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

Prishtina, on 25 July 2022
Ref. no.:RK 2027/22

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

cases no. KI57/22 and 79/22

Applicant

Shqipdon Fazliu and Armend Hamiti

Constitutional review
of Decision [KPK/No. 475/2022] on proposal of Mr. Blerim Isufaj for the position of the Chief State Prosecutor of 6 April 2022 of Kosovo Prosecutorial Council and
Decision [KPK/No. 474/2022] on rejection of the Report of 6 April 2022 of the Review Commission of the Kosovo Prosecutorial Council

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

Applicants

1. The Referrals were submitted by Shqipdon Fazliu, represented with power of attorney by Flakron Sylejmani, a lawyer in Prishtina, and Armend Hamiti, both candidates in the appointmentprocess of the Chief State Prosecutor of the Republic of Kosovo (hereinafter: the Applicants).

Challenged decision

2. The Applicant in case KI57/22, Mr. Shqipdon Fazliu challenges the Decision [KPK/No. 475/2022] of 6 April 2022 of the Kosovo Prosecutorial Council for the proposal of Mr. Blerim Isufaj for the position of the Chief State Prosecutor (hereinafter: KPC Decision of 6 April 2022) and Decision [KPK/No. 474/2022] of 6 April 2022 on the Rejection of the Report of the Review Commission of the Kosovo Prosecutorial Council (hereinafter: Decision on the Rejection of the Report of the Review Commission).

3. The Applicant in case KI79/22, Mr. Armend Hamiti challenges the Decision [KPK/No. 475/2022] of 6 April 2022 of the Kosovo Prosecutorial Council (hereinafter: KPC).

Subject matter

4. The subject matter in case KI57/22 is the constitutional review of the Decision of 6 April 2022 of the KPC and the Decision on Rejection of the Report of the Review Commission, which has allegedly violated the Applicant's fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR) and Articles 32 [Right to Legal Remedies], 45 [Freedom of Election and Participation] and 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 13 (Right to an effective remedy) of the ECHR and Article 110 [Prosecutorial Council of Kosovo] of the Constitution, as well as Article 10 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

5. The subject matter in case KI79/22 is the constitutional review of the Decision of 6 April 2022 of the KPC, whereby the Applicant's fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR have allegedly been violated.

6. The Applicant in case KI57/22 also requests the imposition of an interim measure and the holding of a hearing.

Legal basis

7. The Referrals are 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 of the Republic of Kosovo (hereinafter: the Law) and Rules 32 (Filing of Referrals and Replies), 42 (Right to Hearing and Waiver) and 56 (Request for Interim Measures) of the Rules of Procedure of the Court (hereinafter: Rules of Procedure).

Proceedings before the Court

8. On 28 April 2022, the Applicant in case KI57/22 submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

9. On 10 May, 2022, the President of the Court by Decision [No. GJR. KSH 57/22], appointed judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel

composed of judges: Selvete Gërxaliu-Krasniqi (Presiding), Safet Hoxha and Radomir Laban.

10. On 13 May 2022, the Court notified the Applicant in case KI57/22 about the registration of the Referral and asked him to (i) submit the referral form; and (ii) to inform the Court whether it has initiated any procedure before the regular courts related to the challenged Decisions.

11. On the same date, the Court notified the KPC about the registration of Referral KI57/22 and (i) asked it to submit the relevant documentation regarding the appointment process of the Chief State Prosecutor, including the Decision of 6 April 2022; and (ii) provided the opportunity to submit comments, if any, regarding the referral. On the same date, the Court notified the President of the Republic of Kosovo (hereinafter: the President) about the registration of the Referral.

12. On 17 May 2022, the KPC submitted to the Court (i) Regulation no. 06/2019 on the Appointment of the Chief State Prosecutor and Chief Prosecutors of the Prosecutor's Offices of the Republic of Kosovo (hereinafter: Regulation for the Appointment of the Chief Prosecutor); (ii) The decision to announce the vacancy for Chief State Prosecutor; (iii) Vacancy for the Chief State Prosecutor; (iv) The decision on the establishment of the Evaluation Panel; (v) The Decision on the Establishment of the Review Commission and its supplementation and amendment; (vi) List of candidates who have applied for Chief State Prosecutor; (vii) Final confirmation of the list of candidates by KPC; (viii) Resignation of candidate A.I.; (ix) The list with the final points obtained by each candidate for Chief State Prosecutor, after the process of interviewing and scoring the candidates; (x) Final confirmation by KPC of the list of five candidates; (xi) The final notification for the candidate Mr. Shqipdon Fazliu; (xii) The decision on the confirmation of the final list of candidates' scores; (xiii) The decision of 6 April 2022 regarding the nomination of Mr. Blerim Isufaj for the position of Chief State Prosecutor, after the secret voting process. The KPC did not offer specific comments regarding the Applicant's allegations.

13. On 20 May 2022, the Applicant in case KI57/22 submitted the referral form to the Court and clarified that he has not initiated any proceedings before the regular courts against the challenged Decisions.

14. On 6 June 2022, the Applicant in case KI79/22 submitted the Referral to the Court.

15. On 8 June 2022, the President of the Court by Decision [No. GJR.KSH 79/22] appointed judge Bajram Ljatifi, as Judge Rapporteur and the Review Panel composed of judges: Safet Hoxha (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

16. On 14 June 2022, in accordance with paragraph 1 of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court ordered the joinder of Referral KI79/22 with Referral KI57/22. Based on paragraph 3 of the aforementioned rule, the Judge Rapporteur and the composition of the Panel remain in the composition determined for the first referral, namely the referral in case KI57/22.

17. On 15 June 2022, the Court notified the Applicants about the registration of the Referrals and their joinder and asked the Applicant in case KI79/22 to notify the Court if he has initiated any proceedings before the regular courts regarding the decision which he has challenged. On the same date, the Court notified the KPC and the President about the registration of the Referral KI79/22 and its joinder with the

Referral KI57/22. Within the set deadline, the Court did not receive any response from the Applicant in case KI79/22.

18. On 22 June 2022, the KPC submitted to the Court the same documents as those it had submitted to the Court on 17 May 2022 regarding Referral KI57/22.

19. On 30 July 2022, the Review Panel considered the report of the Judge Rapporteur and, by majority, recommended to the Court the inadmissibility of the referrals.

20. On 4 July 2022, the Court voted, by majority, that the Referral of the Applicants is inadmissible on procedural grounds, as a result of the non-exhaustion of legal remedies established by law.

Summary of facts

21. On 14 January 2022, the KPC, based on Article 5 (Announcement of the Competition for Chief Prosecutor and Chief Prosecutors) of the Regulation on the Appointment of the Chief Prosecutor, announced the competition for the appointment of Chief State Prosecutor. On the same date, based on the aforementioned Regulation, the KPC established: (i) the Evaluation Panel composed of five (5) members; and (ii) the Review Commission for the process of appointing the Chief State Prosecutor, composed of three (3) members.

22. According to the case documents, six (6) candidates had applied in the competition announced by the KPC, among whom were two (2) applicants. According to the case documents, on 11 March 2022, from the competition withdrew one of the six (6) candidates.

23. After submitting the concept documents of each candidate, based on paragraph 4 of Article 11 (Evaluation panel and interview procedure) of the Regulation on the Appointment of the Chief State Prosecutor, on 18 March 2022, interviews were held with each of the five (5) candidates for the position of Chief State Prosecutor. On the same date, the draft documents of the candidates for Chief State Prosecutor were published on the website of the KPC.

24. On 19 March 2022, the interview of the candidates was broadcast on Radio Television of Kosovo.

25. On 22 March 2022, the Applicant in case KI57/22 received the "*Final Notification [no. 417/2022]*" from the Chairman of the Evaluation Panel by which he was notified about the final score by all members of the Evaluation Panel. The individual scoring of each candidate was developed by each member of the Evaluation Panel in an anonymous manner, where each member was assigned a code. According to this scoring, the Applicant in case KI57/22 was listed in the second position (2).

26. On the same date, the Applicant in case KI79/22 received the "*Final Notification [no. 419/2022]*" from the Chairman of the Evaluation Panel by which he was notified about the final score by all members of the Evaluation Panel. According to the individual scoring of each member of the Evaluation Panel, the Applicant in case KI79/22 was listed in the fourth position (4).

27. According to the case documents submitted by the applicants and the documentation submitted by the KPC, the candidate Blerim Isufaj received the highest score from the Evaluation Panel and as such was ranked first in the list.

28. On 23 March 2022, the Applicant in case KI57/22 submitted a request to the Secretariat of the KPC, for access to the files of other candidates and their scores, in order to analyze and compare the scores and the possibility of exercising the legal remedies. On the same date, the Applicant in case KI57/22 via e-mail received the notification by which his request for access to the file of other candidates, based on Article 15 (Notification of candidates) of the Regulation on the Appointment of the Chief Prosecutor, was rejected.

29. On 27 March 2022, the Applicant in case KI79/22 submitted an objection to the Review Commission, claiming (i) non-implementation of the provisions of Law no. 06/L-056 on the Kosovo Prosecutorial Council (hereinafter: Law on KPC); (ii) non-implementation of the provisions of the Regulation on the Appointment of the Chief Prosecutor; and (iii) incorrect scoring.

30. On 28 March 2022, the Applicant in case KI57/22 submitted the objection to the Review Commission, claiming (i) non-implementation of the provisions of the Law on the KPC; (ii) non-implementation of the provisions of the Regulation on the Appointment of the Chief Prosecutor; and (iii) incorrect scoring.

31. On 1 April 2022, the Review Commission addressed the objection of the applicants and other candidates, while on 4 April 2022, it submitted the report to the KPC.

32. The Review Commission rejected as ungrounded the allegations of the Applicant in case KI57/22 regarding the non-implementation of the Law on the KPC and the Regulation on the Appointment of the Chief Prosecutor, but recommended that the objections of the Applicant in case KI57/22 be partially approved, only regarding the allegation for incorrect scoring, with the proposal that the members of the Evaluation Panel review once again the process regarding the reasoning of the scoring. In this context, as regards the objection of the Applicant, regarding the evaluation of the members of the Evaluation Panel with codes 159 FTC, 214 LOD, 142 OID and 430 VIK related to the criteria *"Integrity of the Candidate", "Technical knowledge and experience*", "*Leadership and managerial skills", "Concept document and presentation"*, respectively, the Review Commission proposed to approve the objection considering that the relevant members of the Evaluation Panel did not justify the deduction of two points in relation to the first three criteria and three points regarding the last criterion in relation to the corresponding maximum points. The other part of the objection regarding the incorrect scoring was rejected because the Review Commission found that the scoring was in harmony with the reasoning given by the members of the Evaluation Panel.

33. The Review Commission rejected as unfounded the allegations of the Applicant in case KI79/22 regarding non-implementation of the Law on the KPC and the Regulation on the Appointment of the Chief Prosecutor, but recommended that the objections of the Applicant in case KI79/22 be partially approved, only pertaining to the allegation of incorrect scoring, with the proposal that the Members of the Evaluation Panel review once again the process regarding the reasoning of the scoring. In this context, regarding the objection of the Applicant, regarding the evaluation of the members of the Evaluation Panel with codes 159 FTC, 214 LOD and 142 OID related to the criteria *"Concept document and presentation"*, and "*Leadership and managerial skills",* respectively, the Review Commission proposed to approve the objection, considering that the relevant members of the Evaluation Panel did not provide sufficient justifications in the score sheet. The other part of the objection regarding the incorrect scoring was rejected because the Review Commission found that the scoring was in harmony with the reasoning given by the members of the Evaluation Panel.

34. On 6 April 2022, the KPC held its meeting, in which, among other things, the pointson the agenda were set to be: (i) review of the Reports of the Review Commission; and (ii) voting for the proposal of the candidate for the position of Chief State Prosecutor.

