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

Prishtina, on 11 May 2021
Ref.No:RK 1772/21

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI09/21

Applicant

Sadat Lekiqi

Constitutional Review of the Notification of the *Ad-hoc* Parliamentary Committee of the Assembly of the Republic of Kosovo for the Selection of Candidates for Members of the Independent Oversight Board for Civil Service of Kosovo, of 15 September 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, 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 Sadat Lekiqi, residing in the village of "Gadime e Ulët", Municipality of Lipjan (hereinafter: the Applicant).

Challenged act

2. The Applicant challenges the Notification of the Ad-hoc Parliamentary Committee of the Assembly of the Republic of Kosovo for the Selection of Candidates for Members of the Independent Oversight Board for the Civil Service of Kosovo, of 15 September 2020 (hereinafter: the Notification of the Parliamentary Committee).

Subject matter

3. Subject matter is the constitutional review of the challenged act, which as alleged by the Applicant has violated his fundamental rights and freedoms guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law] and 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 13 (Right to an effective remedy), 14 (Prohibition of discrimination) and 17 (Prohibition of abuse of rights) of the European Convention on Human Rights (hereinafter: ECHR).

4. The Applicant also requests the Court to impose an interim measure *"regarding the reselected candidates until the meritorious determination of the case"*.

Legal basis

5. The Referral was based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 (Processing Referrals), 27 (Interim Measures) and 47 (Individual Requests) of Law No. 03/L-121 on the Constitutional Court, as well as Rules 32 (Filing of Referrals and Replies) and 56 (Request for Interim Measures) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 12 January 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 18 January 2021, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 26 January 2021, the Court notified the Applicant, the President of the Assembly of the Republic of Kosovo (hereinafter: the Assembly) and the Secretary General of the Assembly regarding the registration of the Referral.

9. On 28 April 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. The Applicant appears before the Court for the third time. His first referral, which is not related to the circumstances of the respective case, was registered in the Court with the number KI164/15. (See the case of the Court, KI164/15, Applicant *Sadat Lekiqi*, Resolution on Inadmissibility of 16 November 2016). In this case, the Applicant challenged the Judgment [ARJ-UZVP.No.22/2015] of 30 July 2015 of the Supreme Court and which rejected the request for extraordinary revision of the court decision, against the relevant Judgment of the Court of Appeals, deciding finally regarding the dispute related to the termination of the Applicant's employment relationship with the Kosovo Judicial Council. After examining the Applicant's allegations, the Court, by the Resolution on Inadmissibility of 16 December 2016, declared this case inadmissible as manifestly ill-founded on constitutional grounds.

11. Whereas, his second referral, which is also not related to the circumstances of the present case, was registered in the Court with the number KI140/20. (See the case of the Court, KI140/20, Applicant *Sadat Lekiqi*, Resolution on Inadmissibility of 12 April 2021). In this case, the Applicant challenged the Judgment [ARJ-UZVP.no.121/2019] of 18 November 2019, of the Supreme Court, and which rejected the request for extraordinary revision of the court decision, against the relevant Judgment of the Court of Appeals, deciding finally regarding the dispute related to the non-selection of the Applicant for one of the positions advertised by the Anti-Corruption Agency. After examining the Applicant's allegations, the Court by Resolution on Inadmissibility of 12 April 2021, declared this case inadmissible as manifestly ill-founded on constitutional grounds.

12. The circumstances of the present case are related to the Applicant's dispute with the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: IOBCSK), for whose members, the Applicant had applied but was not selected.

13. On 23 July 2018, the Assembly adopted the Law No. 06/L-048 on the Independent Oversight Board for Civil Service of Kosovo (hereinafter: the Law on the IOBCSK), which on 10 August 2018, was published in Official Gazette of the Republic of Kosovo. Pursuant to subparagraph 3 of paragraph 1 of Article 9 (Criteria for the appointment of a member of the Council) of the Law on the IOBCSK, a candidate applying to be appointed a member of the IOBCSK must have at least ten (10) years of professional work experience, of which at least five (5) years of work experience in the Civil Service.

