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

Prishtina, on 11 October 2019
Ref. no.:RK 1444/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI147/18

Applicant

Arbër Hadri

Constitutional Review of Decision 06/375 of the Committee on Agriculture, Forestry, Rural Development, Environment and Spatial Planning of the Assembly of Kosovo on the Recommendation of Candidates for the Election of the Director of the Agency for the Management of Memorial Complexes of Kosovo, of 22 May 2018, and Decision No. 06-V-151, of the Assembly of Kosovo on the Election of the Director of Agency for the Management of Memorial Complexes of Kosovo, of 6 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 Arbër Hadri, residing in the Municipality of Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision [06/375] of 22 May 2018 of the Committee on Agriculture, Forestry, Rural Development, Environment and Spatial Planning of the Assembly of Kosovo (hereinafter: the Parliamentary Committee) on the recommendation of candidates for the election of the Director of the Agency for the Management of the Kosovo Memorial Complexes (hereinafter: the Agency) and the Decision [No.06-V-151] of the Assembly of the Republic of Kosovo of 6 June 2010 (hereinafter: the Assembly) on the Election of the Director of the Agency.

Subject matter

3. The subject matter is the constitutional review of the challenged decisions, by which the Applicant alleges that his fundamental rights and freedoms guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial] and 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) have been violated.

Legal basis

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

Proceedings before the Court

5. On 5 October 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 9 October 2018, the President of the Court appointed Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (presiding), Safet Hoxha and Radomir Laban.

7. On 22 October 2018, the Court notified the Applicant about the registration of the Referral and, pursuant to Article 21 [Representation] and paragraph 4 of Article 22 [Processing Referrals] of the Law and paragraph 2 (c) of Rule 32 [Filing of Referrals and Replies] and paragraph 2 of Rule 33 [Registration of Referrals and Filing Deadlines] of the Rules of Procedure, required from him to submit to the Court the power of attorney proving that the representative referred to in the Referral is authorized to represent the Applicant before the Court, as well as to submit the decisions which he is challenging.

8. On the same date, the Court notified the President of the Assembly, the Chairman of the Parliamentary Committee and the Secretary-General of the Assembly about the registration of the Referral, and informed the President of

the Parliamentary Committee that they can submit their written comments regarding the Referral, if any, within the time limit of fifteen (15) days.

9. On 30 October 2018, the Parliamentary Committee submitted comments in relation to the Applicant's Referral.

10. On 13 November 2018, the Court received the Applicant's additional information and documents requested by the Court, which he had sent by Post Office on 8 November 2018. As regards the power of attorney sought by the Court, he stated that *"the power of attorney of the legal representative will be realized on the occasion of the eventual hearing being held [...]"*.

11. On 21 December 2018, the Court notified the President of the Assembly, the Chairman of the Parliamentary Committee and the Secretary-General of the Assembly about the additional information and documents submitted by the Applicant and requested from the Parliamentary Committee if they have comments in relation to additional documents and allegations of the Applicant, including the alleged lack of legal remedies, to submit them by 4 January 2018. The Court did not receive any comments from the Parliamentary Committee

12. On 17 January 2019, the Court sent to the Applicant the comments of the Parliamentary Committee in relation to his Referral, submitted to the Court on 30 October 2018.

13. On 29 January 2019, the Court received from the Applicant, via email, his comments in relation to the Parliamentary Committee's comments. On 31 January 2019, the Court once again received from the Applicant the same comments which he had submitted via email on 29 January 2019.

14. On the same date, the Court notified the President of the Assembly, the Chairman of the Parliamentary Committee and the Secretary-General of the Assembly about the Applicant's comments of 29 January 2019.

15. On 4 September 2019 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of Facts

16. On 24 April 2018, pursuant to paragraph 2 of Article 6 (Procedure for Election of Director of the Agency) of Law no. 04 / L-146 on Agency for the Management of Memorial Complexes of Kosovo (hereinafter: the Law on Agency), the Parliamentary Committee took a decision to announce the vacancy for the Director of the Agency.