35. Regarding the examination of the reports of the Review Commission, the KPC, by Decisions [KPK. no. 470/2022] and [KPK. no. 471/2022], respectively, rejected the Report with the findings of the Review Commission in the case of the applicants of referrals in cases KI57/22 and KI79/22. The KPC reasoned that the findings of the Review Commission for the approved part were not based on the Regulation on the Appointment of the Chief Prosecutor, due to the fact that (i) the summary of the evaluation rationale for the approved criteria by the Review Commission determined by the members of the Evaluation Panel match the scoring, the presentation of the candidate during the interview and the evaluation file; and (ii) even if the justifications were supplemented further, this would not result in a change in the scoring and therefore would not affect the final result.

36. Regarding the point on the agenda for the voting of the candidate for Chief State Prosecutor, the KPC by Decision [KPK. no. 475/2022] decided that (i) Mr. Blerim Isufaj, be nominated for Chief State Prosecutor; (ii) Mr. Blerim Isufaj, is proposed to the President for appointment as Chief State Prosecutor; (iii) *"The proposal for the appointment will be justified in writing, including the entire nomination process of the candidate proposed for appointment as Chief State Prosecutor"*; (iv) obliged the Secretariat to publish this Decision on the website; and (v) emphasized that the decision enters into force on the date of approval by the KPC.

Applicants' allegations

37. The Applicant in case KI57/22 alleges that the two challenged Decisions of the KPC, namely the Decision of 6 April 2022 and the Decision on the rejection of the Report of the KPC Review Commission of the same date, were rendered in violation of his rights and fundamental freedoms guaranteed by Article 24 and Article 31 of the Constitution in conjunction with Article 6 of the ECHR and Articles 32, 45 and 54 of the Constitution in conjunction with Article 13 of the ECHR, Article 110 of the Constitution, as well as Article 10 of UDHR.

38. The Applicant in case KI79/22 alleges that the challenged Decision of the KPC of 6 April 2022 was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

39. In the following, the Court will present the allegations of the applicants, starting with the case KI57/22, to continue with the case KI79/22.

I. Applicant's allegation in case KI57/22

(i) Regarding admissibility of the Referral

40. The Applicant emphasizes that the Constitutional Court, in its practice, has declared as admissible Referrals KI99/14 and KI100/14 with the Applicants *Shyqri Syla and Laura Pula*, Judgment of 3 July 2014 (hereinafter: Judgment of the Court in case KI99/14 and KI100/14), by which the constitutionality of the challenged decisions of the KPC regarding the appointment procedure of the Chief State Prosecutor in 2014 was assessed. In this respect, the Applicant cites paragraph 50 of the relevant Judgment, which, among other things, emphasizes that: *"[...] even if there are legal*

remedies, in the case of the applicant they have not proven to be effective [...] there are no legal remedies for exhaustion". In the context of this Judgment of the Court, the Applicant specifies that he also fulfills the same requirement for exemption from the obligation to exhaust legal remedies.

41. Furthermore, referring to the case law of the European Court of Human Rights (hereinafter: ECtHR) and of the Court, the Applicant points out (i) Judgment *Selmouni v. France*, application no. 25803/94, Judgment of 28 July 1999 (hereinafter: Judgment *Selmouni v. France*), reasoning that based on the latter, the legal remedies should exist in theory but also in practice; (ii) Judgment of the Court KI06/10 Applicant *Valon Bislimi*, Judgment of 30 October 2010 (hereinafter: Judgment of the Court in case KI06/10), in which case the Court had declared the referral admissible despite non-exhaustion of legal remedies ; and (iii) the Court's Resolution on Inadmissibility of 29 July 2020, in case KI42/20, Applicant *Armend Hamiti* (hereinafter: Resolution on Inadmissibility in case KI42/20), which the Court had declared inadmissible, among other things, on the grounds that the circumstances of the case were related to the procedure for appointment of the position of the Chief Prosecutor in the Special Prosecutor's Office of the Republic of Kosovo, not that of the Chief State Prosecutor.

42. In the end, the Applicant, referring to the court proceedings before the first instance court, states that "*it is a known fact that the court procedure in the first instance takes considerable time*". In relation to the latter, the Applicant refers to the statistics published on the website of the Kosovo Judicial Council of (hereinafter: KJC), namely the Work Report of the Department for Administrative Matters of the Basic Court in Prishtina in 2022, where it is emphasized, among other things, that *"The Administrative Department inherited 6767 [cases], during this year it received 3408 cases, while it managed to complete 3195 cases, and 770 cases are still pending. This division for the 2021 has increased the efficiency of 70.88%".*

(ii) Regarding the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

43. The Applicant alleges that his right to a fair and impartial trial has been violated, namely the principle of equality of arms and of adversarial proceedings. In this context, according to him, "*in the case of the selection of prosecutors for leading positions in the judiciary, based on the constitutional provisions,* [KPC] *should take into account that this state institution should have a very clear picture, a real assessment, based on all merits, objective and subjective criteria and ultimately to arrive at the most complete and best candidacies, with the widest possible support*". In this regard, the Applicant emphasizes that the principle of equality of arms and adversariality must inevitably be applied so that the parties have the opportunity to present their arguments and evidence so that the decision is in accordance with the constitutional guarantees.

44. According to the Applicant, the violation of the principle of equality of arms consists, among other things, in the fact that (i) the Evaluation Panel has asked the candidates different questions and not the same questions according to the standard, and, therefore, emphasizes that this contradicts with paragraph 6 of Article 11 (Evaluation Panel and interview procedure) of the Regulation on the Appointment of the Chief Prosecutor; and (ii) the scoring by the members of the Evaluation Panel was arbitrary because *"they can make an arbitrary assessment and there can be a big difference in the reasoning on one side and the scoring on the other side, but all this is acceptable, because they "didn't give points neither above nor below the foreseen minimum". So, in order to be able to effectively exercise the legal remedy –*

objection, it is necessary to have the files of other candidates, such as the scores, and only in that situation it was possible to compare the scores given to one or the other candidate and find eventual discrepancies".

45. The Applicant, in support of his allegations, refers to paragraphs 37, 38 and 87 of the Court's Judgment in case KI34/17, with Applicant *Valdete Daka*, Judgment of 1 June 2017 (hereinafter: Judgment in case KI34 /17), in which case the issue of meritocracy is elaborated and which, according to the Applicant, also emphasizes the right to freedom of evaluation of the KJC in voting for the candidate, but that this freedom is not absolute and cannot be considered as broad enough to ignore the principles of justice and equality in the scoring process.

46. In essence, the Applicant also challenges the legality and constitutionality of the Regulation on the Appointment of the Chief Prosecutor, emphasizing, among other things, that (i) based on paragraph 1 of Article 17 (The voting process) of the Regulation on the Appointment of the Chief Prosecutor, *"In cases where a candidate gets the most points by going over 3% from the second candidate, the same vote to be confirmed by the Kosovo Prosecutorial Council (KPK). If the candidate does not receive the majority of the votes of the members present, the Kosovo Prosecutorial Council (KPK) re-announces the competition"* and that based on this provision, only one (1) candidate is listed as the final candidate for voting; and (ii) based on the Regulation on the Appointment of the Chief Prosecutor, the Evaluation Panel was composed of five (5) members, whereas based on paragraph 3 of Article 110 [Kosovo Prosecutorial Council] of the Constitution and sub paragraph 1.3 of paragraph 1 of Article 7 (Duties and responsibilities of the Council) of the Law on KPC, the KPC has thirteen (13) members (currently 11) and according to him this has resulted in: *" [...] the minority of the KPC" puts the full composition of the KPC "before the fact [...] because the full composition of the KPC is not given an alternative and the full composition of the KPC in fact has no possibility of the proposal of the candidate for the President of Kosovo".*

(iii) In relation to the allegations of violation of Articles 32 and 54 of the Constitution and Article 13 of the ECHR

47. The Applicant emphasizes that the Regulation on the Appointment of the Chief Prosecutor does not provide for the possibility of appealing the Decision of the KPC on the appointment of the Chief State Prosecutor and in this case violates his right to effective legal remedies because (i) he was not given the files of other candidates, making it impossible for them to effectively exercise their legal remedy; and (ii) with the non-submission of the Decision of the KPC of 6 April 2022, his "*right to participate in court*" was violated, namely it was impossible for him to initiate court proceedings to challenge this decision.

48. The Applicant also alleges that the Decision of the KPC by which the Report of the Evaluation Commission for Reconsideration was rejected, is contrary to Law no. 05/L-031 on the General Administrative Procedure (hereinafter: LGAP), namely Articles 47 (Structure and statutory elements of the written administrative act), 48 (Reasoning of a written administrative act), sub paragraphs 1.3, 1.4, 1.5, 1.6, 1.7 of paragraph 1 of Articles 52 (Unlawfulness of an administrative act) and 125 (Appeal) of it, because it lacks the essential elements that a Decision should have, such as legal advice and reasoning.

(ii) Regarding the allegations of violation of Article 45 of the Constitution

49. The Applicant considers that his right guaranteed by Article 45 of the Constitution has been violated, stating that this right should be guaranteed to the citizens of the Republic of Kosovo who are elected to any public office. In this way, according to the Applicant, he was denied this right due to the implementation of paragraph 1 of Article 17 (The voting process) of the Regulation on the Appointment of the Chief Prosecutor, because according to the allegation, subparagraph 1.3 of paragraph 1 of Article 7 (Confirmation of candidate status) of this Regulation, namely the quota of 3% difference in points in order to propose one or more candidates to the KPC for voting, is contrary to the Constitution, the Law on the KPC and the spirit of the Court's Judgment in case KI34/17.

50. In support of his allegation, the Applicant refers to the Joint Opinion on draft amendments to the Law on the Prosecutor's Office in Georgia CDL-AD (2015) 039 which states that *"In order to make the nomination process more transparent and open, the Venice Commission, OSCE/ODIHR and the CCPE/DGI would recommend that the Minister of Justice proposes not one but several candidates to the position of Chief Prosecutor, and that the Prosecutorial Council then selects one of them"*. In this respect, the Applicant emphasizes that despite what is contained in the aforementioned Regulation, the proposal for Chief State Prosecutor must contain more than one candidate and not as defined in the current Regulation of the KPC.

(v) In relation to the allegations of violation of Article 110 of the Constitution

51. The Applicant again challenges the legality and constitutionality of the Regulation on the Appointment of the Chief Prosecutor, emphasizing, among other things, that the latter is contrary to (i) paragraph 3 of Article 110 of the Constitution because while anonymous voting may be understandable, the same does not apply to scoring; and (ii) that based on Article 16 (Candidate objection to the scoring process) of the aforementioned Regulation, five (5) members of the KPC composition and who were part of the Interview Panel, voted against the proposal of the Review Commission in conflict of interest because *"[...] these 5 members reviewed their decision and came to the conclusion that they had made an appropriate and well-founded decision?"*.

52. Furthermore, the Applicant also challenges the legality of the KPC Press Release of 25 March 2022, in which, among other things, it is stated that *"The KPC assesses that the process for the appointment of the new Chief State Prosecutor, from the beginning to this stage of the interview, has been objective, non-discriminatory, transparent, comprehensive and completely based on meritocracy"* and which, according to the Applicant, is contrary to paragraph 1 of Article 3 (Basic principles of the activities of the Council) of the Law on the KPC, emphasizing that the KPC must be impartial and with this communiqué it is prejudiced "*the fate of eventual objections*."

(iii) Request for interim measure and hearing

53. The Applicant emphasizes that the implementation of the challenged Decision of the KPC would be a further violation of the guaranteed rights and would deprive the legality and constitutionality of operation of the Chief State Prosecutor's Office. According to the Applicant, among other things, all the decisions taken under the direction of the proposed candidate, if he had been appointed, could be declared unlawful, a fact which violates the principle of legal certainty of the citizens of Kosovo. The Applicant further emphasizes the specificity of the appointment

procedure for the position of Chief State Prosecutor and the necessity for this to be done at the right time, respecting the rights guaranteed by the Constitution.

54. Finally, the Applicant requests the Court to: (i) declare the referral admissible; (ii) to impose the interim measure; (iii) to order the holding of the hearing; (iv) to hold that the Decision of 6 April 2022 of the KPC on the proposal of Mr. Blerim Isufaj for the position of Chief State Prosecutor and the Decision of 6 April 2022 of the KPC on the Rejection of the Report of the Review Commission, were rendered in violation of Articles 24, 31, 32, 45 and 54 of the Constitution in conjunction with Articles 6 and 13 of the ECHR and Article 10 of the UDHR and to declare the latter invalid; and (v) to remand the case to the KPC, for reconsideration in accordance with the findings of the Court.