14. On 26 May 2020, the Assembly announced the vacancy for the selection of 7 (seven) members of the IOBCSK. In the above-mentioned vacancy, inter alia, based on Article 9 of the Law on the IOBCSK, it was determined that the candidate applying to be appointed a member of the IOBCSK must have at least ten (10) years of professional work experience, of which at least five (5) years of work experience in the Civil Service.

15. On 12 June 2020, the Applicant applied for a member of the IOBCSK according to the above-mentioned vacancy.

16. On 15 September 2020, the Applicant was notified by the Parliamentary Committee that he was not selected to continue the interview process, because, among other things, he does not meet the relevant competition criteria, respectively, he does not have ten (10) years of work experience, as defined in subparagraph 3 of paragraph 1 of Article 9 of the Law on the IOBCSK.

17. On 13 October 2020, the Applicant addressed a request to the Ombudsperson Institution, requesting the initiation of a referral for constitutional review of the Law on the IOBCSK, to the Court. The Applicant states that the Ombudsperson Institution had rejected his aforesaid request.

Applicant's allegations

18. The Applicant alleges that the Notification of the Parliamentary Committee was issued in violation of his fundamental rights and freedoms guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law] and 49 [Right to Work and Exercise Profession] of the Constitution and Articles 13 (Right to an effective remedy), 14 (Prohibition of discrimination) and 17 (Prohibition of abuse of rights) of the ECHR.

19. The Applicant initially states that there are no legal remedies available to challenge the Notification of the Parliamentary Committee, "*until the selection procedures of the IOBCSK members have started, implemented by the competent authority – the Ad-hoc Parliamentary Committee for the Selection of Candidates for Members of the IOBCSK*".

20. With regard to the Notification of the Parliamentary Committee, the Applicant initially states that (i) despite being aware that he does not meet the formal criteria to be elected a member of the IOBCSK, he has applied for this position thinking that the Parliamentary Committee will invite him for an interview, because "*such a proceeding would be in the spirit of the Constitution*", having into consideration that the Law on IOBCSK has established legal criteria for work experience that exceeds any criteria of work experience in any institution defined by the Constitution, including the criteria for being elected Ombudsperson, judge of the Constitutional Court, as well as for the positions of judges and prosecutors; (ii) based on Article 31 (Setting the grades for current holders of positions in an institution) of Regulation No. 05/2012 on Classification of Jobs in the Civil Service, which, inter alia, determines if the current holder of position does not have the required qualification and experience for the approved job grade, and he/she has shown ability for accomplishment of relevant job requirements, then he/she can be placed in that grade in duration up to thirty six (36) months; (iii) in the competition for members of the IOBCSK there were other candidates who were selected in violation of the Law on the IOBCSK, stating that two (2) candidates were reselected as members of the IOBCSK despite the fact that Article 11 (Mandate of the members of Committee) of the Law on IOBCSK, does not allow reselection to another term of IOBCSK members; and consequently, (iv) he was discriminated against because two (2) candidates were selected in violation of the Law on IOBCSK, while on the other hand, the proceeding of the Applicant as a candidate for IOBCSK member, despite the fact that it would be contrary to the Law on IOBCSK, would be "*in the spirit of the Constitution*".

21. The Applicant also alleges that the Notification of the Parliamentary Committee was issued based on the provision of subparagraph 3 of paragraph 1 of Article 9 of the Law on the IOBCSK, and which according to the Applicant was issued in violation of the Constitution, because (i) the criteria set out in it, respectively the criterion related to the required experience of ten (10) years to apply for a member of the IOBCSK, is discriminatory and consequently violates the fundamental human rights and freedoms guaranteed by the Constitution and the ECHR; and (ii) these criteria are not *"in line with the spirit of the Constitution"*, because the Assembly has exceeded its constitutional powers by setting criteria for candidates for members of the IOBCSK, which exceed any criteria of work experience in any institution including, the criteria for being elected Ombudsperson, judge of the Constitutional Court, as well as the positions of judges and prosecutors.

