have gender reassignment surgery and change gender in official identification documents; and (iv) *Y.Y. v. Turkey* (ECHR Judgment of 10 March 2015, paras 118-122), where it was found a violation of Article 8 of the ECHR considering that the gender reassignment surgery had to prove that

the person could no longer procreate, which in itself was considered an excessive demand.

110. Concerning the change of the name in official identification documents, the ECtHR highlighted several relevant cases in this regard. Initially, the ECtHR referred to the case *S.V. v. Italy* (ECHR Judgment of 11 October 2018, paragraphs 70-75), where the Italian state was considered not to have fulfilled the positive obligations provided for by the ECHR, as the Applicant's inability in that case to change the name (*"forname"*) for a period of two and a half years, on the grounds that the gender transition process was not completed through a gender change surgery, resulted in a violation of the Applicant's right to respect the private life guaranteed by Article 8 of the ECHR. The ECHR further referred, *inter alia*, to the cases of *Schlumpf v. Switzerland* (Judgment of 8 January 2009, paragraph 57), reiterating that the determination of the need to take measures for gender change is not a matter for a judicial review; *and B. v. France* (cited above, paragraph 63), which stated that failure to recognize in law the sexual identity of a transgender person after surgery constitutes a violation of Article 8 of the ECHR.

111. The ECtHR also referred to the case *Kück v. Germany* (cited above, paragraphs 56, 59, 63 and 84) in which it specifically stated that:

"Gender identity is one of the most intimate areas of a person's private life. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate.
Given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment. [This was said in citing case *Christine Goodwin v. the United Kingdom,* cited above]. *[...]*
In the absence of any exhaustive scientific findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain, [...] the approach taken by the Court of Appeal in examining the question whether the applicant had deliberately caused her condition appears inappropriate.
The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate... No fair balance was struck between the interests of the private insurance company on the one side and the interests of the individual on the other".

Contribution submitted by the Constitutional Court of Croatia

112. With regard to the exhaustion of legal remedies, the Constitutional Court of Croatia held that, in principle, the Applicants should exhaust all legal remedies. However, it emphasized that there are two possibilities which constitute an exception to this rule and if such exceptions are applicable, the Applicants can directly address the Constitutional Court of Croatia with a constitutional complaint. The first exception relates to cases where a regular court has not

decided the case within a reasonable time. In such cases, the Applicants may refer a case directly to the Constitutional Court of Croatia. The second exception concerns cases where the challenged decision seriously violates the constitutional rights and it is quite clear that serious and irreparable harm will be caused if no case is initiated before the Constitutional Court of Croatia. In this respect, the latter brought before the Court's attention few cases where the above mentioned types of exemptions had been applicable. (See cases of the Constitutional Court of Croatia, U-IIIN-1005/2004 of 8 July 2004; U-IIIB-4366/2005 of 5 May 2006 and U-IIIB-1373/2009 of 7 July 2009; U-IIIB-369/2016 of 15 December 2015).

113. Regarding transgender rights, the Constitutional Court of Croatia confirmed that its case-law through which it has ruled twice on such cases and even, in one case, it decided before the Applicant had exhausted all legal remedies. (See cases of the Constitutional Court of Croatia, U-IIIB-3173/2012 of 18 March 2014 and U-III-361/2014 of 21 November 2017). In one specific case, the Applicant was born as a male and was registered as such in the civil registration books. After undergoing a gender change from "F" to "M" through surgery, she was able to have a decision that recognized the name and gender change based on the medical documentation she had submitted. Having succeeded in changing the name and gender, the Applicant in question succeeded in establishing, even legally, a new identity in the identity documents, including the new certificate of citizenship that reflected the changes made. Her further attempt to reflect the same changes on her diploma obtained from the University of Zagreb had been unsuccessful and, as a result, she appeared before the Constitutional Court of Croatia. The latter held that the extremely formalistic approach of the University of Zagreb which had rejected her request for modification of her diploma records was not an acceptable act and had, consequently, violated the Applicant's right to private life in relation to the right to fair and impartial trial.

114. Regarding the name change, it was also stated that in Croatia every person has the right to change his name, without giving any reason why he/she wishes to change it. When such a law had been examined before the Constitutional Court of Croatia, in terms of incidental control, it was stated that: "*it is clear that the current legal basis provides a high level of protection for the privacy and private life of all persons, who have changed their gender and personal name or changed their name before changing their gender.*"

Contribution submitted by the Constitutional Court of the Czech Republic

115. In principle, all requests submitted before the exhaustion of legal remedies are rejected as inadmissible, the Constitutional Court of the Czech Republic stated. However, there is one exception to this general rule which states that the Constitutional Court of the Czech Republic will not reject as inadmissible the request even if all legal remedies have not been exhausted, if the significance of the constitutional complaint goes substantially beyond the personal interests of the Applicant who filed that case.

116. In the case-law there can be noted several sets of arguments which have been raised based on this exception. The first set of arguments includes those that

emphasize that the legal remedies were not effective, but such arguments can only be accepted if there is an inefficiency that results from a systematic problem and in such cases, the Court's decision would have a general impact. The second set of arguments concerns cases where public authorities have used an unconstitutional law or used a law that has already been repealed. In such cases it is unreasonable to reject a request for non-exhaustion of legal remedies.

117. As to whether their case-law recognizes a case similar to that of this Court, the Constitutional Court of the Czech Republic stated that they had examined a very similar case. The Applicant in that case was a person who referred to himself as gender neutral and had requested that the identification documents reflect this. The relevant ministry informed her that neither changing her personal identification number nor initiating such a procedure without submitting a medical report proving completion of gender reassignment was permitted. The Constitutional Court of the Czech Republic did not consider the merits of that request as it held that all legal remedies had not been exhausted and that the appeal did not go beyond the Applicant's respective personal interest in applying the above exemption to exhaustion of all legal remedies. Later, the Applicant reached the Supreme Administrative Court of the Czech Republic and the case is still pending before that court.

Contribution submitted by the Federal Constitutional Court of Germany

118. The Federal Constitutional Court of Germany stated that a constitutional complaint is an extraordinary legal remedy which is subject to the principle of subsidiarity, according to which, the constitutional complaints can generally be submitted only after all legal remedies have been exhausted. The rationale behind this rule is that it is for the regular courts to resolve all the factual and legal issues of a case.

119. However, since recourse to a regular court may not always be possible, two exceptions to the principle of subsidiarity are recognized and they are provided by law. The first exception is that the constitutional complaint is of "*general importance*" and the second exception that the recourse to other courts would cause "*inevitable and severe disadvantage*". The Federal Constitutional Court interprets both exceptions in a strict manner.