II. Applicant's allegation in case KI79/22

(i) Regarding the admissibility of Referral

55. The Applicant initially states that his case concerns the determination of civil rights and in this context refers to the Judgments *Frezadou v. Greece*, no. 2683/12, Judgment of 8 November 2018 and *Fiume v. Italy*, no. 20774/05, Judgment of 30 June 2009, respectively, to emphasize, among other things, that (i) "*the right to take part in a selection and appointment process, which is both fair and transparent, represents a "right" in the meaning of the application of guarantees of Article 6(1) of the Convention"* and that *(ii) "the results of this process is decisive for the exercise of this right*".

56. Furthermore, the Applicant states that (i) Article 1 (a) of the Regulation on the Appointment of the Chief Prosecutor defines the criteria and procedures "*that will enable the KPC to have an objective, transparent, non-discriminatory and inclusive, merit-based process regarding the nomination procedure of all Chief Prosecutors and the nomination of Chief State Prosecutor*"; and (ii) based on the Court Judgment in cases KI99/14 and KI100/15, "*[...] any procedure for the selection of the Chief State Prosecutor is subject to the requirements of the right to a fair trial from Article 6 (1), namely that the case of every person "be heard fairly, publicly and within a reasonable time by an independent and impartial court established by law [...], not limited to ordinary court as part of the justice system, where the institution of the Prosecutorial Council certainly falls within this definition*".

57. The Applicant, referring to the Judgment of the Court in cases KI99/14 and KI100/14, emphasizes that there are no legal remedies for exhaustion, because (i) "*the provisions of Law No. 06/L-056 for the Prosecutorial Council do not provide for any legal remedy against the decision which we challenge with this Constitutional Referral; and (ii) in cases KI99/14 and 100/14, it was emphasized that "even if those remedies formally existed, they would not be efficient due to the specificity of the procedure for selecting the Chief State Prosecutor.*"

(ii) Regarding the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

58. The Applicant, in essence, challenges the impartiality of the KPC in the proposal for the appointment of the Chief State Prosecutor, also referring to the report of *"some NGOs of the country which deal with the monitoring of the justice system, it is noted that the extremely high assessment of the Council for the selected candidate was clearly unfounded",* because, according to the allegation*, (i)* the current composition of the KPC is inadequate, referring to the Opinion of the Venice Commission*:*

"Kosovo: Opinion on the Draft Amendments to the Law on the Prosecutorial Council" CDL-AD(2021)051 and emphasizing that *"since the Prosecutorial Council consists almost exclusively of prosecutors, there is a concrete risk for governance with a corporatist mindset" and that in this context, "a Prosecutorial Council, flawed in its objective composition, which has not objectively fulfilled its constitutional mission to ensure an independent, professional and impartial system, will look for these essential qualities in the selection of the new Chief Prosecutor";* and (ii) based on the Court Judgment in case KI34/17, the Constitution obliges *"the KJC to guarantee the independent and impartial functioning of the judicial system. In this regard, the Court considers that the quality of the decision-making procedures within the KJC must also be based upon the principles of independence and impartiality, as a prerequisite to ensuring the impartiality and independence of the justice system as a whole"* and that based on the same Judgment *, "the manner of development of the selection process of the Chief Prosecutor, without sufficiently and properly assessing the professionalism and integrity of the selected candidate, in fact, leaves room for doubts that this next action of the Council was colored by a corporatist mentality and was not guided from the principle of meritocracy".* Regarding the issue of the integrity of the selected candidate, the Applicant KI79/22 also refers to the reporting of civil society organizations. In this context, the Kosovo Law Institute (KLI), the Group for Legal Studies and Politics (GLPS) and the FOL Movement, which had recommended, among other things, *"to cancel the entire selection and appointment process of the Chief State Prosecutor due to procedural violations and defects identified by the coalition in the process of monitoring and evaluating this process".*

59. Based on the above reasoning, the Applicant alleges that the process of appointing the candidate for Chief State Prosecutor was not guided by the principle of meritocracy. In this regard, the Applicant refers to (i) the case law of the Court, namely the Judgment of the Court in cases KI99/14 and KI100/14 and Judgment in case KI34/17, respectively; and (ii) the case law of the ECtHR, namely the cases *Micallef v. Malta*, no. 17056/06, Judgment of 15 October 2009 (paragraphs 93-101); *Denisov v. Ukraine*, no. 76639/11, Judgment of 25 September 2018 (paragraphs 61-65); *De Cubber v. Belgium*, no. 9186, Judgment of 14 September 1987 (paragraph 26); and *Kress v. France* [GC], no. 39594/98, Judgment of 7 June 2011 (paragraph 82).

60. Finally, the Applicant requests the Court to (i) declare the Referral admissible; (ii) to hold that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; (iii) to annul the challenged Decision of 6 April 2022 of the KPC on the proposal of the candidate for Chief State Prosecutor; and (iv) to order the KPC to repeat the appointment procedure for the Chief State Prosecutor in compliance with this Judgment.

Relevant constitutional and legal provisions

Constitution of the republic of Kosovo

Article 24
[Equality Before the Law]

"1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled."

Article 31
[Right to Fair and Impartial Trial]

"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law."

Article 32
[Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

Article 45
[Freedom of Election and Participation]

"1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.
2. The vote is personal, equal, free and secret.
3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies."

Article 54
[Judicial Protection of Rights]

"Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated."

Article 110
[Kosovo Prosecutorial Council]

1. The Kosovo Prosecutorial Council is a fully independent institution in the performance of its functions in accordance with law. The Kosovo Prosecutorial Council shall ensure that all persons have equal access to justice. The Kosovo Prosecutorial Council shall ensure that the State Prosecutor is independent, professional and impartial and reflects the multiethnic nature of Kosovo and the principles of gender equality.
2. The Kosovo Prosecutorial Council shall recruit, propose, promote, transfer, reappoint and discipline prosecutors in a manner provided by law. The Council

shall give preference for appointment as prosecutors to members of underrepresented Communities as provided by law. All candidates shall fulfill the selection criteria as provided by law.
3. Proposals for appointments of prosecutors must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the relevant territorial jurisdiction.
4. The composition of Kosovo Prosecutorial Council, as well as provisions regarding appointment, removal, term of office, organizational structure and rules of procedure, shall be determined by law.

European Convention on Human Rights

Article 6
(Right to a fair trial)

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
[...]

Article 13
(Right to an effective remedy)

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

LAW No. 06/L-056 ON KOSOVO PROSECUTORIAL COUNCIL

Article 7
Duties and responsibilities of the Council

1. The Council exercises the following duties and responsibilities:
[...]
1.3. proposes to the President the appointment and dismissal of the Chief State Prosecutor, and ensures that the proposed candidate meets the requirements established by law and that the respective procedures have been carried out;
[...]

Article 22
Appointment of the Chief State Prosecutor and the Chief Prosecutors

1. The Council shall nominate the Chief State Prosecutor among the prosecutors and he/she shall be appointed by the President for one mandate, in the duration of seven (7) years without the possibility of reappointment.

2. The Council appoints Chief Prosecutors for all other units of the State Prosecutor. Every prosecutor that fulfils the criteria under the Law on State Prosecutor, is entitled to be proposed for the post of the Chief State Prosecutor.
3. Chief Prosecutor shall be appointed by the Council for a period of four (4) years, with a possibility of extension for one additional mandate.
4. In order to secure that the State Prosecutor reflects a multi-ethnic nature of Kosovo, the Council shall try to secure that the members of the non-majority communities in Kosovo are appointed in managerial positions.
5. The Council is authorized to remove a Chief Prosecutor from his or her position, in accordance with the performance evaluation conducted under the provisions of the applicable law, or in case of determination of the criminal behaviour, inadequate management, non-competence or failure in acting in accordance with the obligations deriving from the position.

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.

Article 63
Other procedure provisions

If this law does not contain provisions for the procedures on administrative conflicts, the law provisions on civil procedures shall be used.

Article 65
Obligatory character of judgment

When the court annuls an act, against which the administrative conflict has started, the case shall be returned in the position that it was before the annulled act was issued. If by the nature of the issue, which was the object of the conflict, instead of annulled administrative act, another act shall be issued. The competent body is obligated to issue another act, without a delay, within thirty (30) days from the date of delivering the judgment. In this case the competent body is obligated on the legal point of view of the court and on courts remarks regarding the procedure.

LAW No. 03/L-006 ON CONTESTED POCCEDURE

RETURN TO PREVIOUS SITUATION

Article 129
(No title)

129.1 when the party does not take part in the proceeding or misses the due date for completion of any procedural action and due to this it looses the right to complete the procedural action bound to the prescribed period of time, the court may permit this party to complete this action with delay if there are reasonable circumstances which can not be determined or avoided.
129.2 If the return to previous situation is permitted, the contentious procedure returns to the situation in which was before failure to act and all the decisions rendered to the court due to failure to act are cancelled.

Article 130
(No title)

130.1 Proposal for return to previous situation is submitted to the court in which the failed action should have taken place.
130.2 Proposal shall be submitted within seven (7) day period from the day the cause of failure to act has ceased, and if party has found out about failure to act at a later stage, the period of time is calculated from the day when the failure to

act was recognized. 130.3 When more than sixty (60) days have passed from the day of failure to act, the return to previous situation may not be requested.
130.4 If the return to previous situation is requested due to failure to complete the procedural action within the prescribed period of time, the requestor is bound to attach the written action which failed to be completed on time.

REGULATION NO: 06 /2019 ON APPOINTMENT OF CHIEF STATE PROSECUTOR AND CHIEF PROSECUTORS OF PROSECUTIONS OF REPUBLIC OF KOSOVO

Article 3
General Criteria

1. *To apply for the position of the CSP and the Chief Prosecutor of the respective prosecution offices, the applicants must meet the following general criteria:*

   1.1 S/he shall be a Prosecutor with a permanent mandate;
   1.2 S/he shall not have any indictment filed against him/her
   1.3 S/he shall not have been convicted for a criminal offense;
   1.4 Have a positive performance evaluation in the last three years;
   1.5 S/he shall not have imposed disciplinary sanctions in the last five years, excluding reprimand and non- public written reprimand;
   1.6 Have a high professional reputation and moral integrity.

Article 4
Special criteria

1. Applicants interested in applying for the position of the CSP and the Chief Prosecutor of the relevant prosecution must meet these special criteria:
1.1. For appointment to the position of CSP, the candidate must have at least eight (8) years of experience as a prosecutor;
[...]

Article 5
Announcement of the competition for Chief Prosecutor and Chief Prosecutors

1. KPC announces the competition for Appointment of Chief State Prosecutor at least 90 days before expiry of current Chief State Prosecutor.
[...]

Article 6
Application and accompanying documents

1. Applicants must submit the following documents*:*
1.1 Completed application which will be published on the official website of KPC and CSP.
1.1. A résumé(CV);
1.2. Concept paper for Chief State Prosecutor for the management of the State Prosecution, respectively Concept Paper for Chief Prosecutor for the management of the respective prosecution.
1.3. Self-assessment;

1.4. Any other relevant documents to document their experience, including recommendations.
2. Application forms, concept papers and self-assessments are an integral part of this Regulation.