22. Moreover, the Applicant also alleges that the challenged Notification of the Assembly is contrary to (i) Article 21 of the Constitution, inter alia, because *"human rights and freedoms have been violated and alienated, for which the Assembly of the Republic of Kosovo is the main actor who has traced this unconstitutionality, despite the fact that it should be a Temple of Democracy to protect and preserve fundamental human rights and freedoms, despite the constitutional obligation to do so"*; (ii) Article 24 of the Constitution, inter alia, because *"the adoption of the challenged law does not coincide with the legal order of the Republic of Kosovo, as sister laws must be in compliance with each other even in the cases when dealing with other state bodies, especially when dealing also with constitutional categories, as the appointment of the employee defined by the Constitution"*; (iii) Article 49 of the Constitution, inter alia, because *"in the case of the adoption of the law, the guaranteed right to work and the free choice of profession and place of work have been violated and as such, has violated the rights of work and profession guaranteed by the Constitution"*; (iv) Article 14 of the ECHR, inter alia, because the relevant provision of the Law on IOBCSK *"diminishes the enjoyment of the rights and freedoms set forth in this Convention"*, and (v) Article 17 of the ECHR, inter alia, because *"none of the provisions of this Convention shall be interpreted to give to a State, group or individual the right to engage in any activity or to perform any act aiming the violation of any rights and freedoms set forth in this Convention or wider restrictions on these rights or freedoms than provided for in the Convention"*.

23. The Applicant, referring to the decision-making of the Court in the case KI164/15 by the Resolution on Inadmissibility of 19 December 2016, also states, inter alia, that to the Constitutional Court *"we cannot in principle give credence regarding the meritorious handling of the issue raised, but at least hope for a professional handling of this legal case"*.

24. Finally, the Applicant requests from the Court to (i) declare his Referral admissible; (ii) to find, the alleged violations of Articles 21, 22, 24 and 49 of the Constitution and Articles 14 and 17 of the ECHR; (iii) to declare null and void the Notification of the Parliamentary Committee of 15 September 2020; (iv) to declare not valid subparagraph 3 of paragraph 1 of Article 9 of the Law on the IOBCSK, by remanding the same for "amending and supplementing" to the Assembly of Kosovo; (v) to declare not valid the voting of Assembly on the reselection of the members of the Council; and (vi) to impose an interim measure *"regarding the reselected candidates until the meritorious determination of the case"*.

Relevant Constitutional and Legal Provisions

Law No. 03/L-202 on Administrative Conflicts

Article 2
Aim

The aim of this law is provision of judicial protection of rights and interests for legal and natural persons and other parties, the rights and interests that have been violated by individual decisions or by actions of public administrative authorities.

Article 3
Definitions

1. Terms used in this law have the following meaning:
1.1. Body – public administration bodies, central government bodies and other bodies on their dependence, local government bodies and bodies on their dependence, when during exercising public authorizations decide on administrative issues.
1.2. Administrative act – every decision of the body foreseen in sub-paragraph 1.1 of this paragraph, which shall be taken in the end of the administrative procedure on exercising public authorizations and which effects, in favor or not favor manner legally recognized rights, freedoms or interests of natural or legal persons, respectively other party in deciding the administrative issues.
1.3. Administrative issue - according to this law is special uncontested situation and with public interest, in which directly from legal provisions, results the need to define the behavior of next party in legal-authoritative manner.

Article 10
[No title]

1. Based on the Law, a natural and a legal person has the right to start an administrative conflict, if he/she considers that by the final administrative act in administrative procedure, his/her rights or legal interests has been violated.
2. Administration body, Ombudsperson, associations and other organizations, which protect public interests, may start an administrative conflict.
[...]

Article 13
[Administrative conflict]

1. An administrative conflict can start only against the administrative act issued in the administrative procedure of the court of appeals.

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

Article 16
[No title]

1. The final administrative act can be objected:
1.1. for the reason that, the law has not been applied at all or legal provisions have not been correctly applied;
1.2. when the act has been issued by a non-competent body;
1.3. when in the procedure that preceded the act, was not been acted according to the procedure rules, the factual situation has not been correctly verified, or if from the verified facts, incorrect conclusion in the light of factual situation has been issued;
1.4. when with the final administrative act issued based on a free evaluation, the body has exceeded the limits of legal authorization or such act was not issued in compliance with the purpose of this law;
1.5. when the accused party has issued again her earlier act, annulled before with the final decision of the competent court.
2. The administrative act can not be rejected for incorrect implementation of the provisions, when a competent body has decided according to free assessment based on authorizations and within the limits given with legal provisions, in accordance with the aim for which the authorization was given.