120. More specifically as to the first exception, the Federal Constitutional Court used this exception when a case raises fundamental questions of constitutional law and consequently, its decision on that constitutional complaint would give clarity to a large number of similar cases. It has not been considered sufficient that a case has not yet been resolved by a court. As strict restrictions are applied in this respect, the Federal Constitutional Court has rarely ruled that it is not necessary to exhaust the legal remedies under this exception.

121. As to the second exception, the Federal Constitutional Court has rarely used this exception and in its case-law clarified that "*the inevitable and severe disadvantage*" implies a particular and grave interference with a fundamental right, which is irreparable in the sense that even a successful legal remedy could not put right such interference. (See the cases referred to by the Federal

Constitutional Court in the responses submitted to this Court: "*cf. BVerfG, Order of the Second Chamber of the First Senate of 17 January 2013 - 1 BvR 1578/12 -; cf. BVerfGE 19, 268 <273>).; cf. BVerfGE 75, 78 <106>; 87, 1 <43>; 101, 239 <270>; BVerfG, Judgment of first Senate of 24 April 1991 – 1 BvR 1341/90; cf. BVerfG, Order of Third Chamber of the First Senate of 28 December 2004, - 1 BvR 2790/04 -, paragraphs 17 and 185, with references ib BVerfGE 38, 105 <110>, BVerfGE 9, 3 <7 and 8>).*").

122. Regarding the argument that the exhaustion of legal remedies may be ineffective or the procedure may take a long time, the procedural law of Germany establishes other legal remedies to oppose the prolongation of a procedure. For example, a preliminary letter may be filed with the courts if there is a fear that the case will not be completed within a reasonable time and, if prolonged, the applicants may seek monetary compensation under the applicable law.

123. As to the Court's third question on the merits of the Referral, the Federal Constitutional Court stated that it has already adjudicated on a considerable number of cases concerning transgender rights. (See the cases referred to by the Federal Constitutional Court in the responses submitted to this Court: "*Order of the First Senate of 11 October 1978 - 1 BvR 16/72 - cf. Decisions of the Federal Constitutional Court, BVerfGE 49, 286; Order of the First Senate of 16 March 1982, - 1 BvR 938/81; cf. BVerfGE 60, 123; Order of the First Senate of 26 January 1993 - 1 BvL 38/92 - cf. BVerfGE 88, 87 ; Order of the Second Chamber of the First Senate of 15 August 1996 - 2 BvR 1833/95 ; Order of the First Senate of 6 December 2005 - 1 BvL 3/03 cf. BVerfGE 115, 1); Order of First Senate of 18 July 2006 - 1 BvL 1/04 -, - 1 BvL 12/04 - cf. BVerfGE 116, 243); Order of First Senate of 27 May 2008 - 1 BvL 10/05 - cf. BVerfGE 121, 175; Order of First Senate of 11 January 2011 - 1 BvR 3295/07 cf. BVerfGE 128, 109); Order First Senate Second Chamber of 17 October 2017 - 1 BvR 747/17 -; Order of the First Senate Second Chamber of 6 December 2016 - 1 BvQ 45/16 - ".)*.

124. In one of those decisions, the Federal Constitutional Court had ruled that the refusal of the state authorities to change/correct the gender data in the birth certificate in cases where a transgender person changed gender through surgery was declared unconstitutional. On that occasion, the Federal Constitutional Court held that such refusal was incompatible with Article 1 of Germany's Basic Law which protects human dignity and the way people perceive themselves as individuals. Human dignity was consequently interpreted to imply an individual's right to free personal development and of personality, including the determination of the civil status of the gender with which that individual is identified.

Contribution submitted by the Supreme Court of Mexico

125. The Supreme Court of Mexico explained the so-called "*amparo*" adjudication procedure, according to which unconstitutional and unlawful acts of the executive, legislative and judicial branches can be challenged. The basic principle is that an "*amparo*" procedure can only be initiated after all the legal remedies provided by the applicable law have been exhausted; however, there

are some exceptions to this general rule. A total of 10 exceptions were enumerated with the relevant sub-exceptions which are applicable in the Mexican legal system and the main reason was that the challenged act should cause irreparable damage.

126. As regards the transgender rights, the Mexican Supreme Court held that there was one such case with facts as follows. A transgender person, born as a male but identified with the female gender, had undergone a gender reassignment surgery and then sought to correct her birth certificate to reflect the changes made. She had also requested that information on her gender change be kept confidential and that the fact that she is a transgender person be not disclosed. Her case was decided by a judge who had granted her request for a birth certificate correction but who ordered new information to be added as "additions", namely as "corrections" to the original birth certificate. The Applicant considered such conduct to violate her rights to equality before the law, non-discrimination, privacy, human dignity and health. The Mexican Supreme Court, following her appeal, ruled that the judge's decision was unconstitutional and, on that occasion, ordered that the changes be made to the original certificate and that the changes not be made public except in court proceedings and in the police, if necessary. The reasoning used by the Supreme Court was as follows: "*Every individual lives a gender-relevant identity. They develop personality based on it, so that psychosocial sex should take precedence over morphological sex. Consequently, sex change imposed by a person is part of their right to free personality development and is in contravention of the fundamental rights to keep a person in the sex that they do not feel is theirs*".

Contribution submitted by the Supreme Court of the Netherlands

127. With regard to the exhaustion of legal remedies, the Supreme Court of the Netherlands stated that overcoming the stages of appeal and sending a case directly to it is known by the term *"sprongcassatie"* or in the literal translation "*jump cassation*" and such a step is possible only if all the interested parties in a case agree, but such cases are more of a contractual nature and do not coincide with the circumstances of the case explained by the Court. Consequently, it was pointed out that their practice does not recognize any similar case where, due to the Applicant's particular circumstances, the latter was exempted from the obligation to exhaust the legal remedies provided by law.

