



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

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Prishtina, on 21 December 2021  
Ref. no.:AGJ 1930/21

*This translation is unofficial and serves for informational purposes only.*

## **JUDGMENT**

in

**case no. KO127/21**

Applicant

**Abelard Tahiri and 10 other deputies of the Assembly of the Republic of Kosovo**

**Constitutional review of Decision no. 08-V-029, of the Assembly of the Republic of Kosovo of 30 June 2021, on dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of:

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

## **Applicant**

1. The Referral is submitted by eleven (11) deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), namely: Abelard Tahiri, Eliza Hoxha, Ganimete Musliu, Blerta Deliu Kodra, Hajdar Beqa, Fadil Nura, Ardian Kastrati, Elmi Reçica, Floretë Zejnullahu, Ariana Musliu Shoshi, Bekim Haxhiu (hereinafter: the Applicants or the Applicant deputies).
2. The Applicants are represented in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), by the legal representative Faton Fetahu from Prishtina.

## **Challenged act**

3. The Applicants challenge the Decision [No. 08-V-029] of 30 June 2021 of the Assembly of the Republic of Kosovo (hereinafter: the challenged Decision) on dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: Independent Board).

## **Subject matter**

4. The subject matter of the Referral is the constitutional review of the challenged Decision, which according to the Applicant's allegations, is not in accordance with Article 101 [Civil Service] and Article 142 [Independent Agencies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
5. The Applicants state that based on Article 43 (Deadline) of the Law, the challenged Decision is subject to *ex-lege* suspensive effect. In this context, the Applicants also refer to (i) paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which stipulates that while the proceeding is pending before the Court, the Court may temporarily suspend the contested action or law, until the Court renders a decision, if it finds that the application of the challenged action or law would result in unrecoverable damages; and (ii) Article 27 (Interim Measures) of the Law, which stipulates that the Court may, *ex officio* or at the request of a party, impose interim measures in a case that is a subject of a proceedings, if such measures are necessary to avoid risks or unrecoverable damages, or if such an interim measures is in the public interest.

## **Legal basis**

6. The Referral is based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties], of the Constitution, Articles 22 [Processing Referrals], 42 [Accuracy of the Referral] and 43 [Deadline] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law), as well as Rules 32 [Filing of Referrals and Replies], 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure of the

Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

### **Proceedings before the Court**

7. On 7 July 2021, the Applicants submitted their Referral to the Court, whereby, they challenged the Decision of the Assembly on dismissal of (5) members of the Independent Board.
8. On 14 July 2021, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Radomir Laban and Remzije Istrefi-Peci (members).
9. On 16 July 2021, the Court notified the Secretary General of the Assembly about the registration of the Referral and requested that by 30 July 2021, to submit to the Court all relevant documents in relation to the challenged decision.
10. On 16 July 2021, the Applicants were notified about the registration of the Referral. On the same date, the Court notified about the registration of the Referral: the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), who was requested to submit a copy of the Referral to all deputies of the Assembly; the Ombudsperson and the Independent Board. The Court notified the interested parties mentioned above that their comments, if any, must be submitted to the Court, within fifteen (15) days, namely until 30 July 2021, at the e-mail address of the Court or by personal submission.
11. On the same date, the Court notified the President of the Republic of Kosovo (hereinafter: the President) and the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister) about the registration of the Referral.
12. On 21 July 2021, the Secretary of the Assembly submitted to the Court the complete file regarding the challenged Decision.
13. On 30 July 2021, the deputy Doarsa Kica-Xhelili, a deputy from the Parliamentary Group VETËVENDOSJE!, submitted comments regarding the Referral KO127/21.
14. On 3 August 2021, the Court notified the Applicants about the receipt of comments from the deputy Kica-Xhelili, and offered them the opportunity to submit their comments by 13 August 2021. The Applicants did not submit additional comments.
15. On 15 September 2021, the Court requested from the Independent Board additional documents, namely (i) a copy of the resignation of Mr. Eshref Shabani from the position of Chairperson of the Independent Board; and (ii) any other relevant documents of 8 September 2021, namely of the extraordinary meeting of this institution, related to the issue of resignation.

16. On 17 September 2021, the Independent Board attached (i) Decision of the Independent Board no. 7/2021 of 8 June 2021; (ii) A copy of the Minutes of the extraordinary meeting of the Board of 8 June 2021, in which the only item on the agenda was the consideration of the request of the Chairperson of the Independent Board to resign from this position; and (iii) the decision of the Assembly on the dismissal of 5 (five) members of the Independent Board.
17. On 6 October 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously requested to postpone the case for additional supplementation, while regarding the assessment of the interim measure, receiving information from the Assembly regarding the actions taken after the adoption of the challenged Decision.
18. On 12 October 2021, the Court requested from the Assembly additional information regarding the actions taken after the challenged Decision.
19. On 13 October 2021, the Assembly responded with the information requested by the Court, notifying the Court regarding the announcement of vacancies, namely the Decision of the Presidency of the Assembly to announce the vacancy for five (5) members of the Board from 23 August 2021; and the Decision of the Presidency of the Assembly for the re-announcement of the vacancy for five (5) members of the Board from the Albanian community and for two (2) members from of non-majority communities from 6 October 2021.
20. On 20 October 2021, the Review Panel considered the proposal of the Judge Rapporteur regarding the decision on the interim measure and unanimously requested the further supplementation of this proposal.
21. On 21 October 2021, the Judge Rapporteur recommended that the Court the approval of the interim measure. On the same date, the Court, unanimously, imposed the interim measure with respect to the challenged Decision until 15 December 2021.
22. On 24 November 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously requested the postponment of the case for further supplementation.
23. On 9 December 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral. On the same date, the Court voted and unanimously decided that Decision [no. 08-V-029] of 30 June 2021 of the Assembly of the Republic of Kosovo is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution.

## Summary of facts

24. On 8 October 2020, after three rounds of secret voting, the Assembly, by Decision [No. 07-V-063], decided to elect five (5) members of the Independent Board. This decision was based on Article 65 [Competencies of the Assembly] and 142 [Independent Agencies] of the Constitution, Articles 8 (Composition of the Board), 10 (Appointment procedures of the members of the Board) and 11 (Term of office for members of Board) of Law no. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo (hereinafter: the Law on the IOBCSK), as well as Articles 51 and 84 of the Rules of Procedure of the Assembly of the Republic of Kosovo.
25. On 31 March 2021, based on paragraph 1 of Article 28 (Annual report of the Board) of the Law on the IOBCSK, the Independent Board submitted to the Assembly its Annual Work Report for 2020.
26. On 28 April 2021, the President of the Assembly: (i) forwarded the Annual Report of the Independent Board to the deputies of the Assembly, and (ii) charged the Committee on Public Administration, Local Government, Media and Regional Development (hereinafter: the Committee of the Assembly for Public Administration) and the Committee on Budget, labor and Transfers, to review this report and submit the respective reports and recommendations to the Assembly.
27. On 1 June 2021, the meeting of the Assembly Committee on Public Administration was held, where with six (6) votes against, it was voted against the approval of the Annual Report of the Independent Board for 2020.
28. On 2 and 3 June 2021, the Assembly Committee on Public Administration through the Coordination Office of the Committee requested the following information from the Independent Board: (i) data on all pending cases before the Independent Board decided on the case that was discussed in the Committee (case of N.K.), including but not limited to recording the number of previous cases before deciding on this case; and (ii) the accurate number of all pending cases, the exact filing dates of each complaint/claim/submission that was pending and submitted before case of N.K., which however was not addressed before this case. This Committee also requested the following information: (i) have all the cases that were identified as pending in the previous question were handled within forty-five (45) days; and (ii) to confirm whether all of these cases did not need to be granted additional time to deal with but that the period in question or what was left of that period in the case of transfer was sufficient. Upon submission of this clarification, the Coordination Office of the Committee requested that (i) the date of the decision be sent to the cases that were identified as pending in the preliminary question; and (ii) attach the complete case file of N.K..
29. On 7 June 2021, the Chairman of the Board, Eshref Shabani, responded to the above request by stating that: (i) The Independent Board provided under paragraph 2 of Article 101 of the Constitution, which stipulates that “An

*independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo*"; (ii) provided information on the manner of allocation of cases to the members of the Independent Board, as well as the placement of cases in the panels composed of three members that were decided by the IOBCSK Decision [No. 2] of 14 October 2020, as defined by paragraph 3 of Article 16 (Review of the Complaints) of the Law on IOBCSK; and (iii) provided information regarding the case of complainant N.K., stating that the latter's complaint was received on 7 February 2019 and was the 77th complaint received in 2019. He further clarified how this complaint had been allocated to him and that the case was handled based on the order of 2019 cases assigned to him, therefore no priority was given to handling the case, also explaining how the extension of the decision-making deadline for another ten (10) days was proposed, based on paragraph 2 of Article 17 (Decision-making deadline in the Board) of the Law on the IOBCSK.