Article 18
[No title]

The plaintiff in the administrative conflict may be a natural person, legal entity, Ombudsperson, other associations and organizations, which act to protect public interest, who considers that by an administrative act a direct or indirect interest according to the law, have been violated.

Article 22
[No title]

[...]
2. By the plaintiff request, the body whose act is being executed, respectively the competent body for execution can postpone the execution until the final legal decision, if the execution shall damage the plaintiff, whereas postponing is not in contradiction with public interest and postponing would not bring any huge damage to the contested party, respectively the interested person.
[...]
7. The court decides within three (3) days upon receiving the claim.

Article 27
[No title]

1. The indictment shall be submitted within thirty (30) days, from the day of delivering the final administrative act to the party.

2. This time-limit shall be also applied for the authorized body for submitting the indictment, if the administrative act has been delivered. If the administrative act has not been delivered, the indictment shall be delivered within sixty (60) days from the date of delivering the administrative act to the party, in favor of which the act has been issued.

Law No. 05/L-021 on the Protection from Discrimination

Article 1
Purpose

1. *The purpose of this law is to establish a general framework for prevention and combating discrimination based on nationality, or in relation to any community, social origin, race, ethnicity, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, social or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.*
   [...]"

Article 2
Scope

1. *This law applies to all acts or omissions, of all state and local institutions, natural and legal persons, public and private sector, who violate, violated or may violate the rights of any person or natural and legal entities in all areas of life, especially related to::*
   1.1. *conditions for access to employment, self-employment and occupation, including employment conditions and selection criteria, regardless of activity and at all levels of the professional hierarchy, including promotions;*
   [...]

Article 6
Other justified treatments

Notwithstanding Articles 3 and 4 of this law it is not deemed a discrimination a distinction in treatment which is based on differences provided on grounds of Article 1 of this Law, but which as such represents real and determinant characteristic upon employment, either because of the nature of professional activities or of the context in which such professional works are conducted, if that provision, criterion or practice is justified by a legitimate purpose and there is a reasonable relationship of proportionality between the means employed and the targeted aim.
[...]

Article 13
Lawsuits on discrimination disputes

1. Any person or group of persons, who claim that they have been discriminated on the grounds mentioned in Article 1 of the Law, may submit a lawsuit in the competent court.
2. Associations, organizations or other legal entities may initiate or support legal procedures on behalf of the claimants, with their consent, for the development of administrative or judicial procedures foreseen for the implementation of obligations set in this law.

Article 14
Court Procedures

1. The lawsuit is submitted to the competent court pursuant to the legislation in force, by the person or group of persons who complain of being discriminated on the grounds set out in Article 1 of this Law.
2. The Basic Court in Pristina is competent for non-resident persons, whether they are temporary or permanent.
3. The subjects may submit lawsuits on discrimination pursuant to this law, not later than five (5) years from the day the damaged party becomes aware of this violation.
4. The plaintiff may defend the case of discrimination by the use of any evidence and legitimate method, including but not limited to, statistical data that may prove discriminatory behaviour.

Article 16
Actions in the contested procedure

1. Any person who claims to be a victim of discrimination, under the provisions of Article 1 of this Law, has the right to file suit against the defendant and to take all legal actions to the competent court.
2. The Court after receiving relevant facts and arguments, verifies that the respondent has committed discrimination actions or non-actions towards the plaintiff, may decide to:

2.1. prohibit performing activities which violate or may violate the right of the defendant, or to compel the defendant to eliminate all discriminatory actions from the plaintiff;

2.2. compensate the material or non-material damage caused by the infringement of the rights protected by this Law according to compensation on lawsuit;

2.3. order temporary measures in accordance with the provisions of the relevant Law on Contested Procedure (if the plaintiff has proven credible, that his/her right for equal treatment is violated, and if deemed necessary to order a measure with the aim of eliminating the risk of irreparable damages, especially for severe violations of the right on equal treatment, or with the aim of preventing violence);

2.4. order a shorter deadline of execution than defined in the Law on Enforcement Procedure;

2.5. publish in the media the court decision, through which it is proven the violation of the right for equal treatment.