17. On 22 May 2018, the Parliamentary Committee conducted interviews with the candidates for Director of the Agency and on the same day, by Decision [06/375] decided to make a recommendation to the Assembly on the voting of the two candidates in the Plenary Session of the Assembly, namely B.Z. and B.M. who received highest scores from the respective Commission. The

Applicant was not included in the Decision [06/375] proposed by the Parliamentary Committee, having been evaluated as the third candidate with the most points for Director of the Agency.

18. On 29 May 2018, the Applicant addressed the General Directorate of Legal and Procedural Affairs of the Assembly, seeking provision of instruction on complaining and access to public documents (hereinafter: the Request for provision of instruction). The Applicant requested from the respective Directorate (i) clarification as to the remedies available to challenge the evaluation procedure of the candidates by the Assembly's Committee and (ii) access to the full documentation of the Committee pertaining to the evaluation and recruitment of candidates for the position of the Director of the Agency.

19. On 6 June 2018, the Assembly voted for the Director of the Agency, and by secret ballot, with 45 (forty-five) votes *"in favour"* from 85 (eighty-five) MP's who took part in the voting process, and by Decision [no.06- V-151] selected one of the candidates proposed by the Parliamentary Committee, namely B.Z. for the position of the Director of the Agency.

20. On 7 June 2018, the Applicant submitted a complaint to the Parliamentary Committee regarding the procedures followed during the competition for the election of the Director of the Agency (hereinafter: the Complaint about the procedures followed). Through this complaint the Applicant, inter alia, stated that (i) he had not been granted access to public documents based on the request of 29 May 2018 because, allegedly, some of the members of the Committee have been absent during the interview, despite the fact that their evaluation and scoring stands in the documentation on evaluation of candidates; (ii) beyond the fact that the members of the Committee were not present during the interview, two of them attended a ceremony in the Municipality of Istog, together with the selected candidate, namely, B.Z., who allegedly has not been present at all during the interview, resulting not only in serious irregularities in the recruitment process, but also in the conflict of interest between the selected candidate and the members of the Committee; (iii) the candidates have not been notified about the results of the evaluation and have been informed only through the announcement of the agenda of the Assembly's Plennary Session of 6 June 2018, thus not providing the candidates with the opportunity to complain regading this evaluation and (iv) these irregularities have resulted in constitutional violations and consequently the recruitment process of candidates for the position of Director of the Agency must be annulled and the entire process repeated.

21. According to the case file, it appears that the Applicant has not received a response from the Assembly either to the Request for provision of instruction or to the Complaint concerning the procedures followed.

Applicant's allegations

22. The Applicant alleges that the Decision [06-375] of the Parliamentary Committee and Decision [no.06-V-151] of the Assembly on the election of the Director of the Agency have been issued in violation of his fundamental freedoms guaranteed by Article 24 [Equality before the Law]], 31 [Right to

Fair and Impartial Trial] and 45 [Freedom of Election and Participation] of the Constitution.

23. The Applicant argues the allegations of violations of the aforementioned rights and fundamental freedoms by asserting, inter alia, that (i) during the interview of candidates for the position of Director of the Agency, the Commission has not been in full composition, moreover, two of the members of this Committee, A.H. respectively E.H., have been present at a solemn event organized in Dubrava in the Municipality of Istog; (ii) furthermore, according to the allegation, neither the candidate selected by the Parliamentary Committee was present during the interview because he had joined the two aforementioned members of the parliament at the said solemn event; (iii) despite the fact that the two aforementioned MPs were not present, their votes and scorings appear in the *"Voters List"*, an evaluation which according to the Applicant has influenced the final results and the final ranking of the candidates; (iv) the election by the Committee was not based on meritocracy, because the Applicant in the previous vacancy for the same position was awarded the highest score, however the process failed at the session of the Assembly of 17 April 2018, whilst in the repeated competition, the Applicant was ranked the third, and consequently was not recommended by the Committee for the Plenary Session, despite two other candidates, one of whom according to the Applicant does not meet the vacancy criteria and lacks the managerial experience; (v) in some cases the voting by Committee members took place only for one candidate, whilts the other candidates were consequently awarded zero points, by abstaining in selective manner; (vi) the voting process for candidates in the Parliamentary Committee was not open and (vii) the candidates have not been notified whether they have been selected or not by the Parliamentary Committee.