30. On 8 June 2021, the Independent Board held an extraordinary meeting and rendered Decision no. 7/2021, whereby it is emphasized that Mr. Eshref Shabani has irrevocably resigned from the position of the Chairman of the Independent Board by which it is decided that Mr. Arben Mehmeti chairs the Board until the election of a new chairman. According to the comments of the Independent Board of 15 September 2021, the minutes remained unapproved by the Board because the members were dismissed. The Court notes that based on the case file, Mr. Shabani had resigned from the position of Chairman of the Independent Board, not from the position of member.
31. On 10 June 2021, the Independent Board notified the Assembly Committee on Public Administration that: (i) Eshref Shabani had resigned from the position of Chairman of the Board; and that (ii) at the extraordinary meeting of the Independent Board of 8 June 2021, his resignation was approved and pursuant to the provisions of Rules of Procedure 01/2018 on the IOBCSK, it was decided that until the election of a new Chairman, the Chairman should be Arben Mehmeti.
32. On 15 June 2021, the Assembly Committee on Public Administration issued the Recommendation [08/314/Ra-11]: *"1. Not to approve the Annual Report of the Independent Oversight Board for the Civil Service of Kosovo, for 2020,"* on the grounds that the Report does not fulfill its legal obligations for reporting and recommends to the Assembly its non-approval.
33. On the same date, the Assembly Committee on Public Administration, by six (6) votes *"for"* and four (4) *"against"* by Recommendation [08/315/Do-213], recommended to the Assembly to dismiss five (5) members of the Independent Board. In the reasoning of the recommendation it was stated that the initiation of the dismissal procedure was done according to paragraph 1, items 1 and 3 of Article 15 (Termination of the Board's member mandate) of the Law on IOBCSK as follows, namely (i) for violation the provisions of the Law on the IOBCSK; and (ii) in cases of performance of duties incompatible with his function. Furthermore,

the relevant recommendation stated that: *“it was assessed that the Board acted in violation of Article 12 of the Law on the IOBCSK, because it did not implement the applicable laws during the decision-making”*.

34. On 17 June 2021, the Independent Board addressed the Assembly by a submission expressing the concern of the members of the Board regarding the initiative to dismiss the members of the IOBCSK on the grounds that: (i) the Independent Board is an independent institution as defined in Article 101 of the Constitution; (ii) members of the Independent Board in relation to decision-making within the constitutional and legal functions of the Board enjoy immunity from prosecution, civil suit or dismissal; (iii) emphasize that the Assembly Committee on Public Administration does not have the necessary expertise and knowledge to review concrete cases as the members of this Committee have done; and (iv) in accordance with Law no. 03/L-176 on Parliamentary Investigation, to initiate the establishment of the Parliamentary Investigation Committee and this Committee to deal with the detailed analysis of the evaluation of the work of the members of the Independent Board.
35. On 30 June 2021, the plenary session of the Assembly voted on the recommendation of the Assembly Committee on Public Administration for the dismissal of five (5) members of the Independent Board. The result of the voting was as follows: sixty two (62) votes *“for”* the dismissal of the members of the Independent Board, three (3) votes *“against”* and eleven (11) *“abstentions”*. Therefore, the Assembly, by Decision [No. 08-V-029], voted to dismiss five (5) members of the IOBCSK.
36. On 19 July 2021, the Presidency of the Assembly by Decision [no. 08-V-049] decided that from 23 August 2021, to announce the vacancy for five (5) members of the Independent Board, from the Albanian community. While, within the period of twenty one (21) days, until 13 September 2021, no sufficient number of candidates had applied, the Presidency of the Assembly, on 29 September 2021, by Decision [No. 08-V-065], re-announced the public vacancy for five (5) members of the Independent Board from the Albanian community and for two (2) members from the non-majority communities. The vacancy was announced on 6 October 2021 and remained open until 25 October 2021.

### **Applicant’s allegations**

37. The Applicants allege that the challenged decision of the Assembly, in substantive and procedural aspect, is contrary to Articles 101 [Civil Service] and 142 [Independent Agencies] of the Constitution.
  - (i) *Allegations regarding the admissibility of the Referral*
38. The Applicants state that based on Judgment KO73/16, and in particular paragraphs 43 and 49 thereof, the challenged Decision raises constitutional issues

because it falls within the background of the norms set out in Articles 101 [Civil Service] and 142 [Independent Agencies] of the Constitution.

39. The Applicants argue that the Constitutional Court should interpret the constitutional norms whenever a case is addressed to the Court by the institutions mandated for referral and in the present case, according to the Applicants, in order to protect the civil service system, represented by the Board “*members whose system, indirectly by the challenged decision, their legal security provided by the Independent Oversight Board for the Kosovo Civil Service has been violated, which has an independent responsibility from the Government to protect the principles of public service and the rights of the servants (employees) of this system*”. Consequently, the Applicants request that the challenged Decision be reviewed on its merits.

(ii) *Allegations of violation of Article 101 and 142 of the Constitution*

40. The Applicants initially state that paragraph 2 of Article 101 of the Constitution establishes the Independent Board in the function of an independent institution which must ensure that the standards of merit, professionalism, policy neutrality and of a civil character of the civil service are reflected in the work and activity of the state civil service. Therefore, the Applicants state that the Assembly, the Government and other political bodies are stripped of their competencies to interfere with the maintenance of the professional integrity of the civil service, because this competence has been transferred to an independent institution.
41. The Applicants further refer to several Judgments of the Court, arguing that (i) the decisions of the Independent Board are final and, as such, constitute a valid executive title; and (ii) proceedings before this quasi-court (*quasi-judicial*) body must comply with the rules on fair and impartial trial, including the procedure for the execution of decisions of the Independent Board.
42. The Applicants also refer to Article 142 of the Constitution, stating that it regulates the form and manner of establishment of Independent Agencies and sets out four basic principles that should accompany the establishment and functioning of Independent Agencies, namely highlight the arguments as in the following: (i) The Assembly of Kosovo is the constitutional authority which retains the right to establish Independent Agencies, and for their establishment, Article 142 of the Constitution stipulates that the Assembly must issue relevant laws, which govern, *inter alia*, the functioning, and their legal scope; (ii) The Constitution stipulates that Independent Agencies must be guaranteed that the exercise of their legal function is exercised without influence and independently of any instruction or interference of other state authorities, including the body that has established it; (iii) to guarantee the independence of Independent Agencies, Article 142 of the Constitution stipulates that they must possess their own separate budget, and administer it independently; and (iv) the constitutional principle which should accompany the establishment of Independent Agencies, relates to the constitutional guarantee that other state bodies shall preserve their independence,



cooperate and respond to the requests of the Independent Agencies in the exercise of their constitutional and legal powers.

43. The Applicants also refer to the Law on the IOBCSK, stating that: (i) by the challenged Decision in the plenary session by a majority of votes it was decided to dismiss five (5) members of the Independent Board, consequently terminating their constitutional mandate; (ii) have been collectively dismissed, despite the indisputable fact that the members of this institution are elected individually in a procedure clearly defined in the Assembly, and that according to the Applicants, in this case, there has been a violation of the procedure followed regarding their dismissal.
44. The Applicants further refer to Article 15 (Termination of the Board's member mandate) of the Law on the IOBCSK, stating that the decision to dismiss (terminate) the mandate of the members of the Independent Board is unconstitutional because in the case of dismissal none of the requirements of this article are met. The Applicants also refer to the reasoning given by the challenged Decision on *"violation of the provisions of the law on the Board; in case of performance of duties in incompatibility of his function"* and the reasoning in the Recommendation where it reads *"(...) it was assessed that the Board acted in violation of Article 12 of the Law on the IOBCSK, because it did not implement the applicable laws during the decision-making"*. For these reasons, in essence the Applicants emphasize that the expression *"violation of the provisions of the law on the Board"*, consumes all, and in fact the reasons of Article 15 of the IOBCSK Law have not been met.
45. Furthermore, the Applicants allege that there is no fact presented in the recommendation of the Parliamentary Committee on Public Administration: (i) that proves that the members of the Independent Board have violated the Law on IOBCSK; and (ii) which proves that the dismissed members of the Independent Board have carried out activities that constitute a conflict of interest, as defined in Article 15 of the Law on the IOBCSK; (iii) proving that the dismissed members of the Independent Board have performed their duties not in accordance with their function, as defined in Article 15 of the Law on the IOBCSK; and (iv) proving that the dismissed members of the Independent Board have been absent from work for more than five (5) days for reasons that are not foreseen by the law, as established in Article 15 of the Law on the IOBCSK.
46. The Applicants allege that the members of the Independent Board and the Independent Board itself as an independent constitutional body have been subjected to pressure and interference by the Parliamentary Committee on Public Administration, which according to the Applicants demonstrates the tendency to interfere with the independence of this institution. The Applicants also refer to an official e-mail sent on 2 June 2021, to the official address of the Independent Board, through which additional information was requested for a specific case that was in the process of being resolved by the Independent Board, which a day later the full file of the relevant case was requested.