3. Unsatisfied party may file a complaint from the first instance decision within seven (7) days in the Court of Appeal according to the Law on Contested Procedure.

4. Requirements from paragraph (1) of this Article may be submitted together with the requirements for protection of other rights, on which is established a contested procedure, if all requests are mutually related and if the court has the same competence regarding thereto, notwithstanding whether for those requirements is determined a decision-making in a general or particular contested procedures.
[...].
9. Judicial procedures in the cases of discrimination should be dealt urgently."

Assessment of the admissibility of Referral

25. The Court first examines whether the admissibility criteria established by the Constitution, and further specified by the Law and Rules of Procedure, have been fulfilled.

26. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides:

"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."

27. The Court also refers to Articles 47 (Individual Requests), 48 (Accuracy 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."

28. With regard to the fulfillment of these criteria, the Court finds that the Applicant submitted the Referral in the capacity of an authorized party, challenging an act of public authority, namely the Notification of the Parliamentary Committee of 15 September 2020. However, in addition the Court will assess whether the Applicant has met the criterion of exhaustion of legal remedies provided by law, as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure.

29. The criteria for assessing whether the obligation to exhaust all *"effective"* legal remedies has been met, are well defined in the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, based on 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. The same principles are also elaborated in the case law of the Court, including but not limited to the cases of the Court, KI108/18, Applicant *Blerta Morina*, Resolution on Inadmissibility, of 30 September 2019 (hereinafter: the case of the Court, KI108/18); KI147/18, Applicant *Artan Hadri*, Resolution on Inadmissibility, of 11 October 2019 (hereinafter: the case of the Court, KI147/18); KI211/19, Applicants *Hashim Gashi, Selajdin Isufi, B.K., H.Z., M.H., R.S., R.E., S.O., S.H., H.I., N.S., S.I., and S.R,* Resolution on Inadmissibility, of 11 November 2020 (hereinafter: the case of the Court, KI211/19); KI43/20, Applicant *Fitore Sadikaj*, Resolution on Inadmissibility, of 31 August 2020 (hereinafter: the case of the Court, KI43/20); and KI42/20, Applicant *Armend Hamiti*, Resolution on Inadmissibility, of 31 August 2020 (hereinafter: the case of the Court, KI42/20).

30. As clarified through the cases mentioned above, the purpose and justification of the obligation to exhaust legal remedies or the rule of exhaustion is to provide the relevant authorities, first of all the regular courts, with the opportunity to prevent or remedy 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 mean of protecting the fundamental rights and freedoms guaranteed by the Constitution. (See, in this context, the case of the ECtHR: *Selmouni v. France*, Judgment of 28 July 1999, paragraph 74; and, inter alia, see also the case of the Court, KI211/19, cited above, paragraph 53 and the references used therein).

31. Based on the same case law, the release from the obligation to exhaust legal remedies is done only exceptionally and only in specific cases when analyzing this criterion of admissibility in the light of factual, legal and practical circumstances of a particular case. Therefore, in principle, the exhaustion rule should be applied with a *"degree of flexibility and without excessive formalism"*, having into consideration the context of the protection of human rights and fundamental

freedoms. (In relation to the concept of *"flexibility and lack of excessive formalism"*, see Practical Guide on Admissibility Criteria of the ECtHR of 30 April 2020, I. Procedural grounds for inadmissibility, A. Non-exhaustion of domestic remedies, 2. Application of the rule, a) Flexibility, paragraphs 82 and 83 and the references used therein). In this regard, the ECtHR has also adopted the concept of *"special circumstances"*, through which it assesses whether there is any special basis that releases the Applicant from fulfilling the obligation to exhaust the legal remedy. However, in all cases based on the case law of the Court and the ECtHR, in assessing whether the relevant legal remedies have been exhausted or are not *"effective"*, the test of *"burden of proof"* is applied, a process clearly defined in the above-mentioned case law and on the basis of which, in principle, the respective Applicant must argue that he has exhausted the legal remedies or that the same are not *"effective"* in the circumstances of the respective case. (See, inter alia, the Court case KI211/19, cited above, paragraphs 56, 59 and 60 and references used therein).