128. As regards the right to gender change, it was stated that the Netherlands Civil Code explicitly provides for this possibility and that is why the Supreme Court of the Netherlands did not have a case to declare on this issue. It was further stated that it was not possible until recently in the identification documents (birth certificate/passport) to state that a person does not have a defined gender, any indication that the person is intersex or that gender cannot be determined and therefore, in 2007, the Supreme Court of the Netherlands ruled that this was not foreseen by the applicable law. Also, in that case, the Supreme Court of the Netherlands stated that while, on one hand, Article 8 of the ECHR imposes upon the Contracting States a positive obligation to provide mechanisms for changing the indication of a person's gender; on the other

hand, the Contracting States have a margin of appreciation in this respect and, using such a margin, the Supreme Court in 2007 ruled that, up to that point, there was no basis to accept the conviction of an individual that he does not belong to any gender. However, in a later case in 2018, the Limburg District Court decided that the attitudes of society have changed, so that the requirement that a person have no indication of gender should be approved. In practice, the passport of such person would read: "*gender cannot be determined*" and the current legal provision is designed for cases where gender cannot be determined at birth, which is not the case at hand. The Assembly is in the process of discussing whether the law should be amended to accommodate persons who do not identify with either gender. In this respect it was emphasized that the Netherlands court did not admit that there is a "*third gender*" but stated that it was possible for the identification documents to state that "*gender cannot be determined.*"

Contribution submitted by the Constitutional Court of Hungary

129. With regard to the exhaustion of legal remedies, the Constitutional Court of Hungary held that the Applicants can only appear before it when all legal remedies have been exhausted or when no remedy is available. It was further stated that there is an exception whereby the Applicants can apply directly to the Constitutional Court of Hungary if a legal provision is applied in violation of the Fundamental Law of Hungary or when a legal provision becomes ineffective and the rights are directly infringed, without a court decision. The other exception is when there is no procedure that provides a legal remedy designed to correct the violation of the respective rights.

130. As to whether they have had similar cases, the Constitutional Court of Hungary stated that they had a very similar case to the case pending before the Court. The case in question is not translated into English, but its summary is submitted to the case database of the Venice Commission.

131. The case concerned a refugee who was also transgender and had applied for asylum in Hungary. He requested that his identification documents be written as male since he did not identify with the female gender that figured in his documents. The Hungarian authorities had initially rejected the request, citing that these rights belong only to Hungarian nationals and not to asylum seekers. However, at the end of the litigation process, the Applicant's constitutional complaint was also accepted by the Constitutional Court of Hungary, which decided that the right claimed by the Applicant, although a refugee and asylum seeker, was a universal right. In this respect, it was found that he had been discriminated against on the basis of citizenship origin as the right to a name derives from the right to human dignity and as such this right is inviolable. The Constitutional Court of Hungary considered the right of transgender persons to change the name as a fundamental right based on the right of the person to personal integrity and equal human dignity.

Contribution submitted by the Constitutional Court of Latvia

132. The Constitutional Court of Latvia stated that there was only one exception to the general rule that all legal remedies should be exhausted before a

constitutional complaint is filed. Such exemption relates to cases where the constitutional complaint is of general interest or if the general remedies would not be in a position to avoid substantial damage that would be caused to the Applicant. The concept of "*substantial damage*" is interpreted to mean a negative and irreversible consequence for the constitutional complainant. The latter bears the burden of proof to prove such a thing.

133. The case-law of the Constitutional Court of Latvia shows the self-restraint used in respect of this exception, although as such it is possible. In this respect, there is only one case where this exception was used. In that case it was considered that the general remedies did not have the capacity to avoid the substantial damage to the Applicant (see the case of the Constitutional Court of Latvia, no. 2003-19-0103 of 14 January 2004), and in which no broad reasoning was given on this point but it was emphasized that the case itself shows that the rights and freedoms of the Applicant cannot be protected by the general remedies to which he had access and that substantial damage would be irreversible.

Other contributions sent to the Court

134. The State Court of the Principality of Liechtenstein held that the Applicants should exhaust all possible remedies of appeal and that no exception was ever made to this rule. However, as far as transgender rights are concerned, it has been confirmed that there have been no such cases.

135. The Supreme Court of Finland stated that they did not deal with a case similar as described by the Court and that in Finland all courts have an obligation to give precedence to the Constitution in cases where a law is incompatible with the Constitution. However, as far as transgender rights are concerned, it has been confirmed that there have been no such cases.

136. The Constitutional Court of North Macedonia noted the differences in jurisdiction that exist in the constitutional adjudication as to the exhaustion of legal remedies. In this respect, it was emphasized that individuals have the right to appear directly to the Constitutional Court of North Macedonia in cases where it is alleged that a public authority has violated an individual right; however, according to the stipulation, this provision causes problems in practice as such jurisdiction places it in the position to serve as a court of first instance. Concerning "*special circumstances*", it was stated that no similar case was filed but that, in their view, all cases related to the protection of human rights and freedoms were regarded as "*special*" cases, which must be dealt with a particular diligence.

137. The Constitutional Court of Bulgaria stated that in Bulgaria there is no legal possibility to submit an individual request which could be considered equivalent to the Referral before this Court. Concerning transgender rights, it was confirmed that there have been no such cases.

138. The Supreme Court of Estonia stated that there was only one case in which it was concluded that there was no effective legal remedy to address the applicant's allegations of a violation of fundamental rights and freedoms.

However, noting the jurisdictional differences between this Court and that of Estonia, it was emphasized that individuals in Estonia cannot submit constitutional requests directly without exhausting all legal remedies. Regarding cases that have to do with transgender rights, it was stated that there were no such cases.

139. The Constitutional Court of Portugal stated that there had been no case of transgender rights and that there had been no case where, for special reasons or for special circumstances, an Applicant was exempted from the obligation to exhaust legal remedies.

Admissibility of the Referral

140. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and the Rules of Procedure.

141. In this respect, the Court, by applying Article 113 of the Constitution, the relevant provisions of the Law as to the procedure in the case set out in paragraph 7 of Article 113 of the Constitution; Rule 39 [Admissibility Criteria] and Rule 76 [Request pursuant to Article 113.7 of the Constitution and Rule 46, 47, 48, 49 and 50 of the Rules of Procedure] initially shall examine whether: (i) the Referral was submitted by an authorized party; (ii) an act of public authority is challenged; and if (iii) all legal remedies have been exhausted. Depending on the fulfillment of these initial criteria, the Court will decide whether it is necessary to continue with the examination of other admissibility requirements.

Regarding the authorized party and the act of a public authority

142. In this respect, the Court refers to paragraphs 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."*

143. The Court also refers to Article 47 [Individual Requests] of the Law, which establishes: *"Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority"*.

144. The Court further refers to item (a) of paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure which stipulates: *"(1) The Court may consider a referral as admissible if: (a) the referral is filed by an authorized party"*.

145. The Court additionally refers to paragraph (2) of Rule 76 of the Rules of Procedure which, *inter alia*, foresees: *"(2) A referral under this Rule must accurately clarify [...] what concrete act of public authority is subject to challenge."*

146. As regards the fulfillment of these criteria, the Court finds that the Referral is (i) filed by an authorized party, namely the Applicant, in the capacity of an individual seeking protection of his fundamental rights and freedoms guaranteed by the Constitution and the ECHR, as set out in the abovementioned provisions of the Constitution, the Law and the Rules of Procedure; and that the Applicant (ii) challenged an act of a public authority in the Republic of Kosovo, namely Decision [No. 64/04] of 13 June 2018 of the Civil Registration Agency.