47. The Applicants state that even according to the Judgment in case KO171/18, the decisive article in the circumstances of the present case was assessed in full compliance with the Constitution, namely paragraph 3 of Article 11 (Term of office for members of Board) of the IOBCSK Law who states that: “3. *Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge*”.
48. Referring to the Judgment of the Court in case KO171/18 and especially paragraph 247, the Applicants also emphasize paragraph 3 of Article 11 (Term of office for members of Board) of the Law on the IOBCSK, emphasizing the issue of immunity and citing that “[...] *The purpose of immunity is for the members of the Board to be free to exercise their functions independently and without fear of repercussions for the performance of their functions. [...]*”. The Applicants state that this Judgment already has the status of a legal norm. Furthermore, as a comparative example, they cite the decision of the Constitutional Court of Hungary 29/2011, of 7 April 2011, arguing that the civil servants cannot be dismissed without providing a detailed reasoning regarding such a thing.
49. Finally, the Applicants request the Court to (i) declare the Referral admissible; and (ii) declare the challenged Decision in violation of the Constitution, and consequently, to declare the latter invalid.

*(iii) Request for interim measure*

50. The Applicants, with regard to the interim measure, request that the Court accepts Article 43 of the Law, thus referring to the suspensive effect *ex-lege* of the implementation of the law or the decision of the Assembly. The Applicants also refer to paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which stipulates that until the proceedings is completed before the Court, it may temporarily suspend the contested action or law until the Court decides, if it considers that the application of the contested action or law may cause irreparable damage. The Applicants also emphasize Article 27 (Interim Measures) of the Law.
51. Consequently, the Applicants: (i) request the Court to inform the parties involved that the challenged Decision is suspended *ex-lege* and cannot be enforced until the final decision of the Court; and (ii) consider that it is not necessary to expressly seek the suspension of the application of the challenged act, since it should by law be subject to the suspensive effect, since it has been challenged before this Court, pursuant to paragraph 5 of Article 113 of the Constitution.

*(iv) Request for a hearing*

52. The Applicants regarding the review of the case, based on Article 42 of the Rules of Procedure, request the holding of a hearing regarding the challenged Decision on dismissal of five (5) members of the IOBCSK.

53. In this regard, the Applicants state that it is in the public interest to hold this public hearing, because the content of the challenged Decision violates the constitutional order and specific constitutional provisions related to the legal security of state and public administration employees and the independence of an independent institution at the constitutional level.

### **Summary of Comments of Deputy Doarsa Kica Xhelili**

54. Deputy Kica-Xhelili in the comments submitted regarding the Referrla KO127/21, states that Article 101 of the Constitution in regarding the Independent Board, defines only the general role of the Independent board in the context of regulating the civil service in Kosovo, but does not talk about the composition or manner of election and dismissal of its members.
55. Deputy Kica-Xhelili also emphasizes that Article 142 of the Constitution, speaks in a general way about Independent Agencies. Reference to the fact that these agencies perform their functions “*independently of any other body or authority in the Republic of Kosovo*”, according to the comments, does not expand the scope of this article in the interpretation of the discretion of the Assembly in assessing the legal requirements for the appointment and dismissal of members of the Independent Board. Therefore, according to deputy Kica-Xhelili, it is a completely deviant argument to say that the exercise of the function of the discretionary role of the deputies of the Assembly of the Republic of Kosovo, in relation to the legal interpretation of the provisions of the Law on IOBCSK, falls in some way in the spectrum of the constitutional rights. Finally, she emphasizes that the reference to Articles 101 and 142 of the Constitution does not comply with the provisions which set out the criteria for the dismissal of members of the Independent Board or Independent Agencies.
56. In the following, deputy Kica-Xhelili states that the Constitutional Court deals with the unconstitutional aspect of the Applicant’s allegations, and not with the unlawfulness that is the duty of the regular courts. Respectively, according to the deputy, the legality of a decision, including an administrative decision of a public body, is a subject matter jurisdiction of the regular courts. Therefore, she emphasizes that in case the members of the Independent Board assess the decision of the Assembly as unlawful, they would have to go to the regular courts to ascertain the alleged illegality of the Decision. Meanwhile, the deputies of the Assembly have no legitimacy to address the regular courts on behalf of the already former members of the IOBCSK, through administrative conflict.
57. In addition, the deputy also refers to the case of Court KI79/19, Resolution on Inadmissibility of 10 August 2020, where in paragraph 56, it is stated as follows: “(...) *the Court has consistently reiterated that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). (...) In fact, it is the role of the regular courts to interpret and apply the pertinent rules of procedural and*

*substantive law. (See, ECtHR case Garcia Ruiz v. Spain, Judgment of 21 January 1999, paragraph 28; and see, also cases of the Court: KI70/11, Applicant: Faik Hima, Magbule Hima and Besart Hima, Resolution on Inadmissibility of 16 December 2011, paragraph 29; KIO6/17, Applicant: L.G. and five others, Resolution on Inadmissibility of 20 December 2017, paragraph 37; and KI122/16, Applicant Riza Dembogaj, Resolution on Inadmissibility of 19 June 2018, paragraph 57)."*

58. Through the comments submitted to the Court, the deputy also states that the Court has a duty to make a final interpretation of the provisions of the Constitution. Whereas, jurisdiction based on paragraph 5 of Article 113 of the Constitution implies the constitutional review of any law or decision. According to the allegation, the decisions of the Assembly may be subject to constitutional review in procedural and substantive terms, but only within the meaning of constitutionality.
59. In addition, according to the relevant comments, the Applicants do not clearly or intentionally confuse the legislative process and the oversight function of the Assembly, because they deliberately do not specify (accurate the Referral) whether they challenge the procedure or the content of the act. According to her, in this way they avoid arguing, because in order to assess an act of the Assembly in the constitutional aspect, the Constitution would have to explicitly define at least what is the procedure for the election of members of the Independent Board, and even the procedure for dismissal. In the present case, the composition, functioning, responsibilities, manner of election and manner of dismissal are determined by special law. Thus, the decision of the Assembly to dismiss the members of the Independent Board, although an act of a public body, is not subject to constitutional review.
60. Finally, the deputy states that the Applicants' Referral is not related to a constitutional right and therefore cannot be a subject of review in the Constitutional Court.

## **Relevant constitutional and legal provisions**

### **CONSTITUTION OF THE REPUBLIC OF KOSOVO**

#### **Article 101 [Civil Service]**

- 1. The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality.*
- 2. An independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo.*

[...]

## **Article 142**

### **[Independent Agencies]**

- 1. Independent agencies of the Republic of Kosovo are institutions established by the Assembly based on the respective laws that regulate their establishment, operation and competencies. Independent agencies exercise their functions independently from any other body or authority in the Republic of Kosovo.*
- 2. Independent agencies have their own budget that shall be administered independently in accordance with the law.*
- 3. Every organ, institution or other entity exercising legal authority in the Republic of Kosovo is bound to cooperate with and respond to the requests of the independent agencies during the exercise of their legal competencies in a manner provided by law.*

## **LAW No. 06/L-048 ON INDEPENDENT OVERSIGHT BOARD FOR CIVIL SERVICE OF KOSOVO**

### **Article 4**

#### **Independent Oversight Board of the Civil Service of Kosovo**

[...]