32. In all cases where the legal remedies have not been exhausted, in order to determine whether the same, in the circumstances of the respective cases, would not be *"effective"*, it must be assessed whether (i) the existence of legal remedies is *"sufficiently safe not only in theory but also in practice "*, because the same, should be able to *"provide solutions regarding the allegations of an applicant"* and *"to provide a reasonable opportunity for success"*; and (ii) the relevant legal remedies are *"available, accessible and effective"*, such characteristics which should be sufficiently consolidated in the case law of the relevant legal system. (See, inter alia, the case of the Court, KI211/19, cited above, paragraphs 56 and 57, and the references used therein). However, the Applicant must prove that *"he has done everything reasonably expected from him to exhaust the legal remedies"*, except when an Applicant can prove, providing relevant case law or other appropriate evidence, that an available legal remedy which he did not use would fail. Moreover, *"simple suspicions"* of an Applicant regarding the ineffectiveness of a legal remedy are not valid as a reason to release an Applicant from the obligation to exhaust legal remedies. (See, inter alia, the case of the Court, KI211/19, cited above, paragraph 58 and the references used therein).

33. Therefore, and further the Court must assess whether in the circumstances of the respective case, the Applicant has exhausted the legal remedies or if he, based on the *"burden of proof"* argues that the same in the circumstances of his case, are not *"effective"*, thus resulting in circumstances, based on which, the Applicant could be released from the obligation to exhaust legal remedies. In the context of the latter, the Court based on the principles elaborated above, must assess whether (i) the Applicant has proved that the legal remedies which he has not exhausted are not *"sufficiently safe not only in theory, but also in practice"* because they cannot *"provide solution to the applicant's allegations"* and *"to provide a reasonable opportunity for success"*; and (ii) are not *"available, accessible and effective"*. Furthermore, the Court must also assess whether the Applicant *"has done everything that could reasonably be expected of him to exhaust legal remedies"*, also considering that the Applicant's *"simple suspicions"* about the inefficiency of a legal remedy, as explained above, do not apply as a reason to release an Applicant from the obligation to exhaust legal remedies.

34. In this context, the Court notes that no legal remedy has been exercised against the challenged decision. Consequently, in the circumstances of the present case, it is

not disputed that the Applicant has not exhausted the legal remedies provided by law. As a result, it must be assessed whether, in the circumstances of the present case, the Applicant has argued that the legal remedies in his case either do not exist or would not be *"effective"*. The Court recalls that the Applicant before the Court, simply alleges that *"until the selection procedures of the IOBCSK members have started, implemented by the competent authority – the Ad-hoc Parliamentary Committee for the Selection of Candidates for Members of the IOBCSK"*.

35. Based on the above-mentioned allegation of the Applicant, it is also uncontested that the same did not argue before the Court, as it is necessary through the *"burden of proof"*, neither if there are no legal remedies nor if those which exist, are not *"effective"* in the circumstances of his case.

36. In this regard, the Court notes that beyond the possibility of contesting the proceedings concerning the selection of the IOBCSK members within the Assembly, the applicable laws also refer to other legal remedies set out in (i) Law No. 03/L-202 on Administrative Conflicts (hereinafter: LKA); and (ii) Law No. 05/L-021 on Protection from Discrimination (hereinafter: the Law on Protection from Discrimination), respectively, and which will be elaborated henceforth.

37. With regard to the provisions of the LAC, the Court first notes that *"the actions of public administration bodies"* may be challenged in administrative procedure, as set out in Article 2 (Purpose) of the LAC. The same, based on paragraph 1.1 of Article 3 (Definitions) of the LAC, include also the central government bodies, moreover that based on paragraph 1.2 of the same Article, an administrative act qualifies any decision, including that of central government, which is taken at the end of an administrative procedure, in the exercise of public authority and which affects, favorably or unfavorably, the rights recognized by law, freedoms or interests of natural or legal persons. Furthermore, Articles 10 [no title] and 13 (Administrative Conflict) of the LAC, inter alia, define the possibility of initiating an administrative conflict against administrative acts for which the natural or legal person considers that a right or legal interest has been violated. The same right, based on article 18 [no title] of the LAC, has the administrative body, the Ombudsperson, associations and other organizations, which act in protection of public interests. Further, Articles 16 [no title] and 27 [no title] of the LAC, precisely, define the grounds on which an administrative act and the relevant deadlines can be challenged. In addition, and important, while Article 22 [no title] of the LAC stipulates that the lawsuit does not prohibit the execution of the administrative act, the same article also stipulates that in certain cases with the request of the plaintiff, the execution of an act may be postponed until the final court decision, and that based on paragraph 7 of the same Article, for postponement of execution, the court issues the decision within three (3) days from the date of receipt of the request.