147. Accordingly, the Court concludes that the Applicant is an authorized party; and that he challenges an act of a public authority.

Regarding the exhaustion of legal remedies

148. With regard to exhaustion of legal remedies , the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above; paragraph 2 of Article 47 of the Law; and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure, which establish:

Article 47
[Individual Requests]

"[...]

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

Rule 39
[Admissibility Criteria]

"1. The Court may consider a referral as admissible if:

[...]

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted."

149. In view of the Applicant's request to be exempted from the obligation to exhaust the *"claim for administrative conflict"* as a legal remedy established by law in the circumstances of the present case, the Court will in the following (i) outline the general principles of the ECtHR and of the Court with respect to the exhaustion of legal remedies; and subsequently it shall (ii) apply the latter in the circumstances of the present case.

(i) *General principles of the ECtHR and of the Court as to the exhaustion of legal remedies*

150. The Court notes that paragraph 7 of Article 113 of the Constitution establishes the obligation to exhaust *"all legal remedies provided by law"*. This constitutional obligation is also set out in Article 47 of the Law requiring that *"all legal remedies"* be exhausted and, further, in item (b) of paragraph (1) of Rule 39 of the Rules of Procedure, with particular emphasis on the obligation to exhaust in advance all *"effective"* remedies provided by law.

151. The criteria for assessing whether the obligation to exhaust all *"effective"* legal remedies is fulfilled are well defined in the ECtHR's case-law, in accordance with which, under Article 53 of the Constitution, the Court is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

152. In this regard, the Court notes that the concept of exhaustion and/or obligation to exhaust legal remedies derives from and is based on the *"generally recognized rules of international law"* (see, *inter alia, Switzerland v. United States of America*, Judgment of 21 March 1959 of the International Court of Justice). The same applies to the ECtHR, whereby under Article 35 (Admissibility criteria) of the ECHR: *"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law [...]"*.

153. The purpose and rationale behind the requirement to exhaust the legal remedies or 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 presumption, reflected in Article 32 of the Constitution and 13 of the ECHR that the Kosovo legal order provides an effective remedy for the protection of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery. (See in this regard, the ECtHR cases *Selmouni v. France*, cited above, paragraph 74; *Kudła v. Poland,* Judgment of 26 October 2000, paragraph 152*;* and among others, see also the cases of the Court: KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility of 8 December 2016, paragraph 61; KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility of 7 August 2017, paragraph 35; KI41/09, Applicant *AAB-RIINVEST University L.L.C*, Resolution on Inadmissibility of 3 February 2010, paragraph 16; and, KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).

154. The Court has consistently adhered to the principle of subsidiarity, maintaining that all applicants are required 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 maintained 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, among others, cases of the Court, KI139/12, Applicant *Besnik Asllani*, Decision on the Request for Interim Measures and

the Resolution on Inadmissibility of 25 February 2013, paragraph 45; KI07/09, Applicants *Demë Kurbogaj dhe Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 18-19: KI89/15, Applicant *Fatmir Koçi*, Resolution on Inadmissibility of 22 March 2016, paragraph 35; KI24/16, Applicant *Avdi Haziri*, Resolution on Inadmissibility of 16 November 2016, paragraph 39; and, KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility of 7 August 2017, paragraphs 35-37).

155. The exemption from the obligation to exhaust legal remedies at the level of the ECtHR is only made exceptionally and only in specific cases when analyzing this admissibility criterion in the light of the factual, legal and practical circumstances of a particular case. Even at the level of this Court, based on the ECtHR case-law, but also in harmony with the practice of the Constitutional Courts of the Venice Commission member states, the exemption from the obligation to exhaust legal remedies can only be granted exceptionally. (See cases of the Court in which such an exception was applied: KI56/09, Applicant *Fadil Hoxha and 59 others*, Judgment of 22 December 2010, paragraphs 44-55; KI06/10, Applicant *Valon Bislimi*, Judgment of 30 October 2010, paragraphs 50-56 and paragraph 60; KI41/12, Applicants *Gëzim and Makfire Kastrati*, Judgment of 25 January 2013; paragraphs 64-74; KI99/14 and KI100/14, cited above, paragraphs 47-50; KI55/17 , Applicant *Tonka Berisha*, Judgment of 5 July 2017, paragraphs 53-58; and KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 68-73).

156. The fact that the exemption from the exhaustion of legal remedies provided by law, although possible, is made only exceptionally, is also confirmed by the responses submitted to the Court through the Venice Commission Forum, without prejudice to differences in the Constitutions and the respective applicable laws of these states.

157. The exceptions, namely exemption from the obligation to exhaust legal remedies, are set out in the ECtHR case-law, which states that the exhaustion rule must be applied with a "*degree of flexibility and without excessive formalism*", having regard to the context of the protection of human rights and fundamental freedoms (regarding the concept of "*flexibility and lack of excessive formalism*", see the ECtHR's Practical Guide on Admissibility Criteria of 30 April 2019, I. Procedural Grounds for Inadmissibility, A. Non-Exhaustion of Remedies, 2. Application of this rule, A. Flexibility, page 22 and, *inter alia*, the case of the ECtHR *Ringeisen v. Austria*, Judgment of 16 July 1971, paragraph 89). In principle, based on the ECtHR practice, the obligation to exhaust legal remedies is limited to the use of those remedies, (i) the existence of which is "*sufficiently certain not only in theory but also in practice*", and consequently the latter, should be "*capable of providing redress*" in respect of the applicant's allegations and "*provide a reasonable prospects of success*"; and (ii) which are "*available, accessible and effective*", characteristics which must be sufficiently consolidated in the case-law of the relevant legal system. (see ECtHR cases: *Selmouni v. France*, cited above, paragraphs 71-81; *Akdivar and Others v. Turkey*, cited above, see Section B. on exhaustion of domestic legal remedies, paragraphs 55-77; *Demopolous and Others v. Turkey*, Judgment of 1 March 2010, Sections: A. Submissions before

the Court on exhaustion of domestic legal remedies and B. Exhaustion of domestic legal remedies, paragraphs 50-129; *Öcalan v. Turkey*, Judgment 12 May 2005, paragraphs 63-72; and *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraphs 155-162).