- 2. The Board reports to the Assembly of Kosovo Republic for its work at least once a year and whenever requested by the Assembly.*

### **Article 6**

#### **Functions of the Board**

- 1. For the supervision of the implementation of rules and principles of the Civil Service legislation, the Board shall have the following functions:*
  - 1.1. . reviews and determines appeals filed by civil servants and candidates for admission to the civil service;*
  - 1.2. supervises the selection procedure and determines whether the appointments of civil servants of high executive and management level have been conducted in accordance with the rules and principles of civil service legislation; (repealed by Judgment of the Court KO171/18)*
  - 1.3. monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation*

### **Article 11**

#### **Term of office for members of Board**

- 1. Members of the Board shall be appointed for a term of office of seven (7) years, without the possibility of reappointment for another additional term of office.*
- 2. During the term of office, the member of the Board is not entitled to exercise any other state function, be a member of a political party nor participate in political activities.*
- 3. Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge.*

## **Article 12**

### **Duties of the members of the Board**

- 1. The members of the Board are obliged to exercise the function of the member impartially and to decide in accordance with the Constitution and the law.*
- 2. . Members of the Board are obliged to preserve the authority and image of the Board.*
- 3. Each member shall be obliged to participate in the work and decision-making process of the Board, and to carry out other duties set forth by law, Rules of Procedure and other sub-legal acts of the Board.*

## **Article 15**

### **Termination of the Board's member mandate**

- 1. Kosovo Assembly may discharge a member of the Board through the majority of votes on the following grounds:*
  - 1.1. violation of this law's provisions;*
  - 1.2. when engaged in actions, that present a conflict of interest and despite the warning from the competent body does not eliminate the conflict of interest pursuant to the respective law;*
  - 1.3. in case of exercising duties that are not in accordance with his function;*
  - 1.4. in case he is absent without a reason from work for longer than (5) days for reasons that are not foreseen by the law.*
- 2. Proposal for discharge of the Board member, can be done by:*
  - 2.1. majority of the Board members;*

*2.2. relevant Committee of the Assembly for Public Administration.*

## **Article 16**

### **Review of the Complaints**

*3. On behalf of the Board, complaints are reviewed and decided upon by the College composed out of three (3) members, which is determined with the decision of the Board.*

## **Article 17**

### **Decision-making deadline in the Board**

*1. Within forty-five days (45) from the receipt of your complaint, the Board issues a decision by justifying the legal and factual basis of the decision taken.*

*2. In exclusion from paragraph 1. of this Article, in cases when the subject is of a specific nature, Chairperson of the Board has the right to extend the decision-making deadline for another ten (10) working days.*

### **Admissibility of the Referral**

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

62. Initially, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

*“The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties”.*

63. In addition, the Court also refers to paragraph 5 of Article 113 of the Constitution, which provides:

*“Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed”.*

64. The Court first recalls that the Applicants challenge the constitutionality of the challenged Decision in relation to (i) the procedure followed and (ii) its content, as set out in paragraph 5 of Article 113 of the Constitution.

65. In this regard, the Court notes that the Referral was submitted by eleven (11) deputies of the Assembly, in accordance with paragraph 5 of Article 113 of the Constitution. Therefore, the Applicants are authorized party.

66. In addition, the Court takes into account Article 42 [Accuracy of the Referral] of the Law, which establishes:

*“1. In a referral made pursuant to Article 113, Paragraph 5 of the Constitution the following information shall, inter alia, be submitted:*

*1.1. names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*

*1.2. provisions of the Constitution or other act or legislation relevant to this referral; and*

*1.3. presentation of evidence that supports the contest”.*

67. The Court also refers to Rule 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure, which establishes:

*“[...]*

*(2) In a referral made pursuant to this Rule, the following information shall, inter alia, be submitted:*

*(a) names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*

*(b) provisions of the Constitution or other act or legislation relevant to this referral; and*

*(c) evidence that supports the contest.*

*(3) The applicants shall attach to the referral a copy of the contested law or decision adopted by the Assembly, the register and personal signatures of the Deputies submitting the referral and the authorization of the person representing them before the Court”.*

68. The Court notes that the Applicants: (i) entered the names of the deputies and their signatures and submitted the power of attorney for the person representing them before the Court; (ii) specified the challenged decision, and submitted a copy; (iii) referred to specific constitutional provisions, which they claim that the challenged Decision is not in compliance with; and (iv) presented their evidence in support of the respective allegations. Therefore, the Court considers that the criteria set out in Article 42 of the Law and further specified in Rule 74 of the Rules of Procedure have been met.



69. The Court further assesses whether the Referral was filed within the time limit “*of eight (8) days from the date of adoption*”, as established in paragraph 5 of Article 113 of the Constitution. In this regard, the Court notes that the challenged Decision was adopted on 30 June 2021, while the Referral was filed with the Court on 7 July 2021. Therefore, the Court finds that the Referral was filed within the time limit set by the Constitution..
70. Based on the above, the Court finds that the Applicants have met the admissibility criteria set out in the Constitution and further specified by law and set out in the Rules of Procedure. The Court also considers that the Referral raises important constitutional issues related to the institutional independence of the Independent Board, as an independent institution under the Constitution, which ensures compliance with the rules and principles governing the Civil Service. Therefore, the Referral must be declared admissible and its merits assessed.

### **Merits of the Referral**

71. The Court initially reiterates that the circumstances of the present case relate to Decision [No. 08-V-029] of 30 June 2021 of the Assembly, by which, based on the Recommendation of the Assembly Committee on Public Administration, five (5) members of the Independent Council were collectively dismissed.
72. In this regard, the Court recalls that the Applicants allege that the challenged Decision of the Assembly in substantive and procedural terms is contrary to Articles 101 [Civil Service] and 142 [Independent Agencies] of the Constitution.
73. With regard to their Referral, the Court recalls that the Applicants, in essence, in relation to their constitutional allegations refer to: (i) Article 101 of the Constitution, noting that the latter places the Independent Board in the function of an independent institution, in which the Assembly, the Government and other political bodies are stripped of their powers to interfere with the maintenance of the professional and civil integrity of the civil service; (ii) Article 142 of the Constitution, stating that the latter regulates the form and manner of establishment of Independent Agencies, in essence categorizing the Independent Board in this part, also emphasizing that agencies exercise their legal functions without influence and independently of any instruction or interference of other state bodies, including the body that established it.
74. The Court further recalls that in elaborating on the alleged constitutional violations as above, the Applicants: (i) refer to the Law on the IOBCSK stating that in this case there has been a violation of the procedure followed for the dismissal of members of the Independent Board because they have been collectively dismissed even though they were individually elected to their position; (ii) refer to Article 15 (Termination of the Board’s member mandate) of the Law on the IOBCSK, stating that the decision to dismiss/terminate the mandate of members of the Independent Board is unconstitutional because in the case of dismissal any of the conditions of this article have not been and that there is no fact presented in

the recommendation claiming that the members of the Independent Board have violated the law; (iii) allege that the members of the Board and the Board itself as an independent constitutional body have been subjected to pressure and interference by the Assembly Committee on Public Administration, which according to the Applicants proves the tendency to interfere with the independence of this institution; and (iv) referring to the Judgment of the Court in case KO171/18, in particular paragraph 247 thereof, and paragraph 3 of Article 11 (Term of office for members of Board) of the IOBCSK Law, highlight the issue of immunity from dismissal for decision-making.

75. Having regard to the Applicants' allegations and the circumstances of the case, the Court notes that it is important to first elaborate on the status of the Independent Board and its independence as an institution based on the Constitution, applicable laws and the Judgments of the Court; as well as the competence of the Assembly to oversee the work of the Independent Board, then proceeding to assess the constitutionality of the challenged decision to dismiss five (5) members of the Independent Board. Consequently, the Court will further elaborate on the general principles regarding (i) the applicability of Article 142 of the Constitution; (ii) the status and independence of the Independent Board and its members, based on paragraph 2 of Article 101 of the Constitution; to proceed further with (iii) the competence of the Assembly to oversee the Independent Board; and will ultimately apply these principles in (iv) assessing the constitutionality of the challenged Decision.