Article 11
Evaluation Panel and interview procedure

1. The KPC shall establish an Evaluation Panel composed of the KPC Chairperson and four (4) members to be elected by lot. The Evaluation Panel is chaired by the KPC Chair.
2. The members of the Evaluation Panel will be selected by lot by putting the names of the remaining KPC members in the box and withdrawing from the KPC Chairperson.
3. The members of the Evaluation Panel will be provided with complete files of the candidates, in the language of their choice, not later than 48 hours prior to the interview.
4. All candidates who meet the required criteria will be interviewed.
5. For each candidate will split time of 45 to 60 minutes for interview.
6. Standard questions for all candidates will be compiled prior to the interview. The Evaluation Panel will agree prior to the interview for the questions, with the possibility of asking additional questions depending on the specific issues surrounding the individual candidate.
7. The Chair of the Evaluation Panel will lead the interview and any other member has the opportunity to ask additional questions.
8. Together with the invitation to interview, the candidates shall be notified of the composition of the Evaluation Panel and given the opportunity to file an objection to the composition of the Evaluation Panel within three (3) days of receiving the invitation. The objection is presented to the Review Committee.
9. If the Review Committee finds that the candidate's objection to any member of the Review Panel is reasonable, it proposes to the Chair of the Review Panel that he / she by lot replace the member with any of the members who do not even participate in the Review Committee.
10. In the case that no prosecutor member is possible, the draw for the election of the members of the Evaluation Panel and the Review Committee shall be repeated.
11. The interview will be recorded. The recording of the interview can be given to the Court for the purpose of appointment procedure and judicial proceedings. The Evaluation Panel will score the candidates.

Article 12
Review Committee

1. The KPC will establish a Review Committee to examine the objection of candidates.
2. The Review Committee will be appointed for each competition for the position assigned.
3. The Review Committee for the process designated for State Prosecutor or Chief State Prosecutor shall consist of three (3) members of the KPC.
4. The members of the Review Committee are selected by lot by the KPC. Withdrawal is done by the KPC Chairperson.
5. Members of the Review Committee do not participate in the interview process.

Article 13
Criteria for scoring

1. Candidate scoring will be based on the general criteria as follows*:*
1.1 Concept paper and its presentation - up to 30 points;
1.2 Candidate integrity - up to 20 points;
1.3 Leadership and Management Skills - up to 30 points;
1.4 Technical knowledge and experience required to exercise the function up to 20 points.

Article 15
Notification of candidates

1. Each candidate will receive a copy of their evaluation within five (5) days of the completion of the evaluation process.
2. The notification shall contain:
2.1. Final scoring by all members of the anonymous evaluation panel and
2.2. Anonymous individual score given by each member of the Evaluation Panel together with justification for each score category.
3. The final announcement is made by the Chair of the Evaluation Panel with the support of the Secretariat.

Article 16
Candidate objection to the scoring process

1. Any candidate who objection his / her non-election as the final candidate for voting in the KPC has the right to object to the selection process. The objection is submitted to the KPC Review Committee.
2. The objection must be submitted in writing no later than 5 (five) days from the notification.
3. The objection must contain the following specific reasons:
3.1. Failure to comply with the provisions of the Law;
3.2. Failure to comply with the provisions of this Regulation;
3.3. Scoring has been incorrect.
4. Objection by the candidate must be supported by evidence.
5. The Review Committee examines objections to determine whether they are well founded.
6. If the Review Committee finds that the objection is well founded, it shall submit a reasoned report to the KPC.
7. The KPC votes on the proposal of the Review Committee.
8. If the KPC approves the findings of the Review Committee pursuant to paragraph 6, the KPC requests the members of the Evaluation Panel to review the process once again to address the findings.
9. If the KPC rejects the findings of the Review Committee under paragraph 6, the final score will be confirmed and the KPC goes through the voting process.
10. If the Review Committee finds that the objection is unfounded, the KPC confirms the final score and proceeds to the voting process.
A copy of the decision rejecting the objection under this section, including the reasons for refusal, shall be submitted to the candidate.

Article 17
The voting process

1. In cases where a candidate gets the most points by going over 3% from the second candidate, the same vote to be confirmed by the KPK. If the candidate

does not receive the majority of the votes of the members present, the KPC re-announces the competition.
2. KPC votes for the first and second candidate ranked by the highest number of points in cases when the difference between the first and second candidate is equal to or up to 3%.
3. In cases under par.2 where more candidates have the same number of points, ranked first and second, the KPC will vote for all those candidates.
4. All members of the KPC shall use their right to vote, with the exception of members who have been expelled pursuant to section 8 of this Regulation.
5. If a member of the Council attends the meeting when voting for the candidates and does not vote for any of the candidates, this shall be considered as an abstention valid only for the quorum.
6. The KPC in all cases under this Article shall vote by secret ballot.
7. All candidates who meet the requirements under this section shall be listed simultaneously on the ballot.
8. The KPC member can only vote for one candidate on the ballot.
9. If a member votes for two or more candidates on the ballot, the ballot shall be considered invalid. If a member of the Council does not vote for any candidate, he / she shall be considered abstaining.
10. The candidate who wins the majority of the votes of the members present is elected Chief Prosecutor of the respective prosecution. In the case of the CSP that candidate shall be nominated to the President for appointment.
11. If none of the candidates referred to in paragraph 2 receive the majority of the required votes, the vote is repeated for those candidates. In the cases from paragraph 3, the voting is repeated for the two candidates with the highest number of votes. If even after the repeat of the voting none of the candidates receives the required number of votes the process ends and the KPC re-announces the competition.

Admissibility of the Referral

61. The Court first examines whether the admissibility requirements established in the Constitution and further specified in the Law and in the Rules of Procedure have been met.

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *[...]*
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

63. Based on this constitutional provision, there are two basic criteria that determine the admissibility of a referral, namely (i) that the referral has been submitted by an individual who is authorized to raise alleged violations of public authorities of individual rights; and (ii) that such a referral can be submitted to the Constitutional Court, only after all legal remedies established by law have been exhausted. In the following, the Court will assess the fulfillment of these two criteria, based also on the provisions of the Law and the Rules of Procedure.

Regarding the authorized party

64. Regarding the fulfillment of these criteria, the Court points out that the Applicant in case KI57/22 submitted the referral in the capacity of the authorized party, challenging: (i) the Decision of the KPC of 6 April 2022; and (ii) the Decision of the KPC of 6 April 2022 on Rejection of the Report of the Review Committee. Meanwhile, the Applicant in case KI79/22 submitted the referral in the capacity of the authorized party, challenging the Decision of 6 April 2022 of the KPC. Consequently, the Court finds that the applicants are authorized parties who challenge acts of a public authority, namely the KPC.

Regarding the exhaustion of legal remedies

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

Article 47
(Individual Requests)

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

Rule 39
(Admissibility Criteria)

1. The Court may consider a referral as admissible if:
[...]
b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.

66. The Court will further assess whether the Applicants have met the criterion of exhaustion of legal remedies, as established in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Aarticle 47 of the Law and item (b) of paragraph (1) of rule 39 (Admissibility Criteria) of the Rules of Procedure.

67. Taking into account the allegation, namely the request of the Applicants to be exempted from the obligation to exhaust legal remedies, namely, in the circumstances of the present case, "*lawsuit for administrative conflict*" as a legal remedy provided by law, in the following the Court will present: (i) the general principles of the ECtHR and the Court regarding the exhaustion of legal remedies; (ii) the relevant case law of the Court related to challenging the decisions of the KPC, KJC, but also other public authorities, which decisions have been challenged in terms of appointment or not in certain public functions; (iii) the principles elaborated through opinions and reports of the Venice Commission, which, among other things, also reflect comparative analyzes related to the criterion of exhaustion of legal remedies, as one of the admissibility criteria in the review of requests before the constitutional courts of the member states of the Council of Europe; and then, (iv) will apply the latter in the circumstances of present cases.

68. The aforementioned principles and then their application will be presented in order for the Court to assess whether, under the circumstances of the present case, the applicants could be exempted from the obligation to exhaust legal remedies, this requirement provided by paragraph 7 of Article 113 of the Constitution. In the context

of the latter, the Court based on general principles, including its previous case law and the principles of the Venice Commission, must assess whether (i) the legal remedies which the Applicants have not exhausted, are not "*sufficiently certain not only in theory, but also in practice*" because the latter cannot "*provide a solution regarding applicant's claims*" and "*offer a reasonable prospect of success*"; and (ii) are not "*available, accessible and effective*". Moreover, the Court, based on the same case law, must also assess whether the applicants "*did everything that could reasonably be expected from them to exhaust legal remedies*", also considering that "*mere doubts"* of an applicant regarding the non-efficiency of a legal remedy, cannot serve as a justification to exempt an applicant from the obligation to exhaust the legal remedies established in the Constitution.

I. General principles regarding the exhaustion of legal remedies

(i) General principles of the ECtHR and the Court

69. The above criteria on whether the obligation to exhaust all "*effective*" legal remedies has been met, are well defined in the case law of 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, 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.l., and S.R*, Resolution on Inadmissibility, of 11 November 2020; KI43/20, Applicant *Fitore Sadikaj*, Resolution on Inadmissibility, of 31 August 2020: and KI42/20, Applicant *Armend Hamiti*, Resolution on Inadmissibility, of 31 August 2020.

70. As clarified through the case law, based on the principle of subsidiarity, the purpose and reasoning of the obligation to exhaust legal remedies or the rule of exhaustion, is to provide the relevant authorities, first of all regular courts, the opportunity to prevent or correct the alleged violations of the Constitution. It is based on the assumption reflected in Article 32 of the Constitution and Article 13 of the ECHR, that the legal order of the Republic of Kosovo provides effective remedies for the protection of the fundamental rights and freedoms guaranteed by the Constitution (see, among others, the cases of ECtHR *Weis v. Slovenia*, No. 37169/03, Judgment of 14 February 2012; and *Aksoy v. Turkey*, No. 21987/93, Judgment of 18 December 1996, paragraph 51).

71. The Court continuously respects the principle of subsidiarity, considering that all applicants must exhaust all procedural possibilities in the proceedings before the regular courts, in order to prevent the violation of the Constitution or, if any, to correct such violation of a fundamental right guaranteed by the Constitution. The Court has also consistently established that the Applicants are responsible when their respective cases are declared inadmissible by the Court, if they have not used the regular procedure or have not reported violations of the Constitution before the regular proceedings (see, among others, the Court cases: KI89/15, Applicant *Fatmir Koçi*, Resolution on Inadmissibility of 22 March 2016, paragraph 35; and see also, *inter alia*, ECtHR case *Vučković and others v. Serbia*, no. 17153/11 and 29 others, Judgment of 25 March 2014, paragraph 70).

72. Based on the same case law, the exemption from the obligation to exhaust legal remedies, is only made exceptionally and only in specific cases when analyzing this admissibility criterion in the light of the factual, legal and practical circumstances of a particular case (see, in this regard, cases of the Court in which such an exception was

applied: Kl56/09, Applicant *Fadil Hoxha and 59 others*, Judgment of 22 December 2010, paragraphs 44-46; Kl06/10, Applicant *Valon Bislimi*, Judgment of 30 October 2010, paragraphs 50-56 and paragraph 60; KI41/12, Applicants *Gëzim and Makfire Kastrati*, Judgment of 25 January 2013; paragraphs 64-74; Kl99/14 and KI100/14, cited above, paragraphs 47-50; KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 68-73 and KI55/17 , Applicant *Tonka Berisha*, Judgment of 5 July 2017, paragraphs 53-58).

73. Based on the case law of the ECtHR and the Court, in principle, the exhaustion rule must be applied with a "*degree of flexibility and without excessive formalism*", having regard to the context of the protection of human rights and fundamental freedoms (see, *inter alia*, cases of the ECtHR, *Ringeisen v. Austria*, no. 2614/65, Judgment of 16 July 1971, paragraph 89;*Vučković and others v, Serbia*, cited above, paragraph 76; and *Akdivar and others v. Turkey* no. 21893/93, Judgment of 1 April 1998, paragraph 69).

74. However, in the application of this principle with flexibility and lack of excessive formalism, some criteria must be assessed and met, which are determined through the respective case laws. In all cases, when legal remedies have not been exhausted, to determine whether the latter, under the circumstances of the respective cases, would not be "*effective*", it must be assessed whether (i) the existence of legal remedies is "*sufficiently certain not only in theory, but also in practice*" because the latter, must be able "*provide resolutions to an Applicant's allegations*" and "*offer a reasonable prospect of success*"; and (ii) the respective legal remedies are "*available, accessible and effective*", these characteristics which must be sufficiently consolidated in the case law of the relevant legal system (see, in this regard, cases of the Court 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*, cited above, paragraphs 56 and 57; *Akdivar and other v. Turkey*, cited above; *Öcalan v. Turkey*, no. 46221/99, Judgment of 12 May 2005, paragraphs 63-72; and *Kleyn and others v. the Netherland*, no. 39343/98 and others, Judgment ofi 6 May 2003, paragraphs 155-162).