24. Consequently, the Applicant alleges that the process of evaluating and recruiting candidates in the *Assembly "has failed to provide sufficient procedural guarantees to safeguard the equality of candidates during the process, and as such undermines the perception of independence and impartiality"*. He also complains that there was no opportunity for complaining or any legal remedy in the Assembly, as the institution responsible for the recruitment of high-level officials of independent institutions. As a result, of what is stated above, he alleges violations of Articles 24, 31 and 54 of the Constitution. In support of his allegations, the Applicant refers to Judgment KI34/17 of 1 June 2017, with Applicant Valdete Daka (hereinafter: the Court Case KI34/17).

25. The Applicant also alleges that in his circumstances, no legal remedy is available. The Applicant states that he has addressed the Assembly twice, through (i) Request for provision of instruction and (ii) Complaint about the procedures followed, but received no response.

26. Consequently, the Applicant alleges that there is no legal remedy in the Assembly of Kosovo where he can complain about his case. Moreover, the Applicant, referring to the case law of the ECtHR and the Court, states that in the sense of exhaustion of legal remedies, this practice requires only the exhaustion of those remedies that *"exist, and exist not only in theory but also*

in practice – implying that they must be adequate and effective". In support of his arguments for being exempted from the obligation of exhaustion of legal remedies, the Applicant refers to the case of the ECtHR *Selmouni v. France* (ECtHR Judgment of 28 July 1999) and the Judgments of the Court in Case KI06/10, with *Applicant Valon Bislimi v. Ministry of Internal Affairs, Judicial Council and Ministry of Justice* of 30 October 2010 (hereinafter: the case of Court KI06/10); Case KI99/14 and KI100/14, with Applicants Shyqyri Syla and Laura Pula, of 3 July 2014 (hereinafter: the case of Court KI99/14 and KI100/14); and the case of Court KI34/17.

27. The Applicant also requests from the Court to hold a hearing based on Rule 42 (Right to Hearing and Waiver) of the Rules of Procedure.

28. Finally, the Applicant requests from the Court to (i) declare his Referral admissible; (ii) ascertain the alleged violations of Articles 24, 31 and 45 of the Constitution; (iii) annul the recruitment and election process of the Director of the Agency as well as (iv) order the recruitment and re-election of the Director of the Agency.

Parliamentary Committee Comments

29. In their comments submitted to the Court, the Parliamentary Committee clarified that (i) it has conducted an interview with each candidate who met the conditions set out in the Law on Agency and based on the results of the interview prepared a shortlist of 2 (two) candiates for voting in the plenary session of the Assembly; (ii) the Applicant's allegations that the procedure for the recruitment and proposal of the Director of the Agency was conducted in violation of the Constitution and the Law on the Agency, do not stand. The Parliamentary Committee has also attached the following documents to these comments: (i) Decision to announce the vacancy for Director of the Agency; (ii) List of signatures of candidates who participated in the interview; (iii) List of signatures of the members of Parliamentary Committee who participated in the meeting of 22 May 2018; (iv) List with ranking of candidates for Director of the Agency based on the points; (vi) Minutes of the Parliamentary Committee meeting of 22 May 2018 and, (viii) the Decision [no.06.V-151] of the Assembly on the election of the Director of the Agency.

Applicant's comments regarding the Parliamentary Committee's comments

30. With regard to the comments of the Parliamentary Committee, the Applicant states that (i) they do not oppose his allegations regarding the irregularities of the disputed process and are *"only a presentation and disclosure of the documentation of the recruitment and evaluation process"* which, according to him, became accessible only after the request of the Court, and (ii) substantiate the Applicant's allegations about irregularities in the respective evaluation and recruitment process, irregularities which resulted in violations of *"equality of candidates"* and *"the right to a fair and impartial trial"* guaranteed by the Constitution. Further, the Applicant reiterates his allegations and arguments which he also submitted through the initial Referral submitted to the Court.

The Applicant also reiterates his allegation that there was no legal remedy available against the challenged Decision. The Applicant states that he has not received from the Assembly a response either to his Request for provision of instruction or to the Complaint about the procedures followed.