#### ***I. As to the applicability of Article 142 [Independent Agencies] of the Constitution***

76. The Court initially recalls that the Applicants refer, *inter alia*, to Article 142 of the Constitution, in support of their arguments regarding the violation of the independence of the Independent Board.
77. In this regard, the Court first recalls its Judgment KO171/18, in which it assessed the constitutionality of the Law on the IOBCSK, a law which regulates the functions, competencies, organization and functioning of the Independent Board (see, case of the Court KO171/18, Applicant *The Ombudsperson*, Constitutional review of articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3), 18, 19 (paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on Independent Oversight Board for Civil Service in Kosovo, Judgment of 25 April 2019). By this Judgment, the Court noted, *inter alia*, that Chapter XII [Independent Institutions] of the Constitution specifically regulates the following independent institutions: (i) the Ombudsperson (Articles 132-135 of the Constitution); (ii) the Auditor General of Kosovo (Articles 136-138 of the Constitution); (iii) the Central Election Commission (Article 139 of the Constitution); (iv) the Central Bank of Kosovo (Article 140 of the Constitution), and (v) the Independent Media Commission (Article 141 of the Constitution). Also, Article 142 [Independent Agencies] of the Constitution, within the same chapter,

determines the possibility of establishing Independent Agencies by the Assembly, based on the relevant laws, which regulate their establishment, functioning and competencies. According to this article, these agencies, (i) perform their functions independently from any other body or authority in the Republic of Kosovo; and (ii) any other body, institution or authority exercising legitimate power in the Republic of Kosovo is obliged to cooperate and respond to the requests of independent agencies in the exercise of their legal powers, in accordance with the relevant law.

78. In addition, the Constitution has established several other institutions, *inter alia*, the Constitutional Court in its Chapter VIII, as well as the Independent Oversight Board for the Civil Service in its Article 101. In its Judgment in KO171/18, the Court found that the Independent Board could not be categorized as an independent constitutional institution under Chapter XII of the Constitution nor as an independent agency under Article 142 of the Constitution, because (i) the Constitution has expressly defined in its Chapter XII, the independent constitutional institutions, defining also their role and status; and (ii) in Chapter XII, Article 142 of the Constitution, has established the constitutional basis for the establishment of independent agencies, defining that they are institutions established by the Assembly, based on the relevant laws which regulate their establishment, functioning and competencies (see case KO171/18, cited above, paragraphs 155-159).
79. The Court notes that while the establishment of independent agencies under Article 142 of the Constitution is a competence of the Assembly, and which by the relevant laws regulates their establishment, functioning and competencies, the Assembly does not have the same competence with respect to institutions established by the constitutional provisions, including the Independent Board, because its establishment, functioning and competencies, insofar as they are regulated by the Constitution, cannot be changed by the Assembly, except through constitutional amendments.
80. Taking into account the above, the Court reiterates that unlike the Independent Agencies which, based on Article 142 of the Constitution, are established by the Assembly, the Independent Board is an institution which is established by Article 101 of the Constitution, and as such the institutional independence attributed to it goes beyond what is guaranteed to Independent Agencies by Article 142 of the Constitution. Therefore, the Court will examine the Applicants' allegations within the scope of Article 101 of the Constitution.

**II. *Regarding the status and independence of the Independent Board and its members, based on paragraph 2 of Article 101 of the Constitution***

81. The Court recalls that paragraph 2 of Article 101 provides that “*An independent oversight board for civil service shall ensure the respect of the rules and*

*principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo”.*

82. Based on this constitutional norm, the Court will initially address the independence of the Independent Board based on (i) general principles regarding the Board under the Constitution, the IOBCSK Law and the case law of the Court; and (ii) the individual independence of the members of the Independent Board.
- (i) *General principles regarding the independence of the Board under the Constitution and the case law of the Court*
83. The Court first notes that the Independent Board is an institution established by the Constitution. The latter has attributed to the Independent Board (i) the designation of the “*independent*” institution in relation to (ii) the exercise of its constitutional function, namely, “*ensuring the respect of the rules and principles governing the civil service*”. More specifically, paragraph 2 of Article 101 of the Constitution, (i) precisely defines the designation of the Oversight Board as “*independent*”; and (ii) attributed this “*independence*” for the purpose of “*ensuring the respect of the rules and principles governing the civil service*”. Consequently, the purpose of the relevant constitutional provision reflects the institutional independence of the Independent Board in order to exercise its function of “*ensuring the respect of the principles and rules governing the civil service*”. The independent exercise of this function is ensured through the independent decision-making of its members of the Independent Board.
84. The Court also notes that the same independence was conferred on the Independent Board by the Law on the IOBCSK. Article 6 (Functions of the Board) of the Law on the IOBCSK, *inter alia*, stipulates that: “*For the supervision of the implementation of rules and principles of the Civil Service legislation, the Board shall have the following functions: 1.1. reviews and determines appeals filed by civil servants and candidates for admission to the civil service; 1.3. monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation*”. Therefore, the independent function of the Independent Board with respect to “*ensuring the respect of the rules and principles governing the civil service*” is exercised through its competence, namely its members, for taking decisions regarding the complaints of civil servants and candidates for admission to the civil service.
85. In this context, and through a number of its decisions, the Court has addressed the nature of the decisions of the Independent Board, emphasizing through its case law, including its case KI33/16, that the Independent Board enjoys the prerogatives of a court within the meaning of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR. Through this case law, the Court stated that a “*tribunal*” is categorized in the substantive sense of the term by its judicial function, that is to say determining of matters within its competence on the basis of the rules of law and following the proceedings conducted in a prescribed manner [...]”, stating that the decisions of

the Board are “*final, binding and enforceable*” and that the Independent Board, from the point of view of Article 31 of the Constitution and Article 6 of the ECHR, is independent as, *inter alia*, (a) it is independent of the executive and (b) has full jurisdiction to decide on the issues before them as required by Article 31 of the Constitution and Article 6 of the ECHR (See, *mutatis mutandis*, case KI33/16, *Minire Zeka*, cited above, paragraph 59; whereas regarding the independence of an “*independent tribunal*” see case KO12/17, Applicant *The Ombudsperson*, Judgment of the Constitutional Court of 9 May 2017, paragraph 75; and case KO171/18, cited above, paragraph 163).

86. In addition, the Court in its case-law has stated that the Independent Board is regarded as a “*quasi-judicial*” institution, namely as a tribunal regarding the civil service (the name “tribunal” is widely used in the ECtHR discourse). As such it enjoys the prerogatives of a court precisely because of the independence of the executive, and as an institution having full jurisdiction and issuing binding decisions in relation to the dispute between civil servants or civil servants or the candidates on one hand, and institutions employing civil servants on the other. (see, case of the Court KO171/18, cited above, paragraph 165).
87. Certainly the legality of the decisions of the Independent Board is further subject to the control of the judiciary, through the initiation of an administrative dispute in the competent court, within the conditions and deadlines set by the provisions of the Law on Administrative Conflict, as set out in paragraph 1 of Article 22 (Initiation of the administration conflict) of the Law on IOBCSK. Therefore, the control, namely the assessment of the legality of the decisions of the Independent Board, is the competence of the judiciary.
88. Having regard to the above, namely the constitutional, legal provisions, and the case law of the Court, as regards the independence of the Independent Board in the exercise of its functions and the nature of the decisions rendered by the latter, the Court will further elaborate on the relevant principles, related to the independence of the members of the Independent Board.

*(ii) Individual independence of the members of the Independent Board*

89. The Court reiterates that the Independent Board is an institution established by the Constitution and to which the latter has determined (i) the designation of an “*independent*” institution in relation to (ii) the exercise of its constitutional function, namely, “*ensuring the respect of the rules and principles governing the civil service*”. Ensuring compliance with these rules and principles is realized through the decision-making of the members of the Independent Board. As a result of this function that the Constitution has attributed to the Independent Board, through its case law, the Court has emphasized (i) the qualification of the Board as a “*quasi-judicial*” institution, namely as a tribunal regarding the resolution of disputes arising from the civil service; and (ii) the fact that the decisions of the Independent Board are “*final, binding and enforceable*”. Of course, the constitutional independence of the Independent Board in relation to

its constitutional function in “*ensuring the respect of the rules and principles governing the civil service*” also includes the independence of the members of the Independent Board in relation to their decision-making.