38. With regard to the provisions of the Law on Protection from Discrimination, the Court first notes that the same, based on Article 1 (Purpose), determine the grounds for discrimination, while based on Article 2 (Scope), determine the application *"for all acts or omissions, of all state and local institutions, natural and legal persons,.."*, which violate the rights of every person, including in relation to *"conditions for access to employment, self-employment and occupation, including employment conditions and selection criteria, regardless of activity and at all levels of the professional hierarchy, including promotions "*.

39. Furthermore, paragraph 1 of Article 13 (Lawsuits on discrimination disputes) and paragraph 1 of Article 16 (Actions in the contested procedure) of the Law on Protection from Discrimination, define the court proceeding that can be followed through a lawsuit, explicitly emphasizing, that any person who may have allegations of discrimination may file a claim in the competent court. Article 16 of the Law on Protection from Discrimination stipulates that the competent court has the power (i) to prohibit the defendant from committing discriminatory acts which violate or may violate the right of the plaintiff, or to compel the defendant to eliminate all discriminatory actions from the plaintiff; (ii) to compensate the material or non-material damage caused by the infringement of the rights protected by this Law; (iii) to order temporary measures in accordance with the provisions of the relevant Law on Contested Procedure; (iv) to order a shorter deadline of execution than defined in the Law on Enforcement Procedure; and (v) to publish in the media the court decision, through which it is proven the violation of the right for equal treatment. This Article also (i) establishes the right of the parties to file a complaint to the Court of Appeals against the decision of the relevant Basic Court; while (ii) stipulates that judicial procedures in the cases of discrimination should be dealt urgently.

40. The Court notes that the Law on Protection from Discrimination sets out the legal framework for protection against discrimination, including the selection criteria for employment, as it is the case in the circumstances of the present case. The same law prescribes legal remedies before regular courts, including the duality of court decisions, as well as the precise procedures to be followed to request legal protection in the event that a person or group of persons consider that have been discriminated against. The regular courts also, according to the same law, have the opportunity to order interim measures in accordance with the provisions of the relevant law on contested procedure, if the plaintiff has made it credible that his/her right to equal treatment has been violated, and if it is necessary to order a measure with the aim of eliminating the risk of irreparable damage. Furthermore, as explained above, the above-mentioned law also provides that judicial procedures in cases of discrimination should be dealt urgently.

41. The Court also notes that with regard to the constitutionality of the legal norms, respectively the Applicant's allegations that the challenged Notification of the Parliamentary Committee was issued based on the unconstitutional norm, the regular courts regarding the cases they are handling, including cases when the competent courts deal with matters in accordance with the Law on Protection from Discrimination, in case of doubt on the constitutionality of a legal norm, have the right to refer this case to the Constitutional Court, in accordance with paragraph 8 of Article 113 of the Constitution, either ex officio or if such an issue is raised by the parties.

42. As noted above, the Applicant has not proved before the Court that (i) the legal remedies elaborated above, which he has not exhausted, are not "*"sufficiently safe not only in theory but also in practice"* because they cannot *"provide solutions in in regards to the Applicant's allegations"* and *"to provide a reasonable opportunity for success"*; (ii) the same are not *"available, accessible and effective"*; (iii) *"has done all that can reasonably be expected from them to exhaust legal remedies"*; and (iv) his allegations of ineffectiveness of legal remedies are not based on *"simple suspicions"* and which, as explained above, do to constitute grounds for

releasing an Applicant of the obligation to exhaust legal remedies. Therefore, the Applicant, beyond the fact that he has not exhausted the legal remedies as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 of the Rules of Procedure, he also did not argue before the Court that the existing legal remedies are not *"effective"* in the circumstances of his case, contrary to the principles and criteria set out in the case law of the Court and the ECtHR, as elaborated in this Resolution.