Admissibility of the Referral

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

32. 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, butonly after exhaustion of all legal remedies provided by law."*

33. The Court also refers to Articles 47 [Individual Requests], 48 [Accurracy of the Referral] and 49 [Deadlines] of the Law, which provide:

> Article 47
> [Individual Requests]
>
> *"1. 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.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*
>
> Article 48
> [Accuracy of the Referral]
>
> *"In his /her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]."

34. The Court also takes into account Rule 39 (1) (b) [Eligibility Criteria] of the Rules of Procedure which specifies:

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 exhasuted."

35. As regards the fulfillment of these criteria, the Court concludes that, pursuant to paragraph 7 of Article 113 of the Constitution and Article 47 of the Law, the Applicant is an authorized party to submit a Referral to the Court. The Court also notes that the Applicant in his Referral had initially stated that he is represented by a lawyer. Following the Court's request for the submission of the relevant power of attorney, the Applicant stated that "the power of attorney of the legal representative will be realized on the occasion of the eventual hearing being held [...]".Taking into consideration the fact that the Applicant has signed and personally submitted his Referral, the Court finds that he is not represented by any representative.

36. The Court also emphasizes that the Applicant is challenging an act of a public authority, namely the Decision [06/375] of the Parliamentary Committee of 22 May 2018 on the Recommendation of Candidates for the Election of the Director and the Decision [No.06-V-151] of the Assembly of 6 June 2018 for the election of the Director of the Agency. The Applicant also clarified the fundamental rights and freedoms which he alleges to have been violated in accordance with Article 48 of the Law and submitted the Referral in accordance with the deadlines set forth in Article 49 of the Law.

37. However, in the following, the Court will assess whether the Applicant has fulfilled the criterion of exhaustion of legal remedies required by 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. Having regard to the Applicant's request to be exempted from the obligation of exhaustion of legal remedies in the circumstances of the present case, in the following the Court will (i) present the general principles of the ECtHR and of the Court with respect to the exhaustion of legal remedies and (ii) apply them in the circumstances of the present case.

(i) General principles of the ECtHR and of the Court with respect to the exhaustion of remedies

38. The Court reiterates 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 laid down in paragraph 2 of Article 47 of the Law requiring that all "remedies" be exhausted and, further, under item (b) of paragraph (1) of Rule 39 of the Rules of Procedure, which in particular states the obligation to exhaust beforehand all *"effective"* remedies provided by law.

39. The criteria for assessing whether the obligation to exhaust all *"effective"* legal remedies is fulfilled are well defined in the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution the Court is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

40. In this context, the Court emphasizes that the concept of exhaustion and/or obligation to exhaust the 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, which under Article 35 (Admissibility Criteria) of the ECHR, may *"only deal with the matter after all domestic remedies have been exhausted according to the generally accepted rules of international law [...] "*.

41. The purpose and justification of the obligation to exhaust the remedies or the rule of exhaustion is to provide the relevant authorities, above all the regular courts, with the opportunity to prevent or correct the alleged violations of the Constitution. It is based on the assumption reflected in Article 32 [Right to Legal Remedies] of the Constitution and Article 13 (Right to an effective remedy) of the ECHR that the legal order of the Republic of Kosovo provides an effective remedy for the protection of constitutional rights. This is an important aspect of the subsidiary character of the constitutional justice machinery (see, in this context, ECtHR cases: *Selmouni v. France*, cited above, paragraph 74; *Kudła v. Poland*, the Judgment of 26 October 2000, paragraph 52; and, inter alia, 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 SH.P.K* , Resolution on Inadmissibility of 3 February 2010, paragraph 16; and KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).