90. In the context of this independence, the Assembly, through the adoption of the Law on the IOBCSK, has granted the members of the Independent Board immunity in respect of their decision-making. More precisely, paragraph 3 of Article 11 (Term of office for members of Board) of the Law on IOBCSK, establishes that “*Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge*”. This provision was also assessed by the Court by Judgment in case KO171/18, and after reviewing the relevant court practices but also the relevant reports of the Venice Commission, it was assessed “*in accordance with the Constitution*”.
91. Certainly, based on the same Judgment, the functional immunity guaranteed to members of the Independent Board under the Law on the IOBCSK is limited and does not include actions beyond their scope as members of the Independent Board, including if they are accused of criminal offenses that are not simply related with the fact that they have exercised their functions in relation to the views expressed, the manner of voting or the decisions taken during their work as members of the Independent Board. They also have no immunity from arrest. (see the case of Court KO171/18, cited above, paragraph 244). The Court notes that the purpose of the immunity is that the members of the Board are free to exercise their functions with independence and without fear of the consequences for the performance of their functions, with emphasis on decision-making (see case of the Court KO171/18, cited above, paragraph 247).
92. Furthermore, the individual independence of the members of the Independent Board in terms of decision-making includes the expression of this independence not only in the face of external influences that the members of the Independent Board may have, but also in the face of influences from the body which has appointed them to the respective positions, namely the Assembly. The Court recalls that such independence, the Constitution has attributed to independent agencies, which are in fact established by the Assembly itself by Article 142 of the Constitution. The Court emphasizes that this independence includes the intention that the members of the respective agencies be free to exercise their functions without fear of consequences for the performance of their constitutional and legal functions.
93. The Court further notes that the Law on the IOBCSK, namely Article 15 (Termination of the Board’s member mandate), sets out the cases of termination of the mandate of a member of the Independent Board by the Assembly on the proposal of the relevant Committee Assembly on public administration or a majority of the members of the Board, limited to the following reasons: (i) for violation of the provisions of the Law on the IOBCSK; (ii) when it carries out an activity that creates a conflict of interest and, despite a warning from the

competent body, does not eliminate the conflict of interest under the relevant law; (iii) in cases of performance of duties inconsistent with its function; and (iv) in case of unjustified absence from work for more than five (5) days for reasons not provided by law.

94. However, having regard to the wording of (i) paragraph 2 of Article 101 of the Constitution; (ii) the case law of the Court and as explained above; and (iii) the joint reading of Article 15 and paragraph 3 of Article 11 of the Law on the IOBCSK, namely the possibility of termination of the mandate of a member of the Independent Board by the Assembly and the immunity the latter has determined for dismissal regarding the decision-making within the constitutional and legal functions of the Independent Board, the Court notes that the member of the Board cannot be dismissed for reasons of decision-making, namely the manner of voting during the review of concrete cases. The legality of such decision-making in fact and as explained above, belongs to the judiciary, through the procedure of the administrative conflict as established in Article 22 of the Law on the IOBCSK.

### ***III. Regarding the competence of the Assembly to oversee the Independent Board***

95. The competence of the Assembly to oversee the work of the Government and other public institutions, which, in accordance with the Constitution and laws, report to the Assembly, is defined in paragraph 9 of Article 65 [Competencies of the Assembly] of the Constitution. In the case of the Independent Board, this competence of the Assembly is further detailed through the Law on the IOBCSK. More precisely, by (i) Article 4 (Independent Oversight Board for the Civil Service of Kosovo) and Article 28 (Annual report of the Board), according to which the obligation of the Independent Board to report on its work to the Assembly is determined, at least once a year, and whenever required by the Assembly and related procedures; (ii) paragraph 1 of Article 8 (Composition of the Board) and Article 10 (Appointment procedures of the members of the Board), which define the competence of the Assembly to appoint the members of the Independent Board and the relevant procedure; (iii) Article 15 (Termination of the Board's member mandate), which sets out the legal grounds on which the term of office of a member of the Independent Board may be terminated and the procedure to be followed; and (iv) Article 27 (Funding of the Board), which sets out the budgetary independence of the Independent Board, but also its obligation to notify the Assembly of contributions received from donors. Furthermore, the Court notes that the Assembly itself, by the Law on the IOBCSK, namely Articles 23 (Procedure in case of non-implementation of the Board decision) and 24 (Administrative sanctions for non-implementation of the Board decision), has emphasized the importance of implementation of the decisions of the Independent Board, defining the procedure to be followed in case one is not implemented, the relevant sanctions and the obligation of the Independent Board to notify the Assembly in such cases.

96. Based on these constitutional and legal norms, the Court first emphasizes that the authority of the Assembly to oversee the Independent Board based on paragraph 9 of Article 65 of the Constitution is indisputable. The mechanisms of this oversight are further defined in the Law on the IOBCSK and it is materialized through parliamentary bodies such as standing committees, functional committees and *ad hoc* committees, which according to paragraph 1 of Article 77 [Committees] of the Constitution, the Assembly appoints them, which in this case, turns out to be the Assembly Committee on Public Administration.
97. In this context, the Court also recalls that the Venice Commission has also dealt with the oversight role of the Assembly, in particular the work of the Committees and in its Opinion, has emphasized that permanent committees should exercise efficient control in their area of competency, which should not be restricted to the examination of reports submitted by the State bodies and officials, but should also include a more pro-active scrutiny of the actions of the executive and of the independent agencies (see, Opinion no. 845/2016 of the Venice Commission entitled "Parameters on the Relationship between the Parliamentary Majority and the Opposition in Democracy", CDL-AD (2019) 015 of 24 June 2019, paragraph 92).
98. The Court therefore notes that the competence of oversight of the Independent Board by the Assembly is not limited to simple periodic reporting, but it can also decide on the dismissal of certain members of the Independent Board, pursuant to Article 15 (Termination of the Board's member mandate) of the Law on the IOBCSK, which stipulates that the the right to make the proposal for dismissal of a member of the Independent Board has the majority of members of the Independent Board or the relevant Committee on Public Administration, and determines that the Assembly may dismiss the member of the Independent Board by a majority of votes for the following reasons: (i) for violation of the provisions of the Law on the IOBCSK, as defined in point 1.1 of paragraph 1 of Article 15; (ii) when it carries out an activity that creates a conflict of interest and, despite the warning from the competent body, does not eliminate the conflict of interest under the relevant law, as defined in point 1.2 of paragraph 1 of Article 15; (iii) in cases of exercising its duties inconsistent with its function, as defined in point 1.3 of paragraph 1 of Article 15; and (iv) is absent without reason from work for more than five (5) days for reasons that are not provided by law, as defined in point 1.4 of paragraph 1 of Article 15 of the Law on the IOBCSK.
99. However, the exercise of the competence of oversight by the Assembly, as defined in paragraph 9 of Article 65 of the Constitution, is limited by the relevant relation to paragraph 2 of Article 101 of the Constitution in terms of the independence of the Independent Board in exercising its constitutional function, while the exercise of the power to dismiss members of the Independent Board by the Assembly, disputable in the circumstances of the present case, is also limited by the relationship between (i) paragraph 2 of Article 101 of the Constitution and the Law on the IOBCSK; and (ii) Article 15 of the Law on the IOBCSK, which defines the possibility of termination of the mandate, and paragraph 3 of Article 11 of the Law



on the IOBCSK, which establishes immunity from dismissal with regard to the decision-making of the members of the Independent Board.

100. The Court recalls that in the circumstances of the present case, the Recommendation of the Assembly Committee on Public Administration for the dismissal of the members of the Independent Board and consequently the Decision of the Assembly on the dismissal of the latter, is based on points 1.1. and 1.3 of paragraph 1 of Article 15 (Termination of the Board's member mandate) of the Law on the IOBCSK. Whereas, the Law on the IOBCSK defines the competence of the Assembly to terminate the mandate of members of the Independent Board in cases and under the conditions provided by this law, the Court, based on the principles elaborated above, should assess whether the manner of exercising such competence of the Assembly, may have resulted in (i) exceeding the powers set forth in paragraph 9 of Article 65 of the Constitution; and (ii) breach of the guarantees set forth in paragraph 2 of Article 101 of the Constitution.