75. Arguments about the "*effectiveness*" or lack of "*effectiveness*" of the legal remedy must also be supported by the case-law, or namely its absence (see, in this context, the ECtHR case *Kornakovs v. Latvia*, no. 61005/00, Judgment of 15 June 2006, paragraphs 83-85). The importance of the case-law is also evidenced in the case of the ECtHR, *Vinčić and others v. Serbia*, in which the appeal to the Constitutional Court of Serbia was not considered effective, since that court had not yet heard cases related to the relevant violations of human rights and until that court had issued and published such decisions on the merits (see, the ECtHR case *Vinčić and Others v. Serbia*, nr. 44700/06 and 30 others, Judgment of 1 December 2009, paragraph 51). Thus, although in theory there was a possibility for the Applicants to refer to the Constitutional Court of Serbia, at the ECtHR level, in the absence of case-law, such a legal remedy was considered ineffective until it was proved otherwise. At a later stage and only after concrete evidence on the effectiveness of the legal remedy in practice, the ECtHR had accepted the arguments presented for the created effectiveness of the legal remedy and had consequently changed its approach by accepting and requesting that the exhaustion of such legal remedy must take place before an application is filed before the ECtHR.

76. That said, based on the same consolidated case law, the Applicant must prove that they "*did everything that could reasonably be expected of them to exhaust domestic remedies*", or the Applicants must demonstrate, by providing relevant case-law or other appropriate evidence that a legal remedy available to them, which they have not used, would fail. Moreover, "*mere doubts*" of an Applicant about the ineffectiveness

of a legal remedy does not serve as a reason to exempt an Applicant from the obligation to exhaust legal remedies (See ECtHR case, *D.H. and Others v. the Czech Republic*, no. 57325/00, Judgment of 13 November 2007paragraph 116 and the references therein). The ECtHR emphasizes that it is in the Applicant's interests to apply to the appropriate court to give it the opportunity to develop existing rights through its power of interpretation (see, among other cases, the ECtHR case *Ciupercescu v. Romania*, Judgment of 15 June 2010, paragraph 169).

77. The Court also notes that a flexible assessment of the necessary characteristics of the legal remedy must be made taking into account the circumstances of each individual case. In this regard, the ECtHR has also adopted the concept of "*special circumstances*", through which it assesses, if there is any particular ground which exempts the Applicant from the obligation to exhaust the legal remedy. In making this assessment, the ECtHR also takes into account (i) the overall "*legal and political*" context; and (ii) the "*special circumstances*" of an Applicant. (for the concept of *"special circumstances"*, among others, see ECtHR cases: *Van Oosterijck v. Belgium*, no. 7654/76, Judgment of 1 March 1979, paragraphs 36-40, and the relevant references therein; *Öcalan v. Turkey*, cited above, paragraph 67; and *Akdivar and Others v. Turkey*, cited above, paragraphs 67-68 and references therein. Further, for general "*legal and political"* considerations, *inter alia*, see *Akdivar and Others v. Turkey*, cited above, paragraphs 68-69) In cases where it results that an Applicant's obligation to use a legal remedy may be unreasonable in practice and would present a disproportionate obstacle to effectively exercising his right, the ECtHR exempts the Applicant from the obligation to exhaust legal remedies (see, *inter alia*, ECtHR cases: *Veriter v. France*, no. 31508/07, Judgment of 15 December 1997, paragraph 27; *Gaglione and Others v. Italy*, no. 45867/07 dhe 69 others, Judgment of 21 December 2010, paragraph 22; and *M.S. v. Croatia* (*no. 2*) no. 75450/12, Judgment of 19 February 2015, paragraphs 123-125).

78. Finally, 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 "*burden of proof*" test is applied, a process clearly defined in the abovementioned case-law and based on which, in principle, the respective applicant must prove that he has exhausted legal remedies or that the latter are not "*effective*" in the circumstances of the respective case (see, *inter alia*, case of the Court KI211/19, Applicant *Hashim Gashi, SelajdinIsufi, B.K., H.Z., M.H., R.S., R.E., S.O., S.H., H.I., N.S., S.I. and S.R,* cited above, paragraphs 56, 59 and 60 and references used therein; see also ECtHR cases *Vučković and others v. Serbia*, cited above, paragraph 77; *Akdivar and others v. Turkey*, cited above, paragraph 69; and *Gherghina v. Romania*, Judgment of 9 July 2015, paragraphs 88 and 89).

(i) Case law of the Constitutional Court

79. The Court recalls its case law in cases where the constitutional review of relevant decisions or notices related to selections or appointments for various positions in institutions in the justice system was requested and not only, the practice will be elaborated below. The Court in this context emphasizes that throughout its case law, there have been only three exceptions in this context and where it has considered that there is no need to exhaust legal remedies.

(a) Cases where the Court has decided on inadmissibility due to non-exhaustion of legal remedies

80. The Court first emphasizes that, through its case law in assessing the acts of public authorities based on paragraph 7 of Article 113 of the Constitution, it has

continuously assessed the admissibility of the referrals of individuals who have alleged violations of fundamental rights and freedoms of their rights guaranteed by the Constitution as a result of failure to be elected and/or appointed to public functions by the institutions of the Republic, including acts of the legislative and executive powers. All these referrals have been declared inadmissible as a result of non-exhaustion of legal remedies (see, *inter alia*, the Court's case KI09/21, Applicant *Sadat Lekiqi,* Resolution on Inadmissibility of 28 April 2021). Taking into account the circumstances of the present case, namely the challenging of the Decisions of the KPC, in the following Court will only present its case law in the context of assessing the admissibility of cases where acts of the Prosecutorial Council and/or the Judicial Council have been challenged, namely KI114/10; KI 139/11; KI130/12; KI145/15; KI42/20; KI43/20; and KI164/20. All these cases are Resolutions on Inadmissibility, because the legal remedies provided by law had not been exhausted. There are only three exceptions in the context of the assessment of the acts of the KPC and KJC, without fulfilling this constitutional criterion, and which the Court will clarify throughout this Decision. However, first, a brief summary of the aforementioned Resolutions on Inadmissibility will be presented below.

81. Initially, the Court recalls case KI114/10 in which the Applicant requested the constitutional review of the Notification [No. 01/118-713] of 27 October 2010 of the KJC for the reappointment of judges and prosecutors, in which the Applicant was notified that based on Article 150 [Appointment Process for Judges and Prosecutors] of the Constitution, her mandate is terminated as a result of the reappointment process during the third phase of the reappointment of judges and prosecutors based on the relevant articles of Administrative Direction no. 2008/02 for the implementation of UNMIK Regulation no. 2006/25 on the regulatory framework for the justice system in Kosovo. The relevant Applicant had not exhausted legal remedies contrary to paragraph 7 of Article 113 of the Constitution and consequently, the Court found that her referral was inadmissible due to the non-exhaustion of legal remedies (see Court case, KI114/10, Applicant *Vahide Badivuku*, Resolution on Inadmissibility of 18 May 2011, paragraphs 10-11 and 24-25).

82. In case KI139/11, the Applicant challenged the constitutionality of the Notification [No. 01/118-658] of 27 October 2010 of the KJC for the reappointment of judges and prosecutors, by which he was notified that his mandate as a judge in the Municipal Minor Offences Court in Prishtina, ceases from that date. In the Court's assessment, the relevant Applicant had not exhausted legal remedies despite the requirements of paragraph 7 of Article 113 of the Constitution, and therefore, the Court found that his referrals was inadmissible due to non-exhaustion of legal remedies (see Court case, KI 139/11, Applicant *Ali Latifi*, Resolution on Inadmissibility of 20 March 2012, paragraphs 11, 14-16, 19, 26-27).

83. Further, in case KI130/12, the Applicant requested the constitutional review of the Notification [ZZVP/12/123] of 23 November 2012 of the Office for Prosecutorial Assessment and Verification. The Applicant had applied for the position of prosecutor in the Municipal Prosecutor's Office of Gjilan and Ferizaj and on 24 November 2012, he was notified by the Evaluation Panel of the Office for Prosecutorial Assessment and Verification that he was not recommended for the position he had applied for. During the assessment of the admissibility of the referral, the Court referred to the relevant provisions of Law no. 03/L-202 on Administrative Conflicts (hereinafter: LAC), and in this case decided that legal remedies have not been exhausted because the relevant Applicant has not initiated an administrative conflict, based on the applicable legislation in Kosovo (see Court case KI130/12 applicant *Xhymshit Xhymshiti*, Resolution on Inadmissibility of 13 March 2013, paragraphs 11, 20, 22-23).

84. In case KI145/15, the Applicant challenged the Decision [no. 321/2015] of 5 November 2015 of the KPC for the announcement of vacant positions for the selection of a civil society member in the composition of the KPC, because the Applicant was elected as a member of the KPC from the ranks of civil society with a term of 5 (five) years, but after the entry into force of Law no. 05/L-035 for the amendment and supplementation of Law no. 03/L-224 on the Prosecutorial Council of Kosovo, the procedure through which 3 (three) members are elected from the ranks of civil society was changed, determining that the latter are elected by the Assembly of Kosovo and in this line, the KPC decided to announce the vacancy for the selection of the non-prosecutor member from among the civil society by publishing the vacancy for this position. The Applicant complained to the regular courts and at the same time submitted a request for the imposition of an interim measure, namely, the suspension or postponement of the procedure for the selection of the new member of the KPC. The Applicant's request was rejected by the Basic Court and then by the Court of Appeals, after finding that he had not presented facts and evidence that the execution of the decision challenged by the lawsuit would bring harm to him, that the harm would hardly be repaired and that the postponement was not against the public interest. Consequently, the Applicant before the Constitutional Court complained about the procedures in the Basic Court, emphasizing that they last two years on average, therefore "*in the case of the Applicant, due to the urgency of the case, they make this remedy ineffective*". The Court in assessing the admissibility of the referral noted that the relevant Applicant is still waiting for the decision on the merits in the Department for Administrative Matters of the Basic Court and, therefore, he has not exhausted all legal remedies provided by law, namely in the circumstances of the present case, his referral was premature. The Court in its reasoning, among other things, had emphasized that the duration of the proceedings, in itself, does not render the legal remedy ineffective (see the Court's case, KI 145/15 Applicant *Florent Muçaj*, Resolution on Inadmissibility of 14 March 2016, paragraphs 12-20, 31-32, 34, 41).

85. In case KI42/20, the Applicant, who is also the applicant of the present referral in case KI79/22, challenged the Decision of the KPC regarding the appointment process of the Chief Prosecutor in the Special Prosecutor's Office of the Republic of Kosovo, in which position he had applied. Referring to the Judgment of the Court KI99/14 and KI100/14 and the Judgments in the cases KI34/17 and KI55/17, which the Court had addressed, even though the legal remedies had not been exhausted, and which cases will be clarified below, the Applicant emphasized that there is no need to exhaust legal remedies before submitting the referral to the Constitutional Court. The Court, in assessing the admissibility of the referral, emphasized that the Applicant's case differs and is not relevantly comparable to cases KI99/14 and KI100/14, KI34/17 and KI55/17, giving a detailed reasoning why the applicants in those cases, were exempted from the obligation to exhaust legal remedies and emphasizing that in addition to the possibility of opposing the appointmentprocess of the Chief Prosecutor of the SPRK within the framework of the KPC, the applicable laws also refer to other legal remedies defined by the LAC. Therefore, the Applicant's Referral was declared inadmissible as a result of non-exhaustion of all legal remedies established by law (see Court case, KI 42/20 Applicant *Armend Hamiti*, Resolution on Inadmissibility of 29 July 2020, paragraphs 10-15, 26, 52-53 and 63).