42. The Court consistently adheres to the principle of subsidiarity, maintaining that all the applicants should exhaust all procedural possibilities in the proceedings before the regular courts in order to prevent a violation of the Constitution, if any, and correct such a violation of a constitutionally guaranteed fundamental right. The Court has also consistently maintained that the Applicants are liable when their respective cases are declared inadmissible by the Court if they have not used the regular procedure or have not reported a violation of the Constitution in the regular proceedings (see, inter alia, the

cases of the Court: KI139/12, Applicants *Besnik Asllani*, Decision on Interim measure and Decision on Inadmissibility of 25 February 2013, paragraph 45; KI07/09, Applicants *Deme Kurbogaj and Besnik Kurbogaj*, Decision on Inadmissibility of 19 May 2010, paragraphs 18-19; KI89/15, Applicant *Fatmir Koci*, Resolution on Inadmissibility, of 22 March 2016, paragraph 35; KI24/16, Applicant *AvdiHaziri*, 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).

43. The exemption from the obligation to exhaust the legal remedies at the ECtHR level is granted only exceptionally and only in specific cases when analyzing this admissibility criterion in light of the factual, legal and practical circumstances of a specific case. Even at the level of this Court, based on the ECtHR case law, but also in harmony with the case law of the Constitutional Courts of the Venice Commission member states, exemption from the obligation to exhaust legal remedies can only be granted exceptionally (see the cases of the Court in which such an exception was applied: Kl56/09, Applicant *Fadil Hoxha and 59 others*, Judgment of 22 December 2010, paragraphs 44-55; Kl06/10, Applicant *Valon Bislimi*, Judgment of 30 October 2010, paragraphs 50-56 and paragraph 60; KI41 /12, Applicants *Gezim and Makfire Kastrati*, Judgment of 25 January 2013; paragraphs 64-74; Kl99/14 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).

44. The exemptions, namely the exemption from the obligation of exhausting legal remedies, are set out in the ECtHR case law, which states that the exhaustion rule should be applied with some *"degree of flexibility and without excessive formalism"*, by taking into account the context of protection of human rights and fundamental freedoms (with regard to the concept of *"flexibility and lack of excessive formalism"*, see the ECtHR Practical Guide on Admissibility Criteria of 30 April 2019, I. Procedural Grounds for Inadmissibility, A. Non-Exhaustion of Domestic 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).

45. In principle, based on the ECtHR case law, the obligation to exhaust legal remedies is limited to making use of those remedies (i) the existence of which is "sufficiently certain not only in theory but also in practice" , and consequently the same, should be able to *"provide a solution in respect of applicant's allegations"* and *"provide a reasonable prospects of success"* and (ii) which *are "available, accessible and effective"*, features which must be sufficiently consolidated in the case law of the respective 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 for exhaustion of domestic remedies and B. Exhaustion of domestic legal remedies, respectively, 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).

46. However, and beyond these possibilities of exemption, in all cases and in the light of the ECtHR case law, the Applicant must prove that *"he has done all that could reasonably be expected of him to exhaust legal remedies"* (see the ECtHR Cases D.*H. and Others v. the Czech Republic*, Judgment of 13 November 2007 paragraph 116 and the references cited therein). The ECtHR emphasizes that it is in the Applicant's interest to address the competent court to give the opportunity to it to exercise the existing rights through its power of interpretation (see, inter alia, ECHR case: *Ciupercescu v. Romania*, Judgment of 15 June 2010, paragraph 169). This is with exception of cases when an applicant can show, by providing relevant case law or other appropriate evidence, that an available remedy which he has not used was bound to fail (see ECtHR cases: *Kleyn and Others v. The Netherlands*, cited above, paragraph 156 and references cited therein, and *Selmouni v. France*, cited above, paragraphs 74-77). Moreover, the *"mere doubts"* of an applicant about the ineffectiveness of a legal remedy do 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*, Judgment 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 Assessment of the Court).

47. The Court also emphasizes that a flexible assessment of the necessary characteristics of the legal remedy must be made by taking into account the circumstances of each individual case. In this regard, the ECtHR has also adopted the concept of *"particular 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 *"particular circumstances"* of an Applicant (for the concept of *"particular circumstances"*, see, inter alia, ECHR cases: *VanOosterijck 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, with respect to the review of general legal and political context, 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 exercise his right, the ECtHR exempts the Applicant of the obligation to exhaust his 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 *MS v. Croatia (no. 2)*, Judgment of 19 February 2015, paragraphs 123-125).