### ***Application of the above principles in the present case***

101. The Court first recalls that the Applicants, *inter alia*, and in the context of the challenged Decision, state that based on paragraph 2 of Article 101 of the Constitution, the Board is an independent body and the only one competent to maintain the professional integrity of the civil service, and that by the challenged Decision, the Assembly has interfered in an unconstitutional manner with the independence of the function of the Independent Board. Furthermore, they also point out that based on the reasoning of the challenged Decision, there is no evidence presented: (i) that proves that the members of the Independent Board have violated the IOBCSK Law; (ii) proving that the dismissed members of the Independent Board have carried out activities which give rise to a conflict of interest; (iii) proving that the dismissed members of the Independent Board have performed their duties in a manner inconsistent with their function; or (iv) proving that the dismissed members of the Independent Board were absent from work for more than five (5) days for reasons not provided by law, as provided by Article 15 of the Law on the IOBCSK. The Court recalls the arguments of deputy Xhelili-Kica, who states that the Applicants are not clear about the legislative process and the oversight function of the Assembly, because in order to assess an act of the Assembly in the constitutional aspect, the Constitution would have to explicitly define at least what is the procedure for electing members of the Independent Board, and even the procedure for dismissal.
102. In the context of these allegations, the Court has already noted that (i) the independence of the Independent Board is defined by paragraph 2 of Article 101 of the Constitution, in the sense of its constitutional function to “*ensure the respect of the rules and principles governing the civil service*”; (ii) the constitutional function of “*ensuring the respect of the rules and principles governing the civil service*”, is realized through the independent decision-making of the members of the Independent Board, namely the independence of their individual function;

(iii) based on the consolidated case law of the Court, the Independent Board is defined as a “*quasi-judicial*” institution and that its decisions are “*final, binding and enforceable*”, a qualification attributed to it by the Assembly itself, among others, through the Law on the IOBCSK, including Articles 23 and 24 thereof; (iv) the Assembly based on paragraph 9 of Article 65 of the Constitution and based on the provisions of the Law on the IOBCSK, has the competence to oversee the Independent Board, through the mechanisms set out in the above law, including the power to terminate the mandate of members of the Independent Board; and (v) the competence of the Assembly to oversee the Independent Board and its members shall be exercised in accordance with the institutional guarantees of the Independent Board set forth in paragraph 2 of Article 101 of the Constitution and the relevant provisions of the Law on IOBCSK.

103. In assessing whether, in the circumstances of the present case, the exercise of the oversight power of the Assembly, as defined in paragraph 9 of Article 65 of the Constitution, has exceeded the relevant powers in violation of the institutional guarantees of the Independent Board, as set out in paragraph 2 of Article 101 of the Constitution, the Court recalls that by the challenged Decision, five (5) members of the Independent Board were collectively dismissed. The relevant recommendation of the Committee on Public Administration, which preceded the challenged Decision, reasoned as follows:

*[...] The recommendation for initiating the dismissal of the members of the Independent Oversight Board for the Civil Service is made according to Article 15, paragraph 1, point 1 and 3, as follows:*

*1.1 for violation of the provisions of the law on the IOBCSK;*

*1.3 in cases of performance of duties that are incompatible with its function;*

*The Committee in its meeting held on 01.06.2021, reviewed the annual work report of the IOBCSK, and recommended to the Assembly its non-approval.*

*At the meeting held on 15.06.2021, the violations of the members of the [Board] were discussed. In this case, it was assessed that the Board acted in violation of Article 12 of the Law on the IOBCSK, because it did not implement the applicable laws during the decision-making [...].*

104. The Court recalls that on the basis of this Recommendation, the Assembly has issued a Decision dismissing the members of the Independent Board. This Decision of the Assembly contains two points. First, it provides that “*five (5) members of the Independent Oversight Board for the Civil Service of Kosovo are dismissed*”, listing five (5) respective names. Whereas, the second, simply defines that “*The decision is effective on the day of approval*”.
105. 106. Considering that the challenged Decision of the Assembly does not contain any additional clarification regarding the dismissal of five (5) members of the Independent Board, the Court, referring to the content of the Recommendation of the Assembly Committee on Public Administration, notes that the members of the

Independent Board were dismissed collectively, on the grounds that (i) they have violated the provisions of the Law on the IOBCSK, as established in point 1.1 of paragraph 1 of Article 15 thereof; and (ii) have performed tasks inconsistent with their function, as defined in point 1.3 of paragraph 1 of Article 15 thereof. The relevant Recommendation further states that *“it was assessed that the Board acted in violation of Article 12 of the Law on the IOBCSK, because it did not implement the applicable laws during the decision-making.”*

106. In the following, the Court will analyze the challenged Decision of the Assembly on the collective dismissal of five (5) members of the Independent Board, referring to the legal basis on which it was issued, starting with (i) point 1.3 of paragraph 1 of Article 15 of the Law on IOBCSK; to proceed with (ii) point 1.1 of paragraph 1 of Article 15 of the Law on the IOBCSK.
107. With regard to the reasoning of the Assembly, namely the reasoning contained in the Recommendation of the Assembly Committee on Public Administration, the Court notes that point 1.3 of paragraph 1 of Article 15 of the Law on the IOBCSK determines the possibility of termination of the mandate *“in cases of performance of duties incompatible with its function”*. Cases of incompatibility of the function of a member of the Independent Board are explicitly provided in the Law on the IOBCSK, namely in paragraph 2 of Article 11 thereof, and which stipulates that *“the member of the Board is not entitled to exercise any other state, function, be a member of a political party nor participate in political activities”*. The Recommendation, namely, the challenged Decision of the Assembly, does not contain (i) any reference to paragraph 2 of Article 11 of the Law on the IOBCSK; and (ii) no facts or justifications as to how five (5) members of the Independent Board may have exercised the duties of a member of the Independent Board in a manner inconsistent with their function, or may have exercised any other state function, may have exercised the function of a member of a political party or may have participated in political activities.
108. Whereas, regarding the reasoning of the Assembly, namely the reasoning embedded in the Recommendation of the Assembly Committee on Public Administration, the Court notes that point 1.1 of paragraph 1 of Article 15 of the Law on the IOBCSK determines the possibility of termination of the mandate *“for violation of provisions of this law”*. The Recommendation, namely the challenged Decision, does not contain any fact or justification on how five (5) members of the Independent Board may have exercised the duties of a member of the Independent Board *“in violation of the provisions of this law”*.
109. The Court notes, however, that the Recommendation of the Assembly Committee on Public Administration, which resulted in the challenged Decision of the Assembly, states that *“it was assessed that the Board acted in violation of Article 12 of the Law on IOBCSK, because it did not implement the applicable laws during the decision-making.”* In this regard, the Court refers to the content of Article 12 of the Law on the IOBCSK, which sets out the duties of the members of the Independent Board, as follows: (i) to exercise the function of member

impartially and to decide in accordance with the Constitution and the law; (ii) preserve the authority and image of the Independent Board; and that (iii) each member is obliged to participate in the work and decision-making process of the Independent Board, as well as to perform other duties assigned by law, by the Rules of Procedure and other sub-legal acts of the Independent Board. The Court notes that the abovementioned Recommendation on the basis of which the challenged Decision of the Assembly was rendered, does not refer to any fact or reasoning in support of the alleged violation of this provision by five (5) members of the Independent Board collectively.

110. Furthermore, the Court notes that the content of Article 12 of the Law on IOBCSK merely establishes the obligation of members of the Independent Board to (i) exercise the function of member impartially and to decide in accordance with the Constitution; and the law while preserving the authority and image of the Board; (ii) each member has a duty to participate in the work and decision-making process of the Independent Board; and (iii) each member has the duty to perform other tasks assigned by law, by the rules of procedure and other sub-legal acts of the Independent Board. The only reasoning of the Recommendation that has resulted in the challenged Decision of the Assembly, in terms of “*violation of the provisions of this law*”, as defined in point 1.1 of paragraph 1 of Article 15, is that five (5) members of the Independent Board collectively “*have not implemented the applicable laws in decision-making*”. Considering that the challenged Recommendation/Decision of the Assembly does not contain any additional facts and justifications regarding the violation of the provisions of the law, in addition to the reference to the “*decision-making*” of the members of the Independent Board, namely the allegation of non-implementation of “*applicable laws during decision-making*”, it turns out that five (5) members of the Independent Board have been dismissed regarding their decision-making in the exercise of the function to “*ensure respect of the rules and principles governing the civil service*”, as provided by paragraph 2 of Article 101 of the Constitution.
111. Beyond the content of the challenged Recommendation/Decision, according to which the members of the Independent Board have been dismissed for “*decision-making*”, the Court also recalls that the actions of the Assembly Committee on Public Administration, through specific questions in specific cases and the files, which preceded the challenged Decision, consist of a control of the work of the Independent Board in their role as decision-makers in the cases submitted to it.
112. More specifically, the above-mentioned Recommendation of the Assembly Committee on Public Administration for the dismissal of the members of the Independent Board continued after (i) non-approval of the annual report of the Independent Board; (ii) questions posed by the deputies of the Assembly at the session of the Parliamentary Committee on Public Administration regarding the performance of the Board; and (iii) communication through the Secretariat of the Assembly Committee on Public Administration, requesting additional information and access to specific case files of the Independent Board. In this context, the Court recalls that the Assembly Committee on Public Administration raised

specific questions regarding decision-making of the members of the Independent Board and specifically regarding: (i) all pending cases before the Independent Board decided on the case discussed in the Committee (the case of N.K.), including but not limited to the number of preliminary cases before deciding on this case; and (ii) the accurate number of all pending cases, the exact filing date of each complaint/claim/submission that was pending and submitted before the N.K. case, which however has not been handled before this case. This Committee also requested the following information: (i) whether all cases that were identified as pending in the preliminary question were dealt with within forty-five (45) days, and to confirm if all of these the cases did not need to be given additional time for treatment, but the deadline in question or what was left of this deadline in case of transfer was sufficient; and on the occasion of sending this clarification, the Coordination Office of the Committee also requested that (ii) the date of decision-making be sent to the cases that were identified as pending in the preliminary question; and (iii) attach the complete case file of N.K..