158. In both of the abovementioned categories, the case-law is of particular importance. Consequently, arguments about the "*effectiveness*" or lack of "*effectiveness*" of the legal remedy must also be supported by the case-law, or namely its absence (see, in this context, the ECtHR case: *Kornakovs v. Latvia*, Judgment of 15 June 2006, paragraphs 83-85). The importance of the case-law is also evidenced in the case of the ECtHR, *Vinčić and others v. Serbia*, in which the appeal to the Constitutional Court of Serbia was not considered effective, since that court had not yet heard cases related to the relevant violations of human rights and until that court had issued and published such decisions on the merits. (see *Vinčić and Others v. Serbia*, Judgment of 1 December 2009, paragraph 51). Thus, although in theory there was a possibility for the Applicants to refer to the Constitutional Court of Serbia, at the ECtHR level, in the absence of case-law, such a legal remedy was considered ineffective until it was proved otherwise. At a later stage and only after concrete evidence on the effectiveness of the legal remedy in practice, the ECtHR had accepted the arguments presented for the created effectiveness of the legal remedy and had consequently changed its approach by accepting and requesting that the exhaustion of such legal remedy must take place before an application is filed before the ECtHR.

159. However, and beyond these possibilities of exception, in all cases and in the light of the ECtHR case-law, the Applicant must prove that he/she *"did everything that could reasonably be expected of [her] him to exhaust domestic remedies"*. (See ECtHR case, *D.H. and Others v. the Czech Republic*, Judgment of 13 November 2007 paragraph 116 and the references therein). The ECtHR emphasizes that it is in the Applicant's interests to apply to the appropriate court to give it the opportunity to develop existing rights through its power of interpretation. (See among others, the ECtHR case: *Ciupercescu v. Romania*, Judgment of 15 June 2010, paragraph 169). This stand except for cases where an Applicant may demonstrate, by providing relevant case-law or other appropriate evidence that a legal remedy available to him, which he has not used would fail. (See ECtHR cases: *Kleyn and Others v. the Netherlands*, cited above, paragraph 156 and references therein, and *Selmouni v. France*, cited above, paragraphs 74-77). In this respect, it is important to note that a "*mere doubt*" of an Applicant about the ineffectiveness of a legal remedy does not serve as a reason to exempt an Applicant from the obligation to exhaust legal remedies. (See, *inter alia*, ECtHR cases; *Milošević v. the Netherlands*, Decison of 19 March 2002, last paragraph of page 6; and *MPP Golub v. Ukraine*, Judgment of 18 October 2005, last paragraph of Section C on the Assessment of the Court).

160. The Court also notes that a flexible assessment of the necessary characteristics of the legal remedy must be made taking into account the circumstances of each individual case. In this regard, the ECtHR has also adopted the concept of "*special circumstances*", through which it assesses, if there is any particular

ground which exempts the Applicant from the obligation to exhaust the legal remedy. In making this assessment, the ECtHR also takes into account (i) the overall "*legal and political*" context; and (ii) the "*special circumstances*" of an Applicant. (For the concept of "*special circumstances*", among others, see ECtHR cases: *Van Oosterijck v. Belgium*, cited above, paragraphs 36-40, and the relevant references therein; *Selmouni v. France*, cited above, paragraphs 71-81 and the relevant references therein; *Öcalan v. Turkey*, cited above, paragraph 67; and *Akdivar and Others v. Turkey*, cited above, paragraphs 67-68 and references therein. Further, for general legal and political considerations, *inter alia*, see *Akdivar and Others v. Turkey*, cited above, paragraphs 68-69 and references therein; and *Selmouni v. France*, cited above, paragraph 77). In cases where it results that an Applicant's obligation to use a legal remedy may be unreasonable in practice and would present a disproportionate obstacle to effectively exercising his right, the ECtHR exempts the Applicant from the obligation to exhaust legal remedies (see, *inter alia*, ECtHR cases: *Veriter v. France*, Judgment of 15 December 1997, paragraph 27; *Gaglione and Others v. Italy*, Judgment of 21 December 2010, paragraph 22; and *M.S. v. Croatia* (*no. 2*).), Judgment of 19 February 2015, paragraphs 123-125).

161. Finally, the Court notes that, having regard to the principle of flexible assessment of the exhaustion of legal remedies and the adaptation of this assessment to the "*special circumstances*" of each case separately, the ECtHR has developed the test of "*burden of proof*", a process clearly defined in its case-law. According to the latter, in the context of the ECtHR, the burden of proof is shared between the Applicant and the relevant Government claiming non-exhaustion. (For a more detailed discussion on the distribution of the burden of proof, *inter alia*, see ECtHR cases: *Selmouni v. France*, cited above, paragraph 76 and references therein; and *Akdivar and Others v. Turkey*, cited above, paragraph 68 and references therein). In principle, following the allegations of the respective Applicant of lack of the legal remedy, the responding party, namely the relevant state in the context of the ECtHR, bears the burden of proof that there is a legal remedy that has not been used and which is "*effective*" and that the Applicant will have to prove the opposite, namely that the referred remedy was used or that it was not "*effective*" in the circumstances of the respective case. As noted above, reliance on the relevant case-law is relevant in both cases.

(ii) The application of the abovementioned principles to the circumstances of the present case and the assessment of the Court regarding the exhaustion of legal remedies

162. The Court will consider the Referral and the Applicant's request to be exempted from the obligation to exhaust legal remedies provided by law, based on the foregoing principles. In this context, the Court initially recalls that the Applicant filed a claim for administrative conflict with the Basic Court on 24 July 2018. However, only one week later, namely on 30 July 2018, the Applicant also addressed the Court, requesting to be exempted from the exhaustion of this legal remedy, alleging that the latter is not "*effective*" and "*sufficiently certain in theory and in practice*".

163. The Applicant argues the alleged lack of the above-mentioned characteristics of the legal remedy, based on (i) his "*special circumstances*", including the legal and political context of the community he pertains to; and (ii) the length of the proceedings before the regular courts. These allegations of the Applicant are also supported by the Ombudsperson. Whereas, as explained above, the KJC has provided a reply to these allegations and the relevant questions of the Court.

164. The Court recalls that the KJC, in the reply regarding the Applicant's allegations and the questions of the Court, *inter alia*, stated that the relevant legal remedy "*meets all standards to be sufficiently certain in the present case and in other cases given that the courts are independent, apolitical, impartial and ensure equal access to all*". Further, the KJC in the context of the Applicant's right to a legal remedy that is "*sufficiently certain not only in theory but also in practice*", as noted above, referred to paragraph 4 of Article 55 of the Constitution. Whereas regarding the "*availability*", "*accessibility*" and "*effectiveness*" of the legal remedy, it noted that "*the claim for the initiation of an administrative conflict as a legal remedy meets the standards necessary to be considered as a legal remedy available to the Applicant, as the courts enable and provide equal access to all and always strive to be as effective and efficient as possible in resolving cases despite facing a large number of pending cases that are accumulated due to a series of factors such* [are] *the remaining cases from previous years, new cases received at work, insufficient number of judges, etc.*" The KJC did not submit any examples of case-law, as requested by the Court based on the case-law of the ECtHR. The Applicant challenged the KJC arguments, noting, *inter alia*, that the latter merely stated that the administrative conflict "*meets all sufficient standards to be sufficiently certain in the present case and in other cases*", but the same statement was "*not based on any concrete facts or data*".