48. Lastly, the Court notes that, by taking into consideration the principle of flexible assessment of the exhaustion of legal remedies and the adaptation of this assessment to the "particular circumstances" of each case separately, the ECtHR conducted the "burden of proof" test, 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 sharing 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 Applicant's allegations of the lack of legal remedy, the opposing party, namely the State concerned in the context of the ECtHR, bears the burden of proof that there exists a legal remedy that has not been used and is *"effective"*, whereas, the Applicant will have to argue the opposite, namely that the refered legal remedy was used or that it is not *"effective"* in the circumstances of the respective case. Reliance on relevant case law is relevant in both cases.

49. In the context of the above principles, the Court will in the following examine whether, in the circumstances of the present case, (i) the legal remedy has been used and the Applicant has *"'done all that could reasonably be expected of him/her to exhaust legal remedies";* and if the Applicant has, on the basis of the burden of proof, proved that (ii) the remedy is not "sufficiently certain not only in theory but also in practice" and (iii) the remedy is not *"available, accessible and effective"*.

(ii) Applying the above principles to the circumstances of the present case

50. The Court first notes that the Applicant has addressed the Assembly twice, the first time through the Request for provision of instruction, and the second time, through the Complaint about the procedures followed and according to the case file, has not received any response from the Assembly. Furthermore, the Court also notes that through the Request for provision of instruction, the Applicant specifically sought clarification as to the remedies available to complain against Decision [06/375] of the Parliamentary Committee. According to the case file, the Applicant had not received any reply. The Court further notes that the Court had provided the Assembly with an opportunity, by letter of 21 December 2018, to submit relevant comments regarding the Applicant's allegations submitted to the Court, including the alleged lack of a legal remedy, and the Assembly, despite having submitted comments to the Court, did not specifically address the issue of legal remedies.

51. However, the Court notes that in the circumstances of the present case, beyond the possibility of challenging the procedure concerning the election of the Director of the Agency within the Assembly, the applicable laws also refer to other remedies provided by Law No.03/L-202 on Administrative Conflicts (hereinafter: LAC) and Law No. 06/L-048 on the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: the Law on the Independent Board), respectively.

52. The Court notes that (i) inter alia, Articles 13 and 14 of the LAC relating to administrative conflict determine the possibility of initiating an administrative conflict, including also in cases of administrative silence (see also the ECtHR case *Juričić v. Croatia*, Judgment of 26 July 2011, wherein are examined the allegations of a candidate for judge of the Croatian Constitutional Court. While the ECtHR had dealt with her allegations in relation to the decision of the Croatian Constitutional Court, the case also reflects the competence of the relevant Administrative Court to assess, despite limitations, decisions of

Croatian Assembly whilst (ii) paragraph 3 of Article 3 (Statute of the Agency) of the Law on Agency stipulates that *"the official of the Agency shall have the status of civil servant"*, whereas Article 6 (Functions of the Board) of the Law on the Independent Board, inter alia, determines that the Board *"reviews and determines appeals filed by civil servants and candidates for admission to the civil service"*.

53. The Court notes that the Applicant does not refer to these remedies as an opportunity to challenge the Decisions of the Assembly. The Court also notes that in the circumstances of the present case none of these options was used. The Court recalls the fact that the Assembly did not respond to the Applicant either to his Request for Instruction or to his Complaint about the procedures followed. However, the Court notes that in addition to the complaint submitted to the Parliamentary Committee, the Applicant was also able to use other legal remedies to challenge the disputed Decisions, including in the case of administrative silence. Otherwise, the Applicant would have to argue that these legal remedies are not (i) *"sufficiently certain not only in theory but also in practice"*; and/or (ii) *"available, accessible and effective"*.

54. Consequently, and in this context, the Court has to emphasize that the legal remedies available to the Applicant have not been used, and that despite the Request for Instruction and Complaint about the procedure followed in the Assembly, the Applicant has not *"done all that can reasonably be expected of him to exhaust legal remedies"*. As states above in the elaboration of general principles, based on the process of burden of proof, first it belongs to the Applicant to prove that (i) he has done all that can be expected to exhaust legal remedies; (ii) he has used the legal remedies available; and if this was not the case, then (iii) to show, by providing the relevant case law or other appropriate evidence, that an available remedy which he has not used was bound to fail. This is not the case in the circumstances of the present case

55. Furthermore, the Court recalls, as pointed out by the Applicant himself, that the case law of the ECtHR as well as of the Court state that the exhaustion rule must be applied with some *"degree of flexibility and without excessive formalism"*. However, in applying this principle, the burden of proof is of particular importance. The Applicant must argue that the remedies available are not (i) *"sufficiently certain not only in theory but also in practice"*; and/or (ii) *"available, accessible and effective"*.