113. In the context of the above, the Board recalls the general principles within the meaning of paragraph 2 of Article 101 of the Constitution and that based on the latter, the Independent Board is an independent body, which must ensure compliance with the rules and principles of civil service, the observance of which he makes through decision-making in the cases submitted to it, and which implies the individual independence of the members of the Independent Board in reviewing concrete cases.
114. In addition, the Court recalls that (i) the members of the Independent Board enjoy independence in their decision-making in “*ensuring the respect of the rules and principles governing the civil service*”, as defined in paragraph 2 of Article 101 of the Constitution; (ii) this independence is further established through the case law of the Court in case KO171/18 and the legal provisions, namely paragraph 3 of Article 11 of the Law on the IOBCSK, which attributes immunity to members of the Independent Board in relation to decision-making within the constitutional and legal functions of the Independent Board, from prosecution, civil suit or dismissal, which enables them to be free to exercise their functions independently and without fear of consequences for the exercise of their functions in relation to “*the views expressed, the manner of voting or the decisions taken during their work*”; (iii) as long as the Assembly has the constitutional authority to oversee the Independent Board, including the possibility of terminating the mandate of its members in the cases set forth in the Law on IOBCSK, members of the Independent Board may not be dismissed solely for decision-making because the latter enjoy immunity from dismissal, as defined in the law itself adopted by the Assembly. Moreover, based on the same law, the legality of the decisions of the Independent Board is subject to the control of the judicial power and not the legislative power.
115. The Court, based on the independence of the Independent Board, the nature of the decisions taken by the Independent Board and the functional immunity enjoyed by the members of the Independent Board, considers that they cannot be held

accountable for the manner of voting or the decisions taken during their work, because this would infringe on their independence in exercising their competencies as members of the Independent Board, as guaranteed by the principles embodied in paragraph 2 of Article 101 of the Constitution.

116. The Court recalls that a member of the Independent Board cannot be controlled by the Assembly for the rationality of decision-making as they are protected by the principle of independence of decision-making of the Independent Board, which is related to “*ensuring respect for the principles and rules of civil service*” in accordance with paragraph 2 of Article 101 of the Constitution, and protected through immunity from dismissal in accordance with paragraph 3 of Article 11 of the Law on the IOBCSK.
117. It is the duty of the Assembly to oversee, but also to preserve the independence of the Independent Board, as provided for in the Constitution and the Law on the IOBCSK. This means, among other things, not only the duty of selecting members through an open, transparent and merit-based process, but also the eventual termination of the respective mandate on an individual basis, arguing precisely the facts and reasons for such a proposal, based on those circumstances for which the law allows the termination of the mandate, and not certain expectations or interventions of the legislator for the decisions that the member of the Independent Board took or should have taken. The Court reiterates that the decision-making of the members of the Independent Board in concrete cases can be challenged by the dissatisfied party, which claims that the decision of the Independent Board is not lawful, initiating administrative conflict in the competent court, within the time limit set by the provisions of Law on Administrative Conflicts as stipulated by paragraph 1 of Article 22 of the Law on IOBCSK.
118. Therefore, the Court finds that the Assembly, by dismissing the members of the Independent Board pursuant to paragraph 1, points 1.1. and 1.3. of Article 15 of the Law on the IOBCSK, without the inclusion in the Recommendation of the relevant Committee and the challenged Decision of the Assembly, of any fact and based on law, regarding the dismissal of five (5) members of the Independent Board collectively, but only on the grounds that the Independent Board “*has not implemented the applicable laws in decision-making*”, namely because of their decision-making in concrete cases, for which the members of the Independent Board enjoy immunity from dismissal, as defined in paragraph 3 of Article 11 of the Law on the IOBCSK and which decision-making, moreover, is subject to the assessment of legality by the judiciary in the procedure of administrative conflict, as provided by Article 22 of the Law on the IOBCSK, has exceeded the limits of the competence of overseeing the work of public institutions, defined by paragraph 9 of Article 65 of the Constitution in violation of guarantees regarding the independence of the Independent Board in exercising its function foreseen in paragraph 2 of Article 101 of the Constitution.

119. Consequently and finally, the Court finds that Decision [no. 08/V-029] of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo, is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution of the Republic of Kosovo. Therefore, the Court concludes that Decision [No. 07-V-063] of the Assembly on the election of five (5) members of the Independent Board, of 8 October 2020, remains in force.

### **Request for interim measure**

120. The Court recalls that the Applicants also request the Court to accept Article 43 of the Law, thus referring to the *ex-lege* suspensive effect of the implementation of the law or the decision of the Assembly. The Applicants, in this context, (i) request the Court to inform the parties involved that the challenged Decision is *ex-lege* suspended and is not submitted for enforcement until the final decision of the Court; and (ii) consider that it is not necessary to expressly request the suspension of the implementation of the act, since the latter should by law be subject to the suspensive effect in the implementation, as it was challenged before this Court, pursuant to paragraph 5 of Article 113 of the Constitution.
121. On 21 October 2021, the Court *ex officio* imposed the interim measure until 15 December 2021, reasoning that the latter is in the public interest, thus immediately suspending the challenged Decision, and stipulating that the Assembly should refrain from any action related to the issue of the election of new members until the final decision of the Court (for a detailed reasoning on the rationality of the Interim Measure, see the Decision on the Interim Measure in case KO127/21, of 21 October 2021).
122. On 9 December 2021, the Court declared the Referral admissible and decided on its merits. On the same date, the Court also decided to repeal the Interim Measure.

### **Request to hold a hearing**

123. The Court also recalls that the Applicants requested that a hearing be held.
124. The Court recalls paragraph 2 of Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure, which establishes that “*The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law.*”
125. The Court notes that the abovementioned Rule of the Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file are sufficient, beyond any doubt, to reach a decision on merits in the case under consideration (see, *inter alia*, case of the

Court, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110).

126. In the present case, the Court does not consider that there is any uncertainty regarding the “*evidence or law*” and therefore does not consider it necessary to hold a hearing. The documents that are part of the Referral are sufficient to decide the merits of this case.
127. Therefore, the Court, unanimously, rejects the Applicants’ request to hold a hearing.



## FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.5 and 116.2 of the Constitution, Articles 20 and 27 of the Law, and pursuant to Rule 59 (1) of the Rules of Procedure, on 9 December 2021:

## DECIDES

- I. TO DECLARE, unanimously, the Referral admissible;
- II. TO HOLD, unanimously, that Decision No. 08/V-029 of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo, is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution of the Republic of Kosovo;
- III. TO REPEAL, unanimously, Decision No. 08/V-029 of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo;
- IV. TO REPEAL, unanimously, Decision on Interim Measure, of 21 October 2021;
- V. TO REJECT, unanimously, the request for a hearing;
- VI. TO NOTIFY this Judgment to the Applicants, the President of the Republic of Kosovo, the President of the Assembly of Kosovo, the Government of Kosovo, the Ombudsperson and the Independent Oversight Board for the Civil Service of Kosovo;
- VII. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20, paragraph 4 of the Law; and
- VIII. TO DECLARE that this Judgment is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Bajram Ljatifi

**Kopje e vërtetuar  
Overena kopija  
Certified copy**

Gresa Caka-Nimani

*This translation is unofficial and serves for informational purposes only*