86. Further, in case KI43/20, the Applicant requested the constitutional review of the decisions of the KPC, since the latter had applied to the position of the Chief Prosecutor of the Basic Prosecution in Prishtina. The Applicant was not proposed as a candidate of the KPC that will go to the further voting procedure for the position of the Chief Prosecutor of the Basic Prosecutor's Office in Prishtina. Therefore, before

the Constitutional Court, she alleged that it is not necessary to exhaust legal remedies by referring to the Judgment in cases KI99/14 and KI100/14 and the Judgments in cases KI34/17 and KI55/17. The Court, in assessing the constitutionality of the referral, emphasized that the Applicant, after receiving the decisions of the KPC, directly addressed the Constitutional Court, without exhausting the legal remedies established in the administrative procedure. Consequently, the Court declared her referral inadmissible (see the case of the Court, KI 42/20 Applicant *Fitore Sadikaj*, Resolution on Inadmissibility of 29 July 2020, paragraphs 9, 15, 23-24, 44 and 48).

87. Finally, in case KI164/20, the Applicant requested the constitutional review of the Decisions of the KJC regarding the process of appointment of judges of the Supreme Court of Kosovo, since the Applicant had applied for this position but he had not been recommended for judge. The Applicant claimed that the provisions of the Law on the KJC do not foresee legal remedies against the challenged decision and also referred to the Court Judgments in cases KI99/14, KI100/14 and KI34/17 and KI55/17. The Constitutional Court, among other things, emphasized that, in addition to the possibility of opposing the appointment process of judges within the KJC, the applicable laws also refer to other legal remedies determined through the LAC. Therefore, the referral of the Applicant was declared inadmissible because all legal remedies established by law have not been exhausted (see Court's case, KI 164/20, Applicant *Rafet Haxhaj*, Resolution on Inadmissibility of 20 January 2021, paragraphs 17, 25, 50-51).

88. The Court also emphasizes that in addition to the referrals for the constitutional review of the decisions or announcements of the institutions of justice, it has also dealt with cases where the various decisions of the Assembly or the Government were challenged before it and which were challenged before the Court, certainly through individual control, without exhausting the legal remedies established in the law or even 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, the Applicant *Arber Hadri*, Resolution on Inadmissibility of 11 October 2019, the procedures related to the selection of the Director of the Agency for the Management of Memorial Complexes of Kosovo were challenged, namely Decision [06/375] of 22 of May 2018 of the Committee for 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 6 June 2018 of the Assembly for the selection of the Director of the aforementioned Agency. In assessing the allegations of the respective Applicant, the Court found that the Applicant, beyond the possibility of challenging the procedures regarding the selection of the Director of the Agency within the Assembly, had not exercised other legal remedies provided by the LAC and the Law on the Independent Oversight Board of the Civil Service of Kosovo, respectively and as a consequence, had declared the referral of the applicant inadmissible due to the fact that the legal remedies provided by law had not been exhausted and due to the fact that they had not met the requirements to exempt the Applicant from the obligation to exhaust legal remedies (see, case KI147/18, cited above, paragraphs 53 and 61).

89. The Court held the same approach in case KI211/19, where the Decision [no. 11/111] of the Government of the Republic of Kosovo of 19 July 2019, which was related to the Government Decision [no. 05/55] for the return of social properties to the municipalities of Kosovo. In this context, the Court assessed that the challenged decisions of the Government can be challenged in administrative proceedings based on the provisions of the LAC and that the applicants had failed to use the legal

remedies provided for by the LAC and also failed to substantiate before the Court, that the latter would not be "*effective*" legal remedies, based on the case law of the Court and the ECtHR, in the circumstances of the relevant case (see, the case of the Court, KI211/19, cited above, paragraphs 62 and 80).

90. Moreover, the Court has also rejected as inadmissible due to non-exhaustion of legal remedies the cases in which the request for exemption from this obligation was based, among other things, on "*special circumstances*" of an Applicant, including "*the legal and political context"* such as the case KI108/18 (see the case of the Court, KI108/18, the Applicant *Blerta Morina*, Resolution on Inadmissibility of 30 September 2019, paragraphs 148 to 193 and the references used therein).

(b) Cases where the Court has decided that the cases are admissible despite the fact that the applicants did not exhaust their legal remedies before addressing the Court

91. Throughout its case law, since its establishment, the Court has made exceptions to the exhaustion of legal remedies only in six (6) cases, namely (i) Kl56/09, applicant *Fadil Hoxha and 59 others*, Judgment of 22 December 2010; (ii) Klo6/10, applicant *Valon Bislimi*, Judgment of 30 October 2010; (iii) KI41/12, applicants *Gëzim and Makfire Kastrati*, Judgment of 25 January 2013; (iv) KI99/14 and KI100/14, Applicants *Shyqri Syla and Laura Pula*, Judgment of 3 July 2014; (v) KI34/17, applicant *Valdete Daka*, Judgment of 1 June 2017; and (vi) KI55/17, applicant *Tonka Berisha*, Judgment of 5 July 2017. The last three Judgments, which will be summarized below, are related to the challenging of the appointment procedures, namely the proposal for the position of Chief State Prosecutor, in 2014 and the proposal for the position of the President of the Supreme Court and the Court of Appeals, respectively, in 2017. Since the latter, the case law of the Court has no exception in terms of the obligation to exhaust legal remedies, as established in paragraph 7 of Article 113 of the Constitution.

92. The first three exceptions, in which the respective applicants were exempted from this obligation, namely Court cases KI56/09, KI06/10 and KI41/12, reflect circumstances that are not related in any way to the circumstances of the present case. Whereas, in relation to three other Judgments, namely KI99/14 and KI100/14 (joined cases); KI34/17; and KI55/17 and which are related to challenging the acts of public authorities through which various candidates were selected/proposed/appointed to state functions, the Court initially recalls that in the joint cases KI99/14 and 110/14, the respective applicants challenged the appointment procedure for the position of Chief State Prosecutor. More specifically, the Applicant in referral KI99/14 challenged the Decision [KPK no. 151/2014] of 6 June 2014 of the KPC for the appointment of the candidate for Chief State Prosecutor, while the Applicant in Referral KI100/14 challenged the Decision [KPK/146/2014] of 5 June 2014, regarding her request for reconsideration of the final list with the evaluation points of the candidates. Exempting the respective applicants from the obligation to exhaust legal remedies, the Court, among other things, emphasized that the provisions of the law in force for the KPC do not provide for legal remedies, but even if there are legal remedies, in the case of the applicants, they have not been proven as efficient, moreover the Court emphasized, "*the specificity of the* appointment *procedure for the position of Chief State Prosecutor and the necessity for this to be done at the right time. The Court considers that there are no legal remedies for exhaustion"* (see cases KI99/14 and KI100/14, cited above, paragraphs, 48, 50, 52-53, 54). In this case, the Court found a violation of the Constitution regarding the appointment process, namely the proposal of the candidate for Chief State Prosecutor, ordering the repetition of the relevant procedure.

93. Similarly, in two other Judgments, namely, KI34/17 and KI55/17, the respective applicants requested the constitutional review of the decisions on the appointment of the Presidents of the Supreme Court and of the Court of Appeals, respectively. More specifically, the Applicant in case KI34/17 requested the constitutional review of the Decision [KJK no. 50/2017] of 6 March 2017 of the KJC, by which a different candidate and not the applicant was elected President of the Supreme Court, while the applicant in case KI55/17 requested the constitutional review of the Decision [KGJ no. 13/2017] of 13 January 2017 of the KJC, by which a different candidate and not the applicant was elected President of the Court of Appeals.

94. Both applicants submitted their respective referrals to the Constitutional Court, without exhausting the legal remedies provided by law, referring to the case law of the Court in cases KI99/14 and KI100/14. The KJC, in its response, had emphasized that the applicants were able to initiate an administrative conflict and use the available legal remedies in accordance with the LAC. However, the Court, in both cases, decided that taking into account the specificity of the appointment procedure for the position of the President of the Supreme Court of Kosovo and the Court of Appeals, respectively, and the necessity for this to be done at the right time, there is no legal remedy that addresses effectively the allegations raised by the applicants (see, case KI34/17 cited above, paragraphs 28,-29, 42, 70, 73; and case KI55/17 cited above, paragraphs 24, 31, 53, 55 , 58). In both cases, the Court found a violation of the Constitution regarding the process of appointment of the President of the Supreme Court and the Court of Appeals, ordering the repetition of the relevant procedures.

(ii) Opinions and reports of the Venice Commission and comparative analysis regarding the exhaustion of legal remedies

95. In the context of the criterion of exhaustion of legal remedies, as far as it is relevant in the circumstances of the present case, the Court will also refer to the documents approved and published by the Venice Commission as follows: (i) Document [CDL-PI (2020)004, of 14 April 2020] of the Venice Commission containing the summary of opinions, reports and studies regarding constitutional justice; (ii) Study [no. [38/2009, published on 27 January 2011] on individual access to constitutional justice, adopted by the Venice Commission at its 85th plenary session (17-18 December 2010); and (iii) the amended Report [CDL-AD(2021)001] on the individual approach to constitutional justice, adopted by the Venice Commission at its 125th plenary session (December 11-12, 2020).

96. The Court first notes that in the conclusions of the Study regarding the individual access to constitutional justice [no. 38/2009], namely in its paragraph 150, it is emphasized that:

> *"150. [...] Fifth, in order to ensure the effectiveness of individual access to constitutional justice, parties have to act in a bona fide manner, avoiding abusive applications and acting only after they have exhausted other possible remedies. The exhaustion of remedies is necessary in countries with concentrated control of constitutionality to avoid overburdening the constitutional court. Sixth, it should be ensured that the remedy available is appropriate to cure the applicant's grievance. Among the procedural principles applicable to constitutional review, there are adversarial systems, in which parties to the former proceedings are given the opportunity to present their views. The constitutional court should also be able to adopt its decision in a timely fashion and without undue delay;*

respecting correct time limits should not be allowed to jeopardize the effectiveness of the proceedings".

97. While the revised Report [No. 1004/2020] on individual access to constitutional justice, adopted by the Venice Commission at its 125th plenary session (December 11-12, 2020) published on 22 February 2021, presents a comparative analysis of the member states of the Council of Europe regarding the obligation to exhaust legal remedies, reflected in paragraphs 86-88 of this Report as follows:

> *"86. Typically, the individual can bring a full or normative constitutional complaint only after having exhausted all other legal remedies (e.g., Albania, Andorra, Armenia, Azerbaijan, Brazil, Croatia, the Czech Republic, Germany, Hungary, Republic of Korea, Latvia, Liechtenstein, Malta, Montenegro, North Macedonia, Poland, Portugal, Slovakia, Slovenia, Spain, Switzerland and Turkey). The powers of the constitutional court are thus limited by the principle of subsidiarity, i.e. the constitutional court may decide on challenged acts only after all instances of the ordinary courts have pronounced themselves or when no appeal to an ordinary court is possible. The exhaustion of remedies can have different meanings in light of the specific domestic legal context.*
> *87. The precondition of exhaustion for raising a constitutional complaint only exists in countries with concentrated review systems. In countries with diffuse review, an individual may challenge an individual or normative act on the grounds of a violation of the constitution at any stage of the proceedings.*
> *88. In cases where requiring the exhaustion of all remedies could cause irreparable damage to the individual, exhaustion of remedies is usually not required (e.g., Austria, Azerbaijan, Croatia, the Czech Republic, Germany, Latvia, Montenegro, Slovakia, Slovenia and Switzerland). The Venice Commission considers that an exception to the requirement for the exhaustion of legal remedies should be provided for all cases where adhering to this rule could cause irreparable damage to the individual."*

98. Subsequently, in the same aforementioned Report of the Venice Commission, the question of the principle or subsidiary nature of the ECtHR in relation to the obligation to exhaust legal remedies has been elaborated. Paragraphs 198 -199 of this document emphasize that:

> *198. The powers of the ECtHR are limited by the principle of subsidiarity. That is, it may decide on challenged acts only after all instances of the domestic legal system have been exhausted. The Interlaken Declaration, which insists on the subsidiary nature of the Convention mechanism: "4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to: … d) ensuring, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate;*
> *199. In addition, Protocol no. 15 (not yet in force) amending the European Convention on Human Rights also refers to the principle of subsidiarity in Article 1 amending the recital in the preamble of the Convention as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the*

rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

99. The Document of the Venice Commission which includes the compilation of opinions, reports and studies on constitutional justice [CDL-PI(2020)004, of 14 April 2020] regarding the criterion of exhaustion of legal remedies refers to:

> (i) paragraph 26 of the response Amicus Curiae CDL-AD(2018)012 of the Venice Commission to the Constitutional Court of Georgia, regarding the effects of the decisions of the Constitutional Court on final decisions in civil and administrative cases, which specifies that: *"5.2.3 Exhaustion of remedies "The individual can bring full individual constitutional complaint proceedings only after having exhausted all other legal remedies. The powers of the constitutional court are thus limited by the principle of subsidiarity, i.e. the constitutional court may decide on challenged acts only after all instances of the ordinary courts have pronounced themselves or when no appeal to an ordinary court is possible.";* (ii) paragraph 9 of the Opinion of the Venice Commission on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, where it is emphasized that: *"Article 33 settles three issues which were raised in the interim opinion: the Constitutional Court can accept complaints even without the exhaustion of other remedies if these remedies cannot prevent irreparable damage to the complainant";* (iii) paragraph 50 of the Opinion [CDL-AD(2008)03 on the Draft Law on the Constitutional Court of Montenegro, where it is emphasized that: *"There may be ordinary remedies, which are prescribed by law but which are ineffective because they may not be apt to avoid irreversible detrimental consequences for the applicant in the light of the constant jurisprudence of the ordinary courts. In such rare and exceptional cases, the Constitutional Court should have the possibility to accept individual complaints even before the exhaustion of these inefficient remedies.";* (iv) paragraph 54(4) of the Opinion [CDL-AD(201] Law of the Constitutional Court of Hungary: *"An exception to the requirement for the exhaustion of legal remedies should be provided for all cases where adhering to this rule could cause irreparable damage to the individual.";* and (v) *paragraph 32 of the Opinion [CDL-AD(2015)027] regarding the proposed amendments to the Constitution of Ukraine on the judiciary, where it is underlined that: "The Preliminary Opinion recommended to clarify that a constitutional complaint may only be lodged "after exhaustion of the domestic remedies". This is now done in the revised amendments, and is to be welcomed."*

II. The application of the abovementioned principles to the circumstances of the present case

100. The Court first recalls that the precondition for the constitutional review of the challenged Decisions of the KPC, namely the allegations of the unconstitutionality of the process of the proposal for the appointment of the candidate for Chief State Prosecutor, which are summarized in paragraphs 37-60 of this Resolution is the assessment of whether, in the circumstances of the specific cases, the legal remedies established by law have been exhausted and/or whether the criteria defined in the case law of the ECtHR and the Court have been met for the exemption of the respective applicants from this constitutional obligation.

101. The Court notes that, even though the Applicants have pursued the appeal procedures within the KPC, against the challenged Decisions of the KPC, no legal remedy has been exercised before the regular courts by the Applicants. Consequently, in the circumstances of the present case, it is not disputable that the Applicants have not exhausted the legal remedies established by law. More precisely, the Applicant in case KI57/22, in his response to the Court on 20 May 2022, clarified that against the challenged Decisions of the KPC, he had not initiated any procedure in the regular courts, while the Applicant in case KI79/22, had not responded to the Court's request of 15 June 2022, if he had exhausted legal remedies, namely if he had initiated any procedure before the regular courts against the challenged Decision of the KPC. As a consequence and based on the general principles of the Court, the ECtHR and the opinions of the Venice Commission, elaborated above, it must be assessed whether, in the circumstances of the present cases, the applicants can be exempted from the constitutional obligation to exhaust legal remedies because the legal remedies in their case either (i) do not exist; or (ii) would not be "*effective*".

102. The Court recalls that the relevant applicants, in their allegation that there are no legal remedies to be exhausted, based on the Judgments of the Court in cases KI99/14 and KI100/14, KI06/10 and KI42/20, in principle, point out that (i) the Law on the KPC does not define legal remedies to challenge the challenged Decisions of the KPC; (ii) "*even if those remedies formally existed, they would not be efficient due to the specificity of the procedure for selecting the Chief State Prosecutor";* (iii) the procedure before the regular courts, namely that in the first instance *"takes considerable time, as is also argued in cases KI99/14 and KI100/14, because it is about the position of the Chief State Prosecutor",* also referring to the statistics on the website of the KJC, namely the Work Report of the Basic Court in Prishtina for 2021; and (iv) the Applicant in case KI57/22 also states that he was not served with the Decision of the KPC of 6 April 2022 and according to him, this decision is not even published on the official website of the KPC and as a result, he was unable to initiate court proceedings for challenging the Decision of the KPC before the regular courts.

103. In assessing these allegations of the applicants, the Court initially emphasizes that there is no acquired right to be exempted from the obligation to exhaust legal remedies. The exhaustion of legal remedies is a constitutional obligation, clearly defined in paragraph 7 of Article 113 of the Constitution. Moreover, such a regulation is in accordance with the practice of constitutional justice in states with centralized constitutional control, as explained during the elaboration of the general principles above. Of course, based on the case law of the Court, the ECtHR and the comparative analysis summarized by the Opinions of the Venice Commission, there may be exceptions to this rule and such an assessment should not be subject to an excessively formalistic approach. Having said that, in the application of this exception, the criteria defined through the case law of the ECtHR must be met and such an assessment is made on a case-by-case basis. Such an approach is also followed by the ECtHR, as explained above, which applies the relevant principles in the light of the special circumstances of each case separately, not always resulting in the same conclusions if in a given case the legal remedies have been exhausted or not. Thus, such a finding depends on the specifics of each case and the application of certain criteria through its case law in each individual case.

104. Therefore, even in the circumstances of concrete cases, based on the principles elaborated above, the Court, based on the principle of the burden of proof, must assess whether (i) the legal remedies which the applicants have not exhausted, are "*sufficiently certain not only in theory, but also in practice*" because the latter, must be able "*provide resolutions to an Applicant's allegations*" and "*offer a reasonable prospect of success*"; (ii) are not and "*offer a reasonable prospect of success*"; and (ii)

the respective legal remedies are "*available, accessible and effective*"; and (iii) the applicants "*have done everything that could reasonably be expected of them to exhaust legal remedies*", also considering that an applicant's *"mere doubts*" regarding the non-efficiency of a legal remedy, cannot serve as a justification to exempt him/ her from this constitutional obligation (see, *inter alia*, cases of the Court 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*, cited above, paragraphs 56 and 57 and case KI108/18, cited above, paragraph 157; and see also the ECtHR cases *Akdivar and other v. Turkey*, cited above; *Öcalan v. Turkey*, cited above, paragraphs 63-72; *Kleyn and others v. the Netherland*, cited above, paragraphs 155-162; and *Vučković and others v. Serbia,* cited above, paragraph 74).

105. Regarding the first two criteria, the Court notes that the applicants claim that the Law on the KPC does not provide legal remedies for challenging the challenged Decisions of the KPC. Having said that, the Court emphasizes that the legal system consists of a set of legal norms and that they cannot be addressed in isolation from each other. In this context, the Court emphasizes the provisions that regulate the administrative procedure, namely the Law on Administrative Procedure and the LAC and which the Court has consistently referred to throughout its case law in terms of assessing the exhaustion of legal remedies and which the applicants did not refer to in the allegation that there is no legal remedy in their circumstances.

106. However, the Court reiterates that "*actions of public administration bodies*" can be challenged in administrative proceedings, as established in Article 2 (Purpose) of the LAC. The latter, based on paragraph 1.1 of Article 3 (Definitions) of the LAC, also include central government bodies, moreover, based on paragraph 1.2 of the same article, any decision, including that of central government, is qualified as an administrative act, which is rendered at the end of an administrative procedure in the exercise of public authorizations and which affects, in a favorable or unfavorable way, the legally recognized rights, freedoms or interests of natural or legal persons.

107. Furthermore, Articles 10 [no title] and 13 (Administrative Conflict) of the LAC, among other things, define the possibility of initiating an administrative conflict against administrative acts for which the natural or legal person considers that any right or legal interest has been violated. The same right, based on Article 18 [no title] of the LAC, also have the administration body, the Ombudsperson, associations and other organizations, which act in defense of public interests.

108. 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 claimant, 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 (see, among others, Court case KI09/21, applicant *Sadat Lekiqi*, cited above, paragraph 37).

109. Also, Article 63 (Other provisions of the procedure) of the LAC specifies that in the absence of the relevant provisions of the administrative conflict procedure, the provisions of the law on the contested procedure shall apply appropriately. The latter, namely Law no. 03/L-006 on the Contested Procedure (hereinafter: LPC), among others, in articles 129 [No title] and 130 [No title], respectively, determines the possibility of returning to the previous state, in case of missing the deadlines for performing any procedural action, under the conditions defined in these articles.

110. Regarding the above and if the procedure related to administrative conflicts, would be effective to resolve the case of the applicants, at least in theory, the Court recalls its case law, although in a different context, where it had come to the conclusion that *"The Administrative Matters Department has full jurisdiction to examine all questions of fact and law relevant to the dispute before it and to quash in all respects, on questions of fact and law, the decision of the Bodies for Minor Offences. Therefore, the Administrative Matters Department qualifies as a "judicial body that has full jurisdiction", satisfying the requirements to be considered an "independent and impartial tribunal" within the meaning of Article 6, paragraph 1, ECHR and Article 31 of the Constitution."* (see, Court case KO12/17, Applicant *the Ombudsperson*, Judgment of 9 May 2017, paragraph 97).

111. Furthermore, the Court related to the arguments of the Applicants that the Department for Administrative Matters of the Basic Court in Prishtina is loaded with cases and has no opportunity to examine the case of the Applicants within a short period before the proposed candidate is appointed to the position of the Chief State Prosecutor, recalls once again that in addition to deciding a case on merit, as it was emphasized above, the Basic Court, in accordance with Article 22 of the LAC, has the authority to impose interim measure at the request of the party, namely postpone the execution of an act until the final court decision, a decision which according to this article must be taken within three (3) days. In this regard, in case KI145/15, cited above, the applicant regarding his position as a member of the Prosecutorial Council had also initiated an administrative conflict on 23 November 2015, also requesting the imposition of an interim measure. The Basic Court on 24 November 2015, only one (1) day later, decided on his request for interim measure, although it rejected the same request as unfounded. Also, after the Applicant's appeal, the Court of Appeals, on 12 February 2016, decided on the Applicant's appeal for the rejection of the interim measure (see, case KI145/15, cited above, paragraphs 17 and 18).

112. The Court further emphasizes that (i) the use of legal remedies in administrative procedure to challenge the acts of public authorities first in the regular courts, always according to the specifics of the applicable law, is the rule, while exceptions are possible only if the party argues, based on the case law of the ECtHR, that such a remedy, under the circumstances of the relevant case, would not be effective. For example, the ECtHR case, *Juričić v. Croatia*, clearly specifies that the relevant applicant, a candidate for the Croatian Constitutional Court and whom the Croatian Assembly had not elected, was obliged to first challenge the relevant decision of the Assembly in administrative courts and in end, in the Constitutional Court (see, in this context, the ECHR case *Juričić v. Croatia*, no. 58222/09, Judgment of 26 July 2011); and (ii) in fact, the ECtHR case law establishes that it is the duty of the affected individual to test the effectiveness of the legal system and to allow regular courts to address the allegations of violation of relevant rights and to develop the latter through the power of interpretation. Otherwise, the latter must argue, through the burden of proof, that the criteria clarified through the case law of the ECtHR are met in such a way that they should result in the exemption from the obligation to exhaust legal remedies (see, among others, the ECtHR case *Gherghina v. Romania*, cited above, paragraph 101).