56. The Court recalls that the Applicant does not argue why in the circumstances of his case the legal remedies provided by the LAC and the Law on the Independent Board do not possess these characteristics. (See, in this context, the Ruling on Inadmissibility in Case KI116 / 14, Applicant *Fadil Selmanaj*, 26 January 2015, 45 45 45-46.) In the circumstances of the present case, the Court recalls that the Applicant has not provided the Court with any arguments as to the aforementioned legal remedies and has not even argued why, in the circumstances of his case, they are not *"able to provide a solution"* or *"provide reasonable prospects of success"* in respect of his allegations for constitutional violations.

57. The Court recalls that in support of his allegations for the lack of a legal remedy in the circumstances of his case, the Applicant also refers to the ECtHR case *Selmouni v. France* (cited above) and the Court cases KI06/10; KI34/17; and KI99/14 and KI100/14.

58. In this regard, the Court initially notes that, apart from the fact that the Applicant has stated and cited these decisions, he has not elaborated on their factual and legal relevance to the circumstances of the present case. The Court emphasizes that the reasoning of other court decisions must be interpreted in the context and in the light of the factual circumstances in which they were rendered (see, inter alia, the Judgment in Case KI48/18 of 4 February 2019, with Applicant *Arban Abrashi and the Democratic League of Kosovo* (LDK), paragraph 275; and Case KI 119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility of 3 May 2019, paragraph 80).

59. The Court, however, notes that the circumstances of the cases referred to by the Applicant do not coincide with his circumstances. In the above cases, the Court held that the applicants had shown that (i) there was no remedy available, as in the case of Court KI06/10 (see Case KI06/10, cited above, paragraphs 48-61) or (ii) the remedies available to the Applicants were not sufficiently effective to address the relevant allegations (see the case of Court KI34/17, cited above, paragraph 73; and the case of Court KI99/14 and KI100/14, cited above, paragraph 50).

60. Consequently, based on the foregoing and taking into consideration the allegation raised by the applicant and the facts adduced by him, the Court by relying on the standards established in its own case-law in similar cases and the ECtHR case-law, finds that the Applicant does not meet the admissibility criteria as he has not exhausted the legal remedies as set out 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 as such, the Referral must be declared inadmissible.

Request for holding a hearing

61. The Court recalls that the Applicant also requested from the Court to hold a hearing session.

62. In this respect, the Court recalls that pursuant to paragraph 1 of Rule 42 of the Rules of Procedure, *"Only referrals determined to be admissible may be granted a hearing before the Court, unless the Court by a majority of votes decides otherwise for good cause shown"*, whereas, pursuant to paragraph 2 of the same rule, *"the Court may order a hearing if it believes that it is necessary to clarify issues of fact."*

63. The Court notes that the aforementioned Rule of the Rules of Procedure is of a discretionary nature. Moreover, the Court notes that, based on the above Rule, only the cases which are declared admissible and in which their merits are examined may be heard before the Court by a hearing session. The Rules of Procedure enable the Court to do so exceptionally in cases where a Referral is inadmissible, as in the circumstances of the present case. However, the Court

recalls that pursuant to paragraph 2 of Rule 42 of its Rules of Procedure, it may order that a hearing be held when it believes it is necessary to clarify matters of evidence or law. In the circumstances of the present case, this is not the case, because the Court does not consider that there is any uncertainty about the "evidence or the law" and therefore does not find it necessary to hold a hearing session. The documents included in the application are sufficient to rule in this case.

64. Accordingly, the Applicant's request for holding a hearing is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, and Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure, on 4 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. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Gresa Caka Nimani Arta Rama-Hajrizi

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