165. In this respect, the Court initially notes that while the KJC stated that the relevant legal remedy is sufficiently certain in theory and practice, in support of its arguments, it refers to paragraph 4 of Article 55 of the Constitution in relation to the limitations of human rights and freedoms. While such an argument is unclear, the Court also notes that the KJC does not provide any additional reasoning, further elaboration or evidence that would prove the effectiveness of this legal remedy in the circumstances of the present case. Moreover, it has not substantiated its assertions by any relevant case-law, which based on the ECtHR case-law is necessary and supports the determination of the sufficient certainty in practice and the effectiveness of the legal remedy.

166. In this context, and based on the Applicant's allegations and the relevant comments of the Ombudsperson and the KJC, the Court will first address the allegations concerning the lack of effectiveness and insufficient certainty of the legal remedy in theory and practice, as a result of the Applicant's "*special circumstances*".

167. The Court notes that the Applicant's allegations concerning the ineffectiveness of the legal remedy relate to the nature of the alleged violation of the right to

private life and the legal and political context of the community that the Applicant belongs to, as one of the most marginalized communities in the Republic of Kosovo, also according to the arguments of the Ombudsperson. The Court also notes that at the respective time and circumstances under which the Referral was submitted, namely the respective allegations by the Applicant before the Court, there was no applicable case-law that would have proven that a claim for administrative conflict could have been effective and sufficiently certain not only in theory but also in practice for the Applicant's "*special circumstances*".

168. The Court further notes that although the review of a claim related to a similar case was a pending before the Basic Court against the Civil Registration Agency, with the latter similarly rejecting the request of the person "Y" to change the name and gender marker from "F" to "M", until 9 October 2018 and 20 November 2018, dates these associated with the timing when the Ombudsperson submitted its Legal Opinion and the KJC submitted its comments to the Court, based on the case file, up to those dates, the regular courts had no case-law regarding the change of name and gender marker of the transgender persons.

169. The above-mentioned case related to person "Y" results to be the first case decided by the Basic Court on 27 December 2018, and upheld by the Court of Appeals on 2 August 2019. The Court notes that this case-law regarding the rights of transsexual/transgender persons to change their name and gender marker, changes the context of the Applicant's allegations and their assessment by the Court, because such case-law also proves that the claim for administrative conflict, in the circumstances of the present case, besides being effective, is also sufficiently certain not only in theory, but also in practice.

170. The Court in this context notes more specifically that the case decided by the Judgment [A. No. 2196/2017] of the Basic Court of 27 December 2018 and upheld by the Court of Appeals by the Judgment [PA. No. 244/2109] of 2 August 2019, involves the person "Y" who was born female and had a name that clearly belonged to the female gender. At a later stage, the person "Y" underwent gender reassignment surgery from female to male. Such interventions were successful. As a result, in 2017, the person "Y" filed a request with the Civil Status Office in the Municipality of Prizren for legal change of personal name and gender marker. The Civil Status Office rejected his request. The Civil Registration Agency, acting upon the complaint of the person "Y", also rejected his request. Person "Y" initiated court proceedings against the Civil Registration Agency thus filing a claim for administrative conflict with the Basic Court, before the same Basic Court where the Applicant's claim for administrative conflict is still pending. The Basic Court approved the claim of the person "Y" as grounded. On that occasion, it ordered the General Directorate of the Municipality of Prizren to (i) change the personal name of the person "Y" upon his request; and (ii) change the gender marker of person "Y" from female "F" to male "M" gender. The Civil Registration Agency filed an appeal against the decision of the Basic Court with the Court of Appeals. The latter rejected that appeal and upheld the decision of the Basic Court in its entirety. Proceedings before the regular courts in this

case had lasted on average one (1) year and eight (8) months from the time of filing the respective claim until the decision of the Basic Court was upheld by the Court of Appeals.

171. Furthermore, the Court initially notes that the abovementioned case reflects circumstances very similar to the circumstances of the present case, in at least the following two aspects: (i) a request to change the name and gender marker from "F" to "M" in the civil registry books addressed initially to the Civil Status Office; and (ii) a request rejected by the Civil Status Office in the respective municipality that was upheld by the Civil Registration Agency.

172. In the case already decided by the regular courts, namely the case of the person "Y", the Court notes that his claim filed on 27 December 2017 with the Basic Court against the decision of the Civil Registration Agency and which upheld the decision of the relevant Civil Status Office for rejecting the request to change the name and gender marker of the person "Y", was resolved in favor of the latter, through Judgment [A. No. 2196/2017] of 27 December 2018 of the Basic Court and upheld by the Court of Appeals by Judgment [PA. No. 244/2109] of 2 August 2019. The respective courts ordered, namely confirmed that (i) the correction of the personal name of the person "Y" be made based on his request; and (ii) change the gender marker of person "Y" from female "F" to male "M".

173. The Court also notes that the regular courts, in rendering the aforementioned Judgments, also refer to the previous practice of changing the personal name as well as changing the gender marker from "M" to "F" by the relevant municipal offices. More specifically, based on the relevant documents, it results that on 18 April 2012, the Municipality of Suhareka, through the relevant Decision allowed the transgender person "Z" [exact identity will not be disclosed by the Court, *ex officio*, based on paragraph (6) of Rule 32 of the Rules of Procedure], the change of personal name and change of gender marker from "M" to "F", based on her preference and request.

174. The Court furthermore notes that the abovementioned decisions of the regular courts are not subject to review before this Court, and the latter consequently is not assessing their compliance with the Constitution. However, for the purposes of assessing the exhaustion of the legal remedy in the circumstances of the present case, and the effectiveness and sufficient certainty of the claim for administrative conflict in "*theory and practice*", the Court notes that the regular courts, throughout their respective decision-making and in applying the relevant legal remedy in practice referred to (i) the Constitution, namely Articles 21, 24 and 36; (ii) the case-law of the ECtHR, specifically *Christine Goodwin v. the United Kingdom* (cited above), based on Article 53 of the Constitution; (iii) in the ECHR, namely Article 8 thereof; and (iv) the legal regulation set out in the LAP, the Law on Personal Name in conjunction with the Administrative Instruction on Personal Name, the Law on Civil Status and the Law on Gender Equality.