113. In this context, regarding the circumstances of the present case, the Court must emphasize that (i) the legal remedy exists; and (ii) that the same is an effective legal remedy, as long as the applicants do not argue, including through the case law of regular courts, that the lawsuit in administrative procedure, is not "*available and accessible"* or is not *"sufficiently certain not only in theory, but also in practice*"

because it cannot "*provide solutions to an applicant's allegations*" and "*to provide a reasonable prospect of success".*

114. In fact, the main allegations of the applicants regarding the non-efficiency of the court proceedings before the regular courts are related to the overload of cases in the Basic Court in Prishtina. This argument, based on the case law of the ECtHR, falls into the category of "*mere doubts"* about the lack of efficiency of the legal remedy and based on the latter, as explained above, does not count as a reason to exempt an applicant from the obligation for the exhaustion of legal remedies provided by the Constitution. Such an approach, based on Article 53 of the Constitution, has been consolidated by the Court, among others, through case KI108/18 (see, case KI108/18, applicant *Blerta Morina*, cited above, paragraphs 183-187).

115. Furthermore, the Court also states that, based on the case law of the ECtHR, the Applicants must argue that "*they did everything that can reasonably be expected of them to exhaust legal remedies*". In the circumstances of the present case, this is not the case. The Applicants have not taken any single action to challenge the Decisions in question of the KPC before the regular courts, but have directly addressed the Constitutional Court.

116. The Court notes the Applicants' allegations of the lack of efficiency of the legal remedy related to the Decisions of the KPC based on which the candidate for the Chief State Prosecutor is proposed, are based on the case law of the Court, namely the Judgment in cases KI99/14 and KI100/14. In this regard, the Court emphasizes that this Judgment as well as two other Judgments, namely the Judgments in cases KI34/17 and KI55/17, where the respective applicants were exempted from the obligation to exhaust legal remedies to challenge the decisions of the KJC on the selection of the Presidents of the Supreme Court and Court of Appeals, respectively, are the only exceptions of the Court through which the respective applicants are exempted from constitutional obligation. There is no other case in the case law of the Court since 2017, in terms of individual constitutional control, in which the Court has made such exceptions, not only in the assessment of the acts of the KPC, the KJC, but also the acts of the executive and/or legislative power. As explained above, the Court recalls that it has declared inadmissible due to non-exhaustion of legal remedies the referrals for the constitutional review of decisions related to various positions in the judicial system, including members of the KPC, the Chief Prosecutor in the Special Prosecution of the Republic of Kosovo, Chief Prosecutor of the Basic Prosecution in Prishtina, for judge of the Supreme Court and judge of the Basic Court. In all these cases, the Court has referred to the provisions of the administrative procedure and, moreover, the obligation of the respective applicants, if they have not exhausted the legal remedies established by law, based on the principle of the burden of proof, to prove that relevant legal remedies do not exist or are not "*available*", "*accessible*" or "*effective*" in the circumstances of the relevant case.

117. The Court notes that the assessment of the exhaustion of legal remedies and the exemption from this constitutional obligation, in the three cases mentioned above, was made taking into account the circumstances and individual characteristics of the respective cases. However, the Court also notes that, in essence, the difference between the cases declared inadmissible and the three aforementioned Judgments that constitute an exception to the Court's consolidated case law regarding the constitutional obligation to exhaust legal remedies is also related to the "*specificity of the procedure of the appointment of the Chief State Prosecutor*", the President of the Supreme Court and the Court of Appeals, respectively.

118. However, this Court assesses that the obligation to exhaust legal remedies and/or exemption from the obligation to fulfill this constitutional criterion cannot be based on the specifics of the relevant position or function as the only argument, because such an approach would could result in unequal treatment of the parties authorized to challenge the acts of public authorities based on paragraph 7 of Article 113 of the Constitution. Moreover, based on such a premise, it would result that depending on the specifics of the relevant position or function in relation to which the request in question is submitted, the legal system, including the legal remedy, could be effective or not. The argument regarding the certain public function cannot, by any means, stand alone.

119. On the contrary, the assessment whether the legal remedies have been exhausted in a specific case and/or whether an individual can be exempted from this obligation, must be based on the criteria defined in the case law of the Court and the ECtHR and assessed in each case separately, based on the burden of proof, including by providing relevant case law or other appropriate evidence, in relation to each criterion individually and appropriately if (i) the existence of legal remedies is not "*sufficiently certain not only in theory, but also in practice*" because the latter, are not able to "*provide resolutions to an Applicant's allegations*" and "*offer a reasonable prospect of success*"; (ii) the respective legal remedies are not "*available, accessible and effective*", these characteristics which must be sufficiently consolidated in the case law of the relevant legal system; (iii) if the relevant applicant "*did everything that can reasonably be expected of him to exhaust legal remedies*", emphasizing that an applicant's "*mere doubts*" about the ineffectiveness of a legal remedy, do not count as a reason to exempt a Applicants from the obligation to exhaust legal remedies; and (iv) there are "*special circumstances*" of the respective applicant based on which he could be exempted from the obligation to exhaust legal remedies, the circumstances are well established in the case law of the ECtHR.

120. In the circumstances of the present case, the Court emphasizes that (i) the applicants have not exhausted their legal remedies; and (ii) have not met the criteria to be exempted from the constitutional obligation. The latter is because the applicants before the Court have not submitted any arguments as to whether (i) the existing legal remedies are not "*sufficiently certain not only in theory, but also in practice*" because the latter, among other things, are not able "*to provide resolution to a applicant's allegations"* and "*offer a reasonable prospect of success*"; and (ii) the relevant legal remedies are not "*available, accessible and effective*", this argument must be based on examples of the case law of regular courts in the circumstances of the present case. Moreover, despite the case law of the ECtHR, the applicants have not substantiated that "*they did everything that can reasonably be expected of them to exhaust legal remedies*". The allegations related to the caseload, under the circumstances of this case, in the Department for Administrative Matters at the Basic Court in Prishtina, based on the case law of the ECtHR and the Court, are qualified as "*mere doubts"* and based on them, the Court cannot exempt an applicant from fulfilling a constitutional obligation. Moreover, the Court reiterates that (i) based on the aforementioned provisions of the LAC, the relevant court must act on the request for interim measure, namely suspension of the execution of the decision, within the legal term of three (3) days; and (ii) that, as argued above, there is case law based on which the Basic Court acted within 24 hours. The Applicants have not proved otherwise.

121. Finally, the Court reiterates that (i) there is no acquired right to be exempted from the obligation to exhaust legal remedies; (ii) while the Court's case law recognizes three (3) exceptions to this constitutional obligation, by a Judgment of 2014 to which the applicants refer and two Judgments of 2017, its case law, in the context of

individual constitutional control, is highly consolidated in terms of the obligation to exhaust legal remedies in relation to the acts of public authorities, including those of the judicial, legislative and executive powers; (iii) the assessment of the exhaustion of legal remedies is subject to the constitutional criterion and the case law of the ECtHR and, as noted above, this assessment cannot be too formalistic, however, the criteria summarized by this Decision must always be met based on in each case separately and based on the principle of the burden of proof; (iv) the specifics or importance of a function, such as the case with the appointment of the Chief State Prosecutor, as a single argument, cannot serve as a basis for exemption from the obligation to exhaust legal remedies because otherwise, the application of the defined criterion in paragraph 7 of Article 113 of the Constitution, could result in unequal treatment of the parties authorized for individual control, moreover, such an approach could result in the conclusion that the legal system of the Republic of Kosovo and specifically, the operation of regular courts is not effective only in the context of certain positions and/or functions of the state.

122. Therefore, this Court emphasizes that (i) three exceptions in its case law, through which it has evaluated the merits of the appointment of the Chief State Prosecutor, the Supreme Court and the Court of Appeals, respectively, do not guarantee the right to be exempted from the obligation to exhaust legal remedies in relation to these three positions and that any exemption from this obligation must always be based on the burden of proof in relation to the criteria related to the efficiency of a legal remedy as clarified through the case law of the Court and the ECtHR; (ii) that the allegation for a certain function or even the relevant method of appointment cannot stand as the only argument to exempt from the constitutional obligation of exhaustion of legal remedies; and (iii) that with respect to exemption from this obligation, each case is assessed individually, based on the burden of proof.

123. Through these cases of the applicants, the Court clearly clarifies these principles and consolidates its case law regarding the exhaustion of legal remedies in the context of individual control, namely the referrals submitted within the scope of paragraph 7 of Article 113 of the Constitution. Moreover, the Court, in rare cases and only when it has deemed it extremely necessary, beyond consolidating and clarifying its case law, has also changed its case law, such as the case KO79/18 regarding its jurisdiction to deal with "*constitutional questions*" outside the limits of Article 113 of the Constitution (see Court case KO79/18, Applicant: *President of the Republic of Kosovo*, Resolution on inadmissibility, 21 November 2018). Such an approach is also in accordance with the case law of other Constitutional Courts and the ECtHR. In this context and among others, the ECtHR, through case law, has clarified that while it is not formally obliged to follow its prior case law, in the interest of the principle of legal certainty and predictability, it should not deviate from its case law, without any strong reason. However, in certain cases it has also clarified, consolidated and amended its case law (see, *inter alia*, *Társaság a Szabadságjogokért v. Hungary* no. 37374/05, Judgment of 14 April 2009, paragraph 35; *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment of 6 February 2003, paragraph 121; *Chapman v. the United Kingdom*, No. 27238/95, Judgment of 18 January 2011, paragraph 70; and *Micallef v. Malta*, No. 17056/06 , Judgment of 15 October 2009, paras 74-82).

124. Therefore, based on the above and taking into account the allegations raised by the Applicants and the facts presented by them, the Court, also relying on the standards established in its case law and the case law of the ECtHR and above all, relying on the principle of subsidiarity to offer the competent bodies, including the courts, the opportunity to prevent or correct the alleged violation of the Constitution, finds that the Applicants do not meet the admissibility criteria, since they have not exhausted

the legal remedies, as established in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure and as such, the Referral should be declared inadmissible.

Request for interim measure

125. The Court recalls that the Applicant in case KI57/22 also requested the Court to render a decision on the imposition of an interim measure, emphasizing, among other things, that (i) the implementation of the Decision of the KPC, would be a further violation of the guaranteed rights and would deprive the legality and constitutionality of the operation of the Office of the Chief State Prosecutor; and (ii) all the decisions taken under the direction of the proposed candidate, if he had been appointed, could be declared unlawful, a fact which violates the principle of legal certainty of the citizens of Kosovo.

126. In this regard, the Court emphasizes that it has already found that the Applicants' referrals in relation to the case are inadmissible as a result of the non-exhaustion of legal remedies established by law as defined in paragraph 7 of Article 113 of the Constitution. Therefore, in accordance with paragraph 1 of Article 27 (Interim Measures) of the Law and Rule 57 (Decision on Interim Measures) of the Rules of Procedure, the request for interim measure of the Applicant in case KI57/22, is without subject of review and, as such, is rejected.

Request for a hearing

127. The Court also recalls that the Applicant in case KI57/22 has requested to hold a hearing. In this regard, the Court recalls that based on paragraph (1) of the Rule 42 (Right to Hearing and Waiver) of the Rules of Procedure: *"Only referrals determined to be admissible may be granted a hearing before the Court, unless the Court by majority vote decides otherwise for good cause shown";* whereas pursuant to paragraph (2) of the same Rule: *"The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law".*

128. 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. In the circumstances of the present case, the Court repeats the finding that the Referrals of the Applicants were declared inadmissible because the Applicants have not exhausted legal remedies. Therefore, it is not necessary to hold a hearing.

FOR THESE REASONS

The Constitutional Court, in accordance with paragraph 7 of Article 113 of the Constitution, Articles 20, 27 and 47 of the Law and in accordance with item (b) of paragraph 1 of Rule 39 and Rule 57 of the Rules of Procedure, on 4 July 2022:

DECIDES

I. TO DECLARE, by majority, Referrals KI57/22 and KI79/22 inadmissible;

II. TO REJECT, unanimously, the request for interim measure for case KI57/22;

III. TO REJECT, unanimously, the request for a hearing for case KI57/22;

IV. TO NOTIFY this Resolution to the parties;

V. TO PUBLISH this Resolution in the Official Gazette in accordance with paragraph 4 of Article 20 of the Law;

VI. This Resolution is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.