43. The Court also notes that it has even previously handled cases where various decisions of the bodies of the Assembly or the Government have been challenged before it, and which were challenged before the Court without exhausting the legal remedies provided by law or without arguing before the Court that they were not *"effective"* based on the case law of the Court and the ECtHR in the circumstances of the respective cases. For example, in the case of the Court KI147/18, have been challenged the procedures regarding the selection of the Director of the Agency for the Management of Memorial Complexes of Kosovo, respectively Decision [06/375] of 22 May 2018 of the Committee on Agriculture, Forestry, Rural Development, Environment and Spatial Planning of the Assembly for the recommendation of candidates for the selection of the Director of the Agency for the Management of Memorial Complexes of Kosovo, as well as Decision [No. 06-V-151] of the Assembly for the selection of the Director of the above-mentioned Agency, of 6 June 2018. In assessing the allegations of the respective Applicant, the Court found that the Applicant, beyond the possibility of contesting the procedures regarding the selection of the Director of the Agency within the Assembly, has not exercised other legal remedies set out by the LAC and the Law on IOBCSK, respectively and, consequently, had declared the Applicant's Referral inadmissible for the fact that the legal remedies provided by law had not been exhausted and for the fact that they had not met the conditions to release the Applicant from the obligation to exhaust the legal remedies. (See, Case KI147/18, cited above, paragraphs 53 and 61).

44. The Court maintained the same approach also in the case, KI211/19, where was challenged the Decision [no.11/111] of the Government of the Republic of Kosovo of 19 July 2019, in conjunction with the Decision of the Government [no.05/55] for the return of socially-owned properties to the Kosovo municipalities. In this context, the Court had assessed that the challenged decisions of the Government could be challenged in administrative procedure based on the provisions of the LAC, and in the aforementioned case, the Applicants had failed to use the legal remedies provided by the LAC and also failed to argue before the Court that they would not be *"effective"* legal remedies, based on the case law of the Court and the ECtHR, in the circumstances of the present case. (See the case of the Court, KI211/19 cited above, paragraphs 62 and 80). The Court acted the same also in the cases, KI43/20 and KI42/20, by which was requested the constitutional review of the relevant Decisions of the Kosovo Prosecutorial Council. In addition, the Court rejected as inadmissible due to non-exhaustion of legal remedies, also cases in which the request for release from this obligation was based, inter alia, also on the *"legal and political context"* but also on *"special circumstances"* of an Applicant, as is the case KI108/18. (See, the case of the Court, KI108/18, cited above, paragraphs 148 to 193 and the references used therein).

45. Consequently, based on the above and taking into consideration the allegations raised by the Applicant and the facts presented by him, the Court, relying also on the standards set in its case law, in similar cases and the case law of the ECtHR, finds that the Applicant does not meet the admissibility criteria since he has not exhausted the legal remedies as defined in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 of the Rules of Procedure, and as such, the Referral must be declared inadmissible.

Request for interim measure

46. The Court recalls that the Applicant also requests the Court to issue a decision on the imposition of an interim measure, *"regarding the reselected candidates until meritorious determination of the case"*.

47. Nevertheless, the Court concludes that the Applicant's Referral does not meet the procedural admissibility criteria.

48. Therefore, in accordance with paragraph 1 of Article 27 (Interim Measures) of the Law and point (a) of paragraph (4) of Rule 57 (Decision on Interim Measures) of the Rules of Procedure, the Applicant's Referral for an interim measure must be rejected, because the same cannot be subject to review, after the Referral is declared inadmissible. (See, in this context, the cases of the Court: KI107/19, with Applicant *Gafurr Bytyqi*, Resolution on Inadmissibility of 21 April 2020, paragraphs 88-90; KI159/18, with Applicant *Azem Duraku*, Resolution on Inadmissibility of 6 May 2019, paragraphs 89-91; KI19/19 and KI20/19, Applicants *Muhamed Thaqi and Egzon Keka*, Resolution on Inadmissibility of 26 August 2019, paragraphs 53-55; and KI211/19, cited above, paragraph 83).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and in accordance with Rule 39 (1) (b) and 57 of the Rules of Procedure, on 28 April 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

I. TO NOTIFY this Decision to the Parties;

II. TO REJECT the request for an interim measure;

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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