175. In this regard, the Court notes that it has consistently maintained that the claim for an administrative conflict constitutes an "*effective*" legal remedy not only in theory but also in practice. Beyond the limited and stated exceptions in

the general principles part, the Court has consistently rejected referrals as inadmissible precisely on the ground of non-exhaustion of this particular legal remedy. (See, *inter alia*, case KI131/17, Applicant *Uran Halimi*, Resolution on Inadmissibility of 10 October 2018, paragraphs 48-49). In the circumstances of the present case, it is its effectiveness and sufficient certainty "*in practice*" which is at question, taking into account the Applicant's "*special circumstances*".

176. The Court, based on the case-law of the ECtHR, reiterates the importance of the relevant case-law in assessing the effectiveness and sufficient certainty of a legal remedy in practice. With respect to the latter, and following information received from the Court on 21 August 2019, when it was reported that the Basic Court and the Court of Appeals decided on a case similar to the present case, namely the case of the person "Y", the Court cannot but notice and take note of the fact that there is already a case-law in the Republic of Kosovo, although not consolidated but nonetheless important, in respect of the fundamental rights and freedoms of transsexual and transgender persons who seek to change their personal names and gender markers.

177. As noted above, the Judgment [A. No. 2196/2017] of the Basic Court of 27 December 2018 which was upheld by the Court of Appeals by Judgment [PA. No. 244/2019] of 2 August 2019, in similar personal circumstances, and in similar legal and political context, ordered the relevant public authorities to correct the personal name and gender marker of the relevant person in the civil registration books. The Court notes and points out that, unlike in the circumstances of the present case, the person "Y" had previously undergone a gender reassignment surgery. However, the Court also notes that this fact was not decisive in the assessment of the Basic Court by Judgment [A. No. 2196/2017] of 27 December 2018, and which specifically reasoned, *inter alia*, that based on the Constitution, the ECtHR case-law and the Law on Gender Equality, the surgical interventions are not determinative when it comes to the legal recognition of gender identity.

178. Therefore, and in light of these circumstances, the Court must find that the claim for administrative conflict is "*effective*" and "*sufficiently certain* [also] *in practice*", and that, based on the relevant case-law, it is "*capable of providing redress*" regarding Applicant's allegations for a violation of his rights and freedoms guaranteed by the Constitution and "*provides a reasonable prospect of success*".

179. In such cases where, based on the relevant case-law, a regular legal remedy is "*effective*" and "*sufficiently certain in theory and in practice*" and accordingly is "*capable of providing redress*" regarding the Applicant's allegations and "*provides a reasonable prospect of success*", the Court, based on the principle of subsidiarity, cannot deprive the regular courts of their constitutional competence to decide on the Applicants' allegations of possible violations of the articles of the Constitution and of the ECHR. As noted above, it is precisely the purpose and rationale of the obligation to exhaust legal remedies to provide the regular courts with the opportunity to prevent or put right the alleged violations of the Constitution.

180. It would be in full contradiction with the subsidiary spirit of the constitutional control mechanism if the Court were to declare a legal remedy ineffective when in fact it has proven its effectiveness in practice, as the case of person "Y" cited above shows. Respecting the principle of subsidiarity requires precisely allowing the necessary way and space for the lower instance courts to carry out their duty of direct application of the Constitution and the ECHR.

181. However, the principle of subsidiarity in no way prevents the respective applicants from addressing the Court, seeking the constitutional review of (i) acts of public authorities after they have exhausted the legal remedies provided by law as set out in paragraph 7 of Article 113 of the Constitution and the relevant provisions of the Law and the Rules of Procedure; and (ii) the absence of a decision within a reasonable time or the alleged delayed court proceedings in violation of the guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. In the context of an alleged delay of judicial proceedings, the Court recalls that, in certain circumstances, the case-law of the ECtHR and not only, but also the case-law of the respective courts of the member states of the Venice Commission, enables the relevant applicants to be exempted from the obligation to exhaust the legal remedies.

182. The ECtHR has sufficient case-law in this respect. However, the Court will refer to the latest ECtHR case regarding the transgender rights, *X v. North Macedonia*. The Court notes that in this case, the ECtHR rejected the allegations of North Macedonia that the case was premature before the ECtHR because the case was still being dealt with by the courts in North Macedonia. (See the arguments of the Government and the respective Applicant with regard to the exhaustion of legal remedies in paragraphs 40 and 41 of case *X v. North Macedonia*, cited above). The ECtHR rejected these arguments and accepted the Applicant's case for review on merits, despite the non-exhaustion of legal remedies, reasoning that the delay of the judicial proceedings could constitute grounds for exempting the respective Applicants from the obligation to exhaust legal remedies, and that in the relevant circumstances, the Applicant's case was pending before the Macedonian authorities and courts for seven (7) years and with no indication of when it could be completed. According to the ECtHR, the prolongation of the proceedings in relation to the Applicant's circumstances and the fact that he was subject to a highly prejudicial situation with regard to his right to a private life enabled the Applicant's exemption from the obligation to exhaust legal remedies. (See respective reasoning of the ECtHR, in paragraphs 43-46 of case *X v. North Macedonia*, cited above).

183. In this regard, the Court also recalls that before the Court, the Applicant alleges that he should be exempted from the obligation to exhaust legal remedies due to the "*possibility*" of prolongation of the court proceedings in the circumstances of his case. The Court recalls that a considerable part of the Applicant's allegations are based on the KJC reports arguing that the resolution of his case before the regular courts would result in lengthy court proceedings and on average between three (3) and four (4) years, at the risk that his case is not decided at all on merits by the regular courts but remanded to the original

administrative authorities for review. These allegations of the Applicant are also supported by the Ombudsperson's Legal Opinion.

184. However, in this respect as well, the Court must clarify that the Applicant before the Court does not seek the constitutional review of the already lengthy court proceedings in line with the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR and consequently the respective exemption from the obligation for exhaustion of legal remedies provided by law. On the contrary, the Applicant's allegations concerning the length of the regular court proceedings relate to the "*possibility*" of their prolongation in the future.

185. More specifically, the Court reiterates that the Applicant's Referral was submitted to the Court on 30 July 2018, only six (6) days after the submission of the claim to the Basic Court on 24 July 2018. Consequently, the Applicant does not allege that the proceedings before the Basic Court already consist in a prolongation of proceedings and consequently a violation of his right to a court decision within a reasonable time, as guaranteed by the Constitution and the ECHR. Similarly, the criteria referred to by the Applicant set out in the ECtHR case-law and which are related to the "*complexity of the case*", "*conduct of the relevant authorities*" and "*the case under consideration*", relate to the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and serve for the constitutional review of a proceeding which allegedly is already to be considered as a lengthy court proceeding. The latter (i) cannot be applied into a period of six (6) days from the date of filing the claim with the Basic Court and submission of the Referral to the Court; and (ii) based on the ECtHR case-law, does not serve as criteria for assessing the "*possibility*" of a lengthy proceedings in the future.

