



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

Prishtina, on 31 August 2020
Ref. no.:RK 1601/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI43/20

Applicant

Fitore Sadikaj

Request for constitutional review of Decision KPK No. 697/2019 of the Kosovo Prosecutorial Council, of 12 November 2019 and Decision KPK No. 796/2019 the Kosovo Prosecutorial Council, of 23 December 2019

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 Fitore Sadikaj from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges two decisions of the Kosovo Prosecutorial Council (hereinafter: the KPC), regarding the selection of the Chief Prosecutor of the Basic Prosecution in Prishtina (hereinafter: BP), namely:
 - a) the first decision of KPC, KPK No. 697/2019, of 12 November 2019;
 - b) the second decision of KPC, KPK No. 796/2019, of 23 December 2019, which confirmed the first decision of the KPC, KPK No. 697/2019.

Subject matter

3. The subject matter is the constitutional review of the challenged decisions of the KPC, which allegedly violate the Applicant's rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 54 [Judicial Protection of Rights] and Article 110, paragraph 3 [Kosovo Prosecutorial Council] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial), Article 13 (Right to an effective remedy) and Article 14 (Prohibition of discrimination) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of 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 Constitutional Court

5. On 27 February 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 28 February 2020, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
7. On 10 March 2020, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the KPC.
8. On 29 July 2020, after having considered the report of the Judge Rapporteur, the Review Panel unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 1 August 2019, KPC approved Regulation No. 06/2019 on the appointment of the Chief State Prosecutor and the Chief Prosecutors of the Prosecution Offices of the Republic of Kosovo. On the same date, the KPC decided to

announce a vacancy for the selection of the Chief Prosecutor of the Special Prosecution (hereinafter: the SP) and the Chief Prosecutor of the BP in Prishtina.

10. On 14 August 2019, the KPC announced a vacancy for the position of Chief Prosecutor of the SP and Chief Prosecutor of the BP in Prishtina, against which the Applicant filed an appeal. Specifically, the Applicant applied for the position of Chief Prosecutor of BP in Prishtina. According to her, she *"submitted the application in accordance with the approved regulation no. 06/2019"*.
11. On 27 September 2019, the KPC approved the final list of candidates who applied in the announced vacancy of 14 August 2019. Based on the Applicant's allegations, *for the position of Chief Prosecutor of the BP in Prishtina, the KPC selected 4 (four) candidates who met the requirements of the vacancy, among whom was the Applicant.*
12. On 9 October 2019, the Applicant was interviewed by an Evaluation Panel selected by the KPC.
13. Based on the documentation submitted, the Court notes that the Evaluation Panel evaluated all four candidates, according to the following criteria: *"Presentation and attached documents, Integrity, Leadership and Managerial Skills and technical knowledge and experience"*.
14. On 16 October 2019, the Applicant received a notification from the Evaluation Panel which, as she states, *"does not contain the protocol number, signed by the Chairman of the Evaluation Panel, Mr. BH, of 15 October 201"*,
15. By this notification, the Applicant was informed that *"she was not nominated as a KPC candidate who will go to the further voting procedure for the position of Chief Prosecutor of the BP in Prishtina, because according to the scoring of the Evaluation Panel, she was evaluated with a total of 66.2 points out of a possible 100 points"*.
16. On 22 October 2019, the Applicant filed an objection with the KPC Review Commission, which had to do with *"implementation of the provisions of the Regulation and incorrect scoring"* by the Evaluation Panel during the interview procedure of the candidate for Chief Prosecutor of BP in Prishtina.
17. More specifically, the Applicant's objection to the results was related to the fact that *"The Evaluation Panel, although trained, had no knowledge to implement the AXIOM program in the case of evaluation and scoring; that despite the encouragement for women to participate in the vacancy, such a thing was not really taken into account by the Evaluation Panel when evaluating with points; that some members of the Evaluation Panel did not gather sufficient information about her previous work; that the questions of some members of the Panel were contradictory"*.
18. On 2 December 2019, the KPC Review Commission issued Decision KPC/no. 697/2019, in which it was stated:

I. *"The Recommendation of the Commission for reconsideration on the Procedure for Appointment of the Chief Prosecutor of the Basic Prosecution in Prishtina is approved.*

II. *The members of the Evaluation Panel mentioned with the codes 869 UZF, 853 TQK, 598 HCB and 765 EYJ are obliged to complete the list of points achieved by Fitore Sadikaj with the points approved according to the recommendation of the Reconsideration Commission and to reason according to Article 14 paragraph 2 of Regulation no. 06/2019 on the Appointment of the Chief State Prosecutor and Chief Prosecutors of the Prosecution Offices of the Republic of Kosovo..."*

19. On 9 December 2019, the Applicant filed a new objection with the KPC Decision Review Commission, challenging Decision KPK/no. 697/2019, stating, *inter alia* that: the members of the commission did not fully implement the decision of the KPC, namely that they made the re-evaluation with points as a candidate only on the basis of some points which did not justify the alleged objections she made in the first objection in relation to her remarks. Further, the Applicant stated that there are contradictions and inconsistencies between the two assessments of the Panel regarding its scoring, the documents submitted and the way the interview was conducted, and that this process has been completely invalidated. In particular, the Applicant objected to the members of the Evaluation Panel, marked with the codes 869 UZF, 853 TQK and 598 HCB regarding their evaluations and the points given in the part related to *"project documents, leadership/managerial skills and technical knowledge"*.
20. On 23 December 2019, the KPC rendered Decision KPK/no. 796/2019, by which: The Recommendation of the Review Commission on the procedure of appointment of the Chief Prosecutor of BP in Prishtina is approved, the complaint submitted by the candidate Fitore Sadikaj regarding the members of the Evaluation Panel, marked with 869 UZF regarding the evaluation with points on the Criteria of Leadership/Management Skills and Technical Knowledge is rejected, also for the members of the Panel marked with codes 853 TQK and 598 HCB in relation to the evaluation of her documents, leadership/ management skills and technical knowledge.
21. In the reasoning of the decision of KPK/no. 796/2019, the KPC stated:

"KPC, addressing the report of the Commission, assessed that the objection of the candidate Fitore Sadikaj is the same as the objection presented for the first time, and which the Council approved in some controversial points and asked the members of the Evaluation Panel to complete the reasoning in the list of points as required and which were then submitted to the candidate. Candidate Fitore Sadikaj, after receiving the list of completed points according to her objection, again submitted an objection with the same allegations, which were not supported by any evidence, as required by Article 14, paragraph 2 of the Regulation.

As to the candidate's allegation regarding the evaluation process by points, where the candidate considers that the evaluation does not match

the reasoning, it does not stand due to the fact that the Reconsideration Commission and the Council assessed that the members of the Evaluation Panel gave their evaluations based on the presentation of the candidate in the interview and the documents that were subject to evaluation. Based on the Regulation, the candidate for each category can receive a point up to the maximum provided for that category, therefore, non-evaluation with maximum points for the Council does not mean that evaluation with points is contrary to reasoning, if maximum points are not given.

The Council considers that the evaluation of the candidate by the members of the Evaluation Panel is not contrary to the regulation and no other provisions. Also, there were no inaccuracies and technical errors during the awarding of points and the evaluation and all categories of points are in accordance with the relevant reasoning.

Therefore, based on Article 16, paragraph 4 of the Rules of Procedure, which stipulates that the Contest must be based on evidence, which was not provided by the candidate, the Council decided as in the enacting clause of this decision“.

Applicant's allegations

22. The Applicant tries to build her allegations of violation of constitutional rights and rights guaranteed by the ECHR on the allegations that the above-mentioned decisions of the KPC led to a violation of the rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 54 [Judicial Protection of Rights] and Article 110.3 [Kosovo Prosecutorial Council] of the Constitution, as well as Article 6, Article 13 and Article 14 of the ECHR, also as a result of erroneous interpretation of Regulation no. 06/2019, during its implementation in the procedures for the selection of the Chief Prosecutor of BP in Prishtina.
23. First, the Applicant states that it is not necessary to exhaust legal remedies and refers to the case law of the Constitutional Court, namely “...*JUDGMENT in cases no. KI99/14 and KI100/14. Applicant: Shyqri Sylja and Laura Pula. Constitutional review of the decisions of the Kosovo Prosecutorial Council regarding the procedure for the election of the Chief State Prosecutor of the Republic of Kosovo, Prishtina, 8 July 2014, no. Ref: AGJ679/14*)”.
24. Furthermore, the Applicant regarding the exhaustion claims that the same practice has continued “... *in case KI34/17. Applicant: Valdete Daka. Constitutional review of Decision KJC no. 50/2017 of the Kosovo Judicial Council, of 6 March 2017*”. And “...*in case no. KI55/17, Applicant: Tonka Berisha, Constitutional review of Decision KGJ no. 13/2017 of the Kosovo Judicial Council of 13 January 2017*”.
25. The Court further notes that the Applicant alleges a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in that the members of the Evaluation Panel Commission did not properly score her documents, which she submitted during the presentation of the documentation for the announced vacancy, as well as for her oral presentation during the

interview procedure itself. In support of this allegation, the Applicant adds that the proceedings for her complaint before the KPC did not result in a fair result *"despite the fact that her appeal was accepted by the Commission for Review of KPC decisions"*.

26. The Applicant further states alleged violations of Article 24 of the Constitution, the Applicant states that *"The Constitutional Court in its decisions KI34/17, KI55/17, established some principles regarding the observance of transparency of meritocracy, coherence and logical decisions between the evaluation procedure and the selection of candidates, where all candidates are given equal opportunities"*.
27. In this regard, the Applicant adds that in her case gender discrimination was evident at all stages of the proceedings. According to her allegations, this principle means giving priority to female candidates on equal terms, which was not the case. As an evidence of this allegation, she shows some facts, namely: *"that she twice complained about the results of the points by the members of the evaluation panel commission; that there was no procedure for recording the interview itself even though this was a mandatory part of the process"*.
28. The Applicant concludes her allegations of a violation of Article 24 of the Constitution by claiming that she was eliminated from the outset, setting from the fact that they include the assessment of quality as an element of points, which was not part of the elements of official evaluation required by the vacancy, which is an indisputable evidence that there has been a violation of this principle in a procedure as a whole, which is comparable to the cases (*Valdete Daka, and Tonka Berisha*).
29. The Applicant further alleges a violation of Article 32 of the Constitution, due to the fact that she did not receive a decision on the selection of another candidate for the position of Chief Prosecutor of BP, which led to the fact that she was not allowed to challenge it before the courts and other competent bodies the selection of the candidate K.M., in the position of Chief Prosecutor of BP. More specifically, the decision on the selection of candidates was given only to the candidates who entered the voting procedure, and not to those who were not selected for voting, namely those who failed in the first round.
30. The Applicant further adds that the KPC has violated the right to effective legal remedies, taking into account the fact that the KPC provides for an administrative procedure for challenging decisions, which, according to her, is not part of the concept of effective legal remedies, which is the standard set by the Constitutional Court in its decisions, which violates her right to fair and impartial trial under Article 31 of the Constitution.
31. The Applicant requests the Court to declare her Referral admissible, to find that there has been a violation of Article 24 [Equality Before the Law], in conjunction with Article 14 (Prohibition of discrimination) of the ECHR, Article 31.1 [E right to Fair and Impartial Trial] in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 110.3 [Kosovo Prosecutorial Council] of the Constitution, to annul Decisions KPK no. 697/2019 and KPK no. 796/2019, of the Kosovo Prosecutorial Council; to order the KPC to return

the procedure for the selection of the Chief Prosecutor of BP to the point zero, and to conduct the selection again in accordance with the findings of this Court.

Admissibility of the Referral

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

33. In this respect, the Court refers to Article 113.7 of the Constitution, which establishes:

"[...] 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".

34. The Court also refers to Article 47.2 of the Law, which establishes:

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

35. The Court also takes into account Rule 39 (1) (b) of the Rules of Procedure, which specifies:

"(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".

36. The Court recalls that the rule for exhaustion of legal remedies under Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, obliges those who wish to bring their case before the Constitutional Court, that they must first use the effective legal remedies available to them in accordance with law, against a challenged judgment or decision.

37. In that way, the regular courts must be afforded the opportunity to correct their errors through a regular judicial proceeding before the case arrives to the Constitutional Court. The rule is based on the assumption, reflected in Article 32 of the Constitution and Article 13 of ECHR that under the domestic legislation there are available legal remedies to be used before the regular courts in respect of an alleged breach regardless whether or not the provisions of the ECHR are incorporated in national law (see, *inter alia*, case *Aksoy v. Turkey*, Judgment of 18 December 1996, paragraph 51, Judgment of ECtHR of 18 December 1996).

38. The principle is that that the protection mechanism established by the Constitutional Court is subsidiary to the regular system of judiciary safeguarding human rights (see, *inter alia*, *Handyside v. United Kingdom*, paragraph 48, ECtHR Judgment of 7 December 1976).

39. Under Article 113.7 of the Constitution, the Applicant should have a regular way to the legal remedies which are available and sufficient to ensure the possibility to put right the alleged violation. The existence of such legal remedies must be sufficiently certain not only in theory but also in practice, and if this is not so, those legal remedies will lack the requisite accessibility and effectiveness (see, *inter alia*, *Vernillo v. France* paragraph 27, ECtHR Judgment of 20 February 1991, and *Dalia v. France*, paragraph 38, ECtHR Judgment of 19 February 1998).
40. It falls to the Court to examine whether the legal remedies have been exhausted, and whether it was effective, available in theory and practice at the relevant time, that is, that the remedy was accessible, and that it could redress the violations in relation to the objections of the Applicant and that it enables reasonable prospect for success (see, *inter alia*, *Civet v. France* paragraphs 42-44, of the ECtHR Judgment of 28 September 1999).
41. However, when the remedy is provided by law, it is up to the Applicant to prove that i) the legal remedy provided by law has in fact been exhausted; ii) that for any reason it was not available and effective in the particular circumstances of the case; iii) that there have been special circumstances due to which he or she is exempted from the requirements of exhaustion of legal remedies.
42. The Court notes that the Applicant challenges two decisions rendered by the KPC as a result of the vacancy for Chief Prosecutor of BP in which she participated. More specifically, the Applicant according to the results achieved during the comprehensive selection process received an insufficient number of points and was consequently eliminated from the further selection procedure for the Chief Prosecutor of BP.
43. The Court also notes that the Applicant considers that the very fact that she also applied and was one of the candidates for the position of Chief Prosecutor of BP gives a special character and makes her position before the Constitutional Court more specific than other Applicants, therefore, she should be exempted from the exhaustion of all legal remedies available to her.
44. In this regard, the Court notes that the Applicant, after receiving the decisions of the KPC, directly addressed the Constitutional Court, requesting a constitutional review of the challenged decisions regarding the alleged violations of the rights and freedoms guaranteed by the Constitution, basing her referral precisely on the case law of the Constitutional Court, more precisely on cases KI99/14, KI100/14, KI34/ 7 and KI55/17, in which the Court exempted the Applicants from further exhaustion of legal remedies due to the specificity of their positions, namely the position to which the Applicants had applied.
45. The Court notes that in these cases the Court found that there are regular remedies available but that the positions to which the Applicants have applied are special and specific, and found: "*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*" (see paragraph 50 of

Judgment in Case KI99/14 and KI100/14, Applicants *Shyqyri Sylja and Laura Pula*, of 3 July 2014).

46. Furthermore, the Court in Judgments KI99/14 and KI100/14 has made a clear distinction when it comes to a single position and a situation where there are multiple identical positions, emphasizing: “...*the Court notes that there is only one position of Chief State Prosecutor as, for example, compared to multiple positions for the appointment or reappointment of judges and prosecutors. The Court is thus aware that it has received several Applications from judges and prosecutors who did not get reappointed. The present case, however, is factually distinguishable. First, because in those other cases there have been multiple positions and the regular courts could remedy the Applications if a violation was proven months later. Second, in the present case, it does not appear that there is sufficient time for any other Court to address that remedy before the appointment by the President of the Republic of Kosovo*”. (see paragraph 53 of the Judgment in Case KI99/14 and KI100/14 Applicant *Shyqyri Sylja and Laura Pula*, of 3 July 2014).
47. In addition, the Court followed this practice in cases KI34/17 and KI55/17, where taking into account the position of the President of the Supreme Court and the President of the Court of Appeals, the specificity of the selection procedure for these two positions and the necessity that the election be held in a timely manner exempted the Applicants from further exhaustion of legal remedies (see paragraph 77 of Judgment KI34/17, Applicant *Valdete Daka*, of 12 June 2017; see also paragraph 58 of Judgment in the case of Court KI55/17, Applicant *Tonka Berisha*, of 17 July 2017).
48. The Court notes that the Applicant's case differs in relation to the matters referred to by the Applicant, first according to the position to which the Applicant has applied, “*the specificity of the election procedure for the position of Chief State Prosecutor and the necessity this to be done in a timely fashion*” (see paragraph 50 in cases KI99/14 and KI100/14 Applicant *Shyqyri Sylja and Laura Pula*, of 3 July 2014).
49. Furthermore, the position to which the Applicant applied is not unique (see paragraph 53 of Judgment in case KI99/14 and KI100/14, Applicants *Shyqyri Sylja and Laura Pula*, of 3 July 2014). Also, the moment differs, respectively the state of the proceedings in which the Applicant is located and the stage of the proceedings in which the cases referred to by the Applicant were located, namely the cases KI99/14, KI100/14, KI34/17, and KI55/17.
50. Therefore, the Court finds that the case law referred to by the Applicant is not relevant and cannot be applied in the present case for the abovementioned reasons.
51. The Court further notes that the Applicant in this case is an individual who has regular legal remedies available before the regular courts and who belongs to the ranks of persons authorized under Article 113.7 of the Constitution and that the requirements of Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure apply to her (see the case of Court

KI130/16, Resolution on Inadmissibility, Applicant, *Hamdi Ibrahimi against Decision of the KJC*, of 7 July 2017, paragraph 29-33).

52. The Court wishes to emphasize that in case KI145/15 it has dealt with a similar Referral and that on 16 May 2016, it rendered the Resolution on Inadmissibility, because the Applicant has not exhausted all legal remedies which, were available according to the law (see the case of Court KI145/15, Resolution on Inadmissibility, Applicant, *Florent Muqaj v. Decision No. 321/2015 of the Kosovo Prosecutorial Council*, of 5 November 2015, paragraphs 31-41).
53. In sum, the Court considers that there is no final decision of the competent authority in this case which, at this stage, could be subject to review by the Constitutional Court, because the Applicant has not exhausted all legal effective legal remedies under the laws of Kosovo.
54. The Court therefore finds that the Applicant has failed to substantiate why the regular legal remedies before the regular courts were for some reason not available to her, or were ineffective in the particular circumstances of the case, or that there were special circumstances due to which she would be exempted from the requirements of exhaustion of legal remedies.
55. Based on the above, the Court concludes that the Applicant's Referral should be declared inadmissible, because the Applicant has not exhausted regular legal remedies in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and in accordance with Rule 39 (1) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, on 29 July 2020, 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

Radomir Laban

Kopje e vërtetuar
Overena kopija
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Arta Rama-Hajrizi

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