186. Such allegations, in the circumstances of the present case, are regarded by the Court as "*mere doubts*" of the "*ineffectiveness*" of the claim for administrative conflict as a legal remedy and therefore, as such, based on the ECtHR case-law, cannot serve as a reason to exempt the Applicant from the obligation to exhaust a legal remedy. Moreover, from the recent information received by the Court, it follows that, despite the Applicant's allegations, the same Basic Court in a similar case had taken approximately one (1) year to decide on the merits; meanwhile, the Court of Appeals approximately eight (8) months to decide in the second instance and to confirm the decision of the Basic Court.

187. The Court notes that from the moment the Applicant filed the relevant claim with the Basic Court, namely on 24 July 2018, he has submitted five more requests for speeding up of proceedings, on 16 October 2018, 22 March 2019, 16 April 2019, 5 June 2019 and 4 July 2019, respectively, and based on the case file and until this Court decided upon this case, it does not follow that the Applicant has received any reply from the Basic Court. In addition, in the replies submitted to the Court, the Basic Court confirmed the Applicant's allegation that no procedural steps had been taken to address the Applicant's allegations for a violation of Articles 23, 24 and 36 of the Constitution in conjunction with Article 8 of the ECHR.

188. However, and as noted above, the issue before the Court is not the constitutional review of the proceedings before the Basic Court, but the constitutional review of the challenged Decision of the Civil Registration Agency. In order to assess the latter, the Court would have to approve the Applicant's request for exemption from the obligation to exhaust legal remedies, finding that the claim for administrative conflict in the circumstances of the present case and taking into account the "*special circumstances*" of the Applicant, (i) is not effective; and (ii) is not sufficiently certain in theory and practice.

189. As elaborated above, such finding by the Court, in circumstances where the claim for administrative conflict has proven to be effective and sufficiently certain, not only in theory, but also in practice, in the case of the person "Y" decided by the same Basic Court by Judgment [A. No. 2196/2017] of 27 December 2018 and in circumstances similar to those of the Applicant, it would be contrary to the principle of subsidiarity, a principle enshrined in paragraph 7 of Article 113 of the Constitution and the case-law of the Court itself and the ECtHR.

190. The Court has already established in its case-law that if the proceedings are pending before the regular courts, then the Applicants' Referral is to be considered as premature. (See, in this context, the cases of the Court, KI23/10, Applicant *Jovica Gadzic*, Resolution on Inadmissibility, of 19 September 2013; KI32/11, Applicant *Lulzim Ramaj*, Resolution on Inadmissibility, of 20 April 2012; KI113/12, Applicant *Haki Gjocaj*, Resolution on Inadmissibility of 25 January 2013, paragraph 34; KI114/12, Applicant *Kastriot Hasi*, Resolution on Inadmissibility, of 3 April 2013, paragraph 33; KI07/13, Applicant Ibish *Kastrati*, Resolution on Inadmissibility of 5 July 2013, paragraphs 28-29; KI58/13, Applicant *Sadik Bislimi*, Resolution on Inadmissibility, of 25 November 2013, paragraph 31; and KI102/16, Applicant *Shefqet Berisha*, Resolution on Inadmissibility, of 2 March 2017, paragraph 39).

191. Therefore, in the circumstances of the present case, based on the principle of subsidiarity, the Court is obliged to declare the Applicant's Referral inadmissible because it is premature, thereby providing the opportunity and priority to the regular courts to address the issues raised in his referral.

192. Declaring this Referral as premature in itself implies that the Applicant has a guaranteed opportunity by the Constitution, the Law and the Rules of Procedure to address again this Court with a request for constitutional review of the decisions of public authorities, be it for their acts or their omissions to act, which he may claim to consist in violation of a right or fundamental freedom guaranteed by the Constitution, the ECHR or other international instruments.

193. In conclusion, the Court finds that the Applicant has not fulfilled the admissibility criterion of exhaustion of legal remedies established in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure, and consequently his referral must be declared inadmissible.

Applicant's request for compensation of non-pecuniary damage

194. The Applicant, requested the Court to award him compensation for non-pecuniary damage in the amount of € 5,000.00 due to the violation of his fundamental rights and freedoms guaranteed by the Constitution and the ECHR. The Applicant bases his claim for compensation for non-pecuniary damage on Article 41 (Just satisfaction) of the ECHR and the case-law of the ECtHR, namely in cases *Akdivar and Others v. Turkey* (cited above), *B. v. France* (cited above) and *Dolenec v. Croatia* (Judgment of 26 February 2010).

195. The Court notes and finds that Article 41 of the ECHR, which forms part of the Section II [European Court of Human Rights] of the ECHR cannot serve as a basis for seeking *"just satisfaction"* or compensation for non-pecuniary damage before the Constitutional Court, as this Article refers to the competences of the ECtHR and not to the competencies of the domestic courts which are part of the protection mechanism guaranteed by the ECHR. The Contracting Parties are obliged to guarantee the rights and freedoms guaranteed by Section I [Rights and Freedoms] of the ECHR. In this respect, the Court is aware of the fact that the ECtHR awards *"just satisfaction"* or compensation for non-pecuniary damage, but does so on the basis of its specific competences described in Article 41 of the ECHR and Rule 60 of its Rules of Procedure.

196. Despite the fact that the ECtHR has specific authorization to award *"just satisfaction"*, this Court is bound and conditioned to act only on the basis of the legal and procedural regulations governing its work. None of the documents governing the scope and proceedings before this Court and the actions that the latter may take, provide an equivalent authorization to award *"just satisfaction"* in the manner in which such competence is clearly ascribed to the ECtHR with abovementioned provisions.

197. The foregoing does not imply that individuals have no right to seek compensation from public authorities in the event of finding of a violation of their rights and freedoms under the laws applicable in the Republic of Kosovo. On the contrary, the ECtHR itself states that in order for a right protected by the ECHR to be repaired to the fullest extent possible, the relevant Applicants must be compensated at the appropriate amount and in accordance with the right which has been infringed upon. (See, for example, one of the ECtHR cases in this regard: *Gavriliţă v. Moldova*, Judgment of 22 July 2014).

198. Therefore, the Applicant's request is to be rejected due to the fact that his Referral was declared inadmissible and due to the fact that the Court does not have an authorization to award *"just satisfaction"* or *"compensation"*. (See, *mutatis mutandis*, the Court's case KI177/14, Applicant *Miodrag Janković*, Resolution on inadmissibility, of 2 July 2015, paragraph 44).

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 59 (b) of the Rules of Procedure, in the session held on 5 September 2019, unanimously:

DECIDES

I. TO DECLARE the Referral 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;

IV. TO DECLARE